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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF VIRGINIA.

BY PEACHY R. GRATTAN.

VOLUME XXIV.

FROM NOVEMBER 1, 1873, TO APRIL 8, 1874.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.

JOSEPH CHRISTIAN, FRANCIS T. ANDERSON,

WALLER R. STAPLES, WOOD BOULDIN.

Attorney Generals: JAMES C. TAYLOR, RALEIGH T. DANIEL.*

*Mr. Daniel went into office the 1st of January, 1874.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Bier & Mann v. Dozier.

November Term, 1873, Richmond.

BOULDIN, J., Absent.*

1. **Confederate States Government — United States Laws.**—During the war neither the law of the United States, nor any policy of their government, was in force in any part of the Confederate States, not in the possession or under the control of the United States.

2. **Same—Agents of—Contracts by.**†—On the 1st of February 1865 B, representing himself to be the agent of the Confederate States government, to take tobacco into Maryland and exchange it for bacon, applied to D, living near the Potomac river in W. county, to store for him in D's barn for the night, 84 boxes of tobacco. D being unwilling to do it, B agreed with him that if he would
2 receive the tobacco *in his barn, and should sustain any damage or injury from the forces of the United States in consequence of the tobacco being there deposited, B would make good all losses he might sustain thereby. Under this agreement the tobacco was deposited in D's barn, where it remained until the 17th of March, B undertaking to pay for any loss B might sustain thereby. At that time the enemy's gun-boats on the river approaching D's house, he removed and concealed the tobacco, and his houses and out-buildings and furniture were destroyed by the enemy: his loss amounting to $6,352. HELD:

   1. **Same—Same—Same.**—B being the agent of the Confederate Government, which could enforce obedience upon all within its jurisdiction, the contract was valid, and B is bound to pay D for the loss which he sustained.

   2. **Same—Same—Same—False Representation.**—If B was not the agent of the Confederate government, and was prosecuting a private enterprise, against the laws and policy of that government, D is not *particeps criminis* with B, in an equal degree, if at all, and he is entitled to recover.

   3. **Contracts—Against Public Policy.**—To make a contract unlawful as being against public policy or law, it must be manifestly and directly so; and it is not enough that the contract is connected with some violation of the law, however remotely or indirectly.

This is a writ of error to a judgment of the late District court held at Fredericksburg, affirming a judgment of the Circuit court of Essex county, rendered in favor of the defendant in error, the plaintiff in the said Circuit court, William R. Dozier, against the plaintiffs in error, the defendants in the said Circuit court, B. Bier and S. Mann, who, with Samuel Strooke and L. Bowman composed a partnership firm, trading in the name and style of S. Strooke & Co. The action was in assumpsit. The declaration contained two counts, and was in substance as follows: The first count stated that the defendants, on the first day of February 1865, at the county of Westmoreland, in consideration that the plaintiff, at the special instance and request of
3 the defendants, *would receive on storage upon his premises, to wit: in his barn, and take care of a large lot of tobacco, the property of the defendants, for their use and at their risk, for a short time, to wit: for the space of forty-eight hours, undertook and promised that they, the defendants, would make good to the plaintiff, and pay him for all loss and damage done to him or to his property by the army of the United States, or any person or persons in the employment of the United States, by reason of said tobacco having been stored upon the said premises, it having been admitted by the defendants that the said tobacco was intended to be transported from said premises into the State of Maryland, and that such transportation was forbidden by the government of the United States: That the plaintiff, confiding in said promise and undertaking of the defendants, did then and there receive on storage upon his premises, to wit, in his barn, the said tobacco, and did take care of the same, and afterwards safely deliver it to the defendants: That the defendants did not regard their said promise and undertaking, but deceived the plaintiff in this, to wit: that the said tobacco was permitted to remain upon the premises for a long space of time, to wit: for the space of three months, and until the officers and men on the United States gunboats and vessels of war on the Potomac river had been informed of the fact that said tobacco was so stored upon the premises of the plaintiff; and coming in search of the same upon said premises, and failing to find it, by reason of the care and attention of the plaintiff in concealing it, they, the said officers and men, did great damage to the property of the plaintiff, by burning his dwelling house, furniture, stable, grain and other property in and upon the said premises, whereby he was put to great expense and loss, &c., in the whole
4 amounting to a large sum of *money, to wit: to the sum of $6,352. The

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*The case was argued before his election.

†**Contracts by Confederate Government.**—The principal case is cited as authority on this subject in Dinwiddie v. Stuart, 28 Gratt. 554, 580.

second count stated that on, &c., at, &c., in consideration that the plaintiff, at the like special instance, &c., would receive into his possession, upon his premises, in said county of Westmoreland, a large and very valuable lot of tobacco, the property of the defendants, which they were attempting to carry to Maryland for sale, they, the defendants, undertook and promised the plaintiff that they would pay to him any damage or loss sustained by him at the hands of the United States forces, by reason of said tobacco being put into the possession and upon the premises of the plaintiff by the defendants: That the plaintiff did so receive said tobacco into his possession and upon his premises, upon the conditions aforesaid; and that the United States forces did, having sought for said tobacco and failing to find it, burn and destroy the houses, furniture and other property of the plaintiff, of great value, to wit: of the value of $6,352; of which the defendants afterwards, to wit: on the 10th day of May 1865, at, &c., were duly informed: And that the defendants failed and refused to pay the loss and damage sustained by the burning and destruction aforesaid. Wherefore, the plaintiff said that he was injured and has sustained damage to the amount of $——. There was, at the conclusion of both counts, a statement apparently applicable to each: that afterwards, to wit: on the 10th day of May, 1865, in consideration of the premises respectively, the defendants promised to pay the said several sums of money, on request, to the plaintiff; yet they had not paid the same, or any part thereof, "to the plaintiff's damage $12,000; and thereupon he brings suit, &c."

The defendants filed a general demurrer to the declaration, and the plaintiff joined in the demurrer; which, upon argument, was overruled. And then the defendants *plead not guilty to the first count, non-assumpsit to the second, and filed a special plea that they were not partners, as alleged in the declaration. To all these pleas the plaintiff replied generally; and issues being thus joined by the parties, were tried by a jury, which found a verdict for the plaintiff on all the issues, and assessed his damages at $5,937, with interest thereon from the 17th day of March 1865 till paid; and judgment was rendered accordingly.

Two bills of exceptions taken by the defendants to opinions given by the Circuit court during the trial of the cause, were made a part of the record. The first states that after all the evidence had been given to the jury, the counsel for the defendants moved the court to instruct the jury as follows—that is to say: that if the jury believe, from the evidence, that the contract between the plaintiff and defendants, stated in the declaration, was made for or about any matter or thing which was, at the time, prohibited and made unlawful by any law of the United States, or in violation of the policy of the United States government, then said contract is void, and they must find for the defendants. But the court refused to give the said instruction; and the defendants excepted.

The second bill of exceptions states, in substance, as follows: that after the jury were sworn to try the issues joined, the plaintiff, (who testified for himself,) to maintain the said issues on his part, proved the following facts, to wit: that in the latter part of January, or the first of February 1865, two men, representing themselves by the names of Strooke and Bier, came to the home of the plaintiff, situate near the Potomac river, in the county of Westmoreland, near night, and requested of the plaintiff permission to deposit in his barn, until the next morning, a large quantity (about 82 boxes) of tobacco; *which deposit he declined to allow. They then represented to him that they were taking the said tobacco to Maryland, to be exchanged for bacon for the Confederate States government; and that they had full authority to take the said tobacco to Maryland. The plaintiff then consented to receive the said tobacco until the next day. The said Strooke and Bier then agreed with the plaintiff, that if he would receive said tobacco in his barn, and he should sustain any damage or injury from the forces of the United States, in consequence of the said tobacco being there deposited, they would make good all losses which he might sustain. They were wealthy, and good for any agreement they might make. The weather was very cold, and the river and creek were blocked up with ice. Said Strooke remained at the house of the plaintiff three weeks. While there the plaintiff frequently manifested his uneasiness about the tobacco being on his premises, and was told by said Strooke that if ever he was injured thereby, he would pay all losses which he might sustain. The said tobacco remained in the barn of the plaintiff, on storage, till the 17th of March, 1865, when the Potomac flotilla, under Commodore Parker, made its appearance and began to shell the premises of the plaintiff. The plaintiff, with such assistance as he could get, removed the said tobacco to the woods, and concealed the same; and it not being found by the forces of Commodore Parker, the said forces of the United States government burned the dwelling house, the barn, stable and all the houses of the plaintiff, except the overseer's house, all the furniture, except their beds, the agricultural implements, and one year's provisions. The loss of the plaintiff, in consequence of said burning, was not less than $6,352. Between the time of the deposit of the tobacco and its removal, he had interviews with the partners, Strooke, Boreman, Bier and Mann, each of *whom acknowledged himself a member and partner of the firm of Strooke & Co., and all promised him indemnity for any loss he might sustain. After the burning, Bier and Mann came to his house and renewed the promise to reimburse him for his loss. Mann stated

that Strooke proposed to send plaintiff $5,000 by him, but feared, from the unsettled state of the country, it might be lost. On the 27th of May 1865, Bier and Mann came to the house of the plaintiff with what purported to be an order from the Secretary of the Treasury of the United States, endorsed by the President, for the delivery of the tobacco to them; and upon consultation with his friends, he determined to give up the tobacco, though he had previously determined to hold on to it until paid for the loss he had sustained. On motion of the defendant's counsel, the evidence touching the said order was excluded from the jury, unless the order was produced. All the tobacco, except three boxes, which plaintiff had used, and two boxes of damaged tobacco, and a half box of sound tobacco given to the plaintiff by the defendants, was delivered to Bier and Mann.

Dr. Harvey also proved substantially the same facts as above. Another witness also proved that Strooke and Bier came to his house, and in conversation with the daughter of the plaintiff, who was staying there, concerning the loss of her father's property, Strooke told her not to be sad, he would build her father a better house than the one he had lost, and fully reimburse to him the loss he had sustained.

On the cross examination of the plaintiff's witnesses, it was further proved, that the plaintiff resided near the Potomac river, and was in the habit of entertaining at his house refugees from Maryland and Virginia; that a signal corps of the Confederate States was stationed during the war in one and a half miles from the plaintiff's
8 *house, and the members of said corps were frequently at his house; that some of Col. Mosby's men had been there on one occasion; and the blockade runners had stopped at the plaintiff's house some times, though the plaintiff had not been engaged in the blockade business; that when Strooke and Bier came to the house of the plaintiff with the tobacco, they exhibited to him and a friend stopping with him, Dr. Harvey, a paper writing from an officer of the Confederate States, approved by the Secretary of War of the Confederate States, giving Strooke & Co. full authority to carry tobacco into Maryland, to exchange for bacon for the use of the Confederate States, which paper showed that Strooke & Co. had given bond to the Confederate States before the said paper was furnished to them; and Strooke stated the bond was for $100,000 or more. And these were all the facts proved in the cause. Thereupon, the defendants moved the court to give the following instructions to the jury:

1. If the jury shall believe from the evidence that the consideration of the contract set forth in the declaration was in violation of any statute of the Confederate government, or in violation of its policy, then said contract is void, and they must find for the defendants.

2. If the jury shall believe that said contract was for an illegal transaction, then said contract is void, and they must find for the defendants.

3. If the jury believe from the evidence that the consideration of said contract is altogether illegal, it is insufficient to sustain a promise, and the agreement is wholly void, whether the law violated be the common law or statute.

4. If the jury believe from the evidence that the said contract was made for or about any matter or thing which was at the time prohibited and made unlawfully by
9 *any law of the United States, or in violation of the policy of the United States government, then said contract is void, and they must find for the defendants.

5. Unless the jury shall believe from the evidence that the property of the plaintiff was burned and destroyed by the forces or troops of the United States government, because the tobacco of the defendants had been stored in the houses of the plaintiff, they must find for the defendants.

6. If the jury find for the plaintiff, then they must deduct from the amount they shall find such an amount as shall be the value of the tobacco used by him.

All of which instructions the court gave, except the one marked 4; which the court refused to give.

And the plaintiff moved the court to give the following instruction; which the court gave:

If the jury shall believe from the evidence that S. Strooke & Co. did deposit on storage with the plaintiff tobacco which they had authority from the Secretary of War of the Confederate States to take into Maryland, to exchange for bacon for the Confederate States government, and promised to pay all damage done to the property of the plaintiff by the United States forces, by reason of the said tobacco being so stored, and that the said property was destroyed by the United States forces, and that after its destruction the said Strooke & Co. assumed to pay such damage as the plaintiff had sustained thereby, then they should find for the plaintiff.

Thereupon, the jury found a verdict for the plaintiff, as aforesaid; and the defendants moved the court to set aside said verdict and grant them a new trial, upon the ground that said verdict was contrary to law and evidence; which motion the court overruled, and gave judgment for the plaintiff, upon said verdict; and the
10 *defendants excepted to the opinion of the court overruling said motion.

The case was argued by Crump, for the appellants. There was no counsel for the appellee.

Moncure, P., after stating the case, proceeded:

First—Did the Circuit court err in refusing to give the instruction asked for by the defendants, as mentioned in their first bill of exceptions?

This instruction was asked for after all the evidence had been given to the jury.

All the facts proved by the evidence are certified by the court in the second bill of exceptions; and though none of the evidence or facts proved are set out in the first bill of exceptions, I will consider the question as to the propriety of giving the instruction therein mentioned in reference to the facts of the case, as certified in the second bill of exceptions. So considering it, the question was not an abstract one, and could not, properly, have been refused on the ground that it was. Then, was it proper to refuse it on any other ground?

During the war, neither the law of the United States, nor any policy of their government, was in force in any part of the Confederate States not in the possession or under the control of the United States. That law and that policy, in contemplation of law, are presumed to have been, and actually may have been, unknown to the citizens of the Confederate States, who were alien enemies to the citizens of the United States, between whom all intercourse, social, commercial or otherwise, was interdicted by the laws of both countries and the law of nations; and the interdiction was enforced by the armies of both countries. The law and the policy of the Confederate States were binding on the citizens thereof, and the obligation was en-
11 forced by the power of those *States, which was perfectly irresistible by the citizens thereof, however much they may have been disposed to make such resistance. The power of the United States was wholly insufficient to enable such citizens to make such resistance, or to afford them any protection against the consequences of making it. According to the facts as certified, the defendants were agents of the Confederate government, to exchange tobacco with the enemy for bacon, one of the prime necessaries of life, which could not be otherwise procured; and it cannot be supposed that all the power of that government would not, if necessary, have been exerted to compel its citizens to afford all the facilities in their power to the only operation by which bacon could be procured for the use of the government, in that part of the country in which the plaintiff resided, during that period of the war in which the transaction in controversy occurred. So that, if it was not the patriotic duty of the plaintiff, as a good citizen of the government under which he lived, and which alone afforded him protection, to render any facilities he may possibly have rendered to the defendants, in regard to that transaction, he was, in contemplation of law, under the necessity of doing so. The law on this subject is so fully and clearly laid down by Judge Staples, in his opinion in the case of Newton's ex'or v. Bushong & al., 22 Gratt. 628, that it is only necessary here to refer to that case.

I will now proceed to consider the next question, which is:

Secondly—Did the Circuit court err in overruling the motion of the defendants to set aside the verdict and grant them a new trial, upon the ground that the said verdict was contrary to law and evidence, as mentioned in their second bill of exceptions.

Now, the facts proved, which are
12 certified by the *court and repeated in the statement of the case, fully sustain the contract, as set out in the declaration; and moreover show, what is not there set out, that the defendants were acting, as represented to the plaintiff that they were acting, as agents of the Confederate States government, and exhibited to him the written authority under which they professed to be acting. They also show, or strongly tend to show, that the plaintiff fully complied with the contract on his part; that he received the tobacco in his barn and took good care of it; that in consequence of the tobacco being there deposited his property was burned by the forces of the United States, whereby he sustained damage to the amount of $6,352, of which the defendants had due notice, and which they were requested to pay, but wholly failed and refused to pay to the plaintiff.

That the plaintiff's property was burned in consequence of the tobacco having been deposited in his barn, was expressly found by the jury, who were instructed by the court, on the motion of the defendants, that "unless they should believe from the evidence that the property of the plaintiff was burned and destroyed by the forces or troops of the United States government, because the tobacco of the defendants had been stored in the houses of the plaintiff, then they must find for the defendants." On the contrary, they found for the plaintiff; and the evidence well warranted them in so finding. It is more reasonable to believe that the property was burned because the tobacco had been deposited in the barn, than that it was burned because the plaintiff, who resided near the river, had been in the habit of entertaining at his house refugees from Maryland and Virginia, or because the members of a signal corps of the Confederate States, stationed near his house, had frequently been at his house; or because some of Mosby's men had been
13 there *on one occasion. Such hospitalities were universally practiced by our citizens residing near the river; and if the property of every man who practiced them had been destroyed, there would have been a general destruction of all the buildings in that locality. The plaintiff had not himself been engaged in the blockade business. There is not sufficient reason for believing that the property would not have been burned, if the tobacco had not been removed and concealed by the plaintiff. The plaintiff, if he was not bound as bailee, had certainly a right to try to save the defendant's tobacco; and if the effect of his effort has been to save the tobacco, but to lose his own property, the defence that he was not bound by his contract to try to save the tobacco by removing and concealing it, comes with a very ill grace from the defendants. If he had not removed the tobacco, it would certainly have been lost by

the defendants; and probably the plaintiff's property would still have been burned; the loss of which would also have fallen on the defendants by the very terms of the contract. The plaintiff, by his act of removing the tobacco, at least saved them from one of these losses. But it was for the jury to decide the question of fact, upon the evidence; and they did expressly decide that the burning was in consequence of the tobacco having been stored in the houses of the plaintiff.

Then, the case of the plaintiff is fully made out by the facts proved. In other words, the verdict is clearly not against evidence. Is it against law? Is there any thing in the facts proved, which shows that the plaintiff is not legally entitled to recover?

I have already shown that, considering the defendants, as agents of the Confederate States government, in exchanging tobacco for bacon for the use of that government, the plaintiff might lawfully have con-
14 tracted with *them to receive the tobacco in his barn, even though he might thereby facilitate the operation by which that exchange was sought to be effected. And the defendants must be so considered in this case, whether they were in fact so or not; because they so represented themselves to the plaintiff, and are estopped from denying that they were such agents. Indeed they do not now deny the fact, or attempt to deny it. I deem it unnecessary to say any thing further on that subject.

But, suppose the defendants were not the agents of the Confederate States government, to exchange tobacco for bacon, and that they were engaged in an unlawful act on their own account, in carrying or attempting to carry tobacco to Maryland, to exchange it for bacon: Is there any thing in the act of the plaintiff, in receiving the tobacco in his barn, which makes the contract of the defendants, for whose benefit the act was done, unlawful, and enables them to get rid of their promise to indemnify him against loss arising from that act? Did he thereby become a particeps criminis in the supposed unlawful act? And does the maxim ex turpi causa non oritur actio apply to his case? I think not. He was not at all engaged in any act of running the blockade, in which the defendants may have been engaged. On the contrary, it is expressly certified as a fact proved in the cause, "that the plaintiff had not been engaged in the blockade business;" and of course was not engaged in the blockade business, if that was its nature. He was to derive no benefit from it. He knew nothing of it, until the defendants presented themselves at his house, near night, and requested him to permit them to deposit the tobacco, for the night, in his barn; which he refused to do, until he was assured that they were armed with the authority of the Confederate government to do the act in which they were engaged; and not
15 then, until they *promised to indemnify him against all loss. He knew that whether he was in fact concerned in blockade running or not, he would be suspected of being guilty by the enemy, if the tobacco was found by them on his premises; and therefore he properly stipulated with the defendants for his indemnity by them. He afterwards removed and concealed the tobacco, both for his own benefit and that of the defendants, and especially of the defendants, who were bound for his indemnity. He hoped thereby to have saved the property of both. He did save that of the defendants, but lost his own. He did not contract to conceal the tobacco, but merely to afford it shelter and house room; which were necessary, whether the tobacco was to be used in a lawful or an unlawful purpose. It was no part of the process of "running the blockade;" of carrying the tobacco into Maryland. The defendants arrived near night at the plaintiff's house, near the river. The river was then blocked up with ice; and the defendants wanted accommodation and shelter for themselves and their tobacco; and the plaintiff reluctantly, on account of the danger of doing so, afforded them the hospitality which they needed, on their promise to indemnify him against loss. Did he thereby make himself a particeps criminis?—commit an act of turpitude, from which no action can arise, even against the defendants, at whose instance and for whose benefit the act was done? If there be any, the least, guilt on his part, is not their guilt infinitely greater, and would they not, even on that ground, be liable to the plaintiff? The plaintiff did not expect any favors from the forces of the United States, if they found the tobacco in his barn; but he did expect, and had a right to expect, that the defendants would stand up to their bargain. What is it to the government—how can it be against the policy of the law, if the defendants
16 be compelled *to comply with their contract? Suppose the plaintiff had given a meal of victuals, or a night's lodging, to these supposed blockade runners, would that have made him a particeps criminis? He not only did that, but he afforded them shelter and a place of deposit for their tobacco which they had along with them. Did that any more make him a particeps criminis? Must he, of necessity, permit their tobacco to remain exposed to the weather, and be thus destroyed? We must bear in mind that there is no evidence tending to show that there was any purpose of concealment of the tobacco in view of the parties, or any other purpose than that of affording temporary shelter to the defendants and their tobacco, during the night, or until they could carry it away. We know very well, that to make a contract unlawful, as being against law or public policy, "it must be manifestly and directly so; and it is not enough that the contract is connected with some violation of the law, however remotely or indirectly." Let it be remembered that this is not a controversy between a citizen of the Confederate States and a citizen of the United States; nor be-

tween a citizen of the Confederate States and the government, either of the Confederate States or United States; but between citizens of the Confederate States inter se; and that the effort of the defendants is, to get rid of the obligation of their express promise, of which they have received the full benefit, upon the ground that it was contrary to the policy of a law of which they have been the chief, if not the only violators.

I am, therefore, of opinion that the verdict is not against law, any more than it is against evidence; and that the Circuit court did not err in overruling the motion of the defendants to set it aside.

The court gave to the jury an instruction, on the motion of the plaintiff, which
17 is embodied in the defendants' *second bill of exceptions. But that exception was taken only to the opinion of the court overruling the motion of the defendants for a new trial, and not to the opinion of the court in giving that instruction. There was no exception to that instruction; and therefore it cannot be objected to, for the first time, in the appellate court. But, in fact, it is not liable to any well founded objection. It presents a case which made the defendants liable, according to what has been already said. That it proceeds further to state that the defendants, after becoming so liable, assumed to pay such damage as the plaintiff had sustained by the destruction of his property, can do no harm, if it does no good. The next and last question, is:

Thirdly—Did the Circuit court err, in overruling the demurrer to the declaration?

This question would seem properly to be the first which should have been considered in regular order, but I thought it more convenient to consider it lastly. The declaration contains two counts, which seem not materially to vary from each other. The demurrer is general to the whole declaration, and not to each count; so that, if either be sufficient, the demurrer was properly overruled. I think both are sufficient. The declaration says nothing about the authority of the defendants, as agents of the Confederate States, to exchange tobacco for bacon; and therefore it presents the question, whether the contract, without reference to that fact, was legal; and upon that question I have already fully expressed my opinion, that there was nothing in the contract, as stated in the declaration, which made it illegal or void. As to the addendum to the declaration, concerning which the learned counsel for the defendants seemed to be at a loss whether it was intended by the pleader to be a separate count, or what else —I do not consider it as a separate
18 *count, nor that it was intended to be such. It is not accurately drawn, though it may have been intended as a common breach to the two counts; and may well serve as a breach to the first count, which, otherwise, seems to be without a breach. The second count has a breach, and is a perfect count. At all events, the addendum does no harm.

Upon the whole, I think there is no error in the judgment, and that it ought to be affirmed.

The other judges concurred in the opinion of Moncure, P.

Judge Bouldin did not sit in the case; he not having been on the Bench when it was argued; but he said, he concurred in the first proposition considered by Judge Moncure.

Judgment affirmed.

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19 *Ruckman & al. v. Lightner's Ex'ors.

November Term, 1873, Richmond.

1. **Agency—Liability.**—A note given by an agent of the late Confederate States government, and binding himself for the price of cattle purchased for the support of the armies of said government and for the purpose of aiding in carrying on the war against the United States, is a valid contract, and may be enforced against the obligor, after the end of the war.
2. **Same—Promissory Notes—Proof of Agency—Parol Evidence.***—R executes his promissory note to L, by which he promises to pay L a certain sum of money. There is nothing on the face of the note, to indicate that R was acting as agent, or what was the consideration of the note. Parol evidence is not admissible to prove that R was acting as the agent of the Confederate States government, and that the note was given for the price of cattle purchased for that government.

This case was argued at Staunton, at the last term of the court at that place, and was decided at the November term in Richmond.

This is a supersedeas to a judgment of the Circuit Court of Highland county, rendered on the 6th day of May 1871, in an action of debt brought by John Lightner's executors against D. V. Ruckman and R. J. Glendy, on a promissory note, in the following words:

"Ten days after date we promise to pay John Lightner, or order, nine hundred and eighty-five dollars, for value received of him. As witness our hands.

D. V. Ruckman,
R. J. Glendy."

"Dec. 2d, 1861."

On which note were the following endorsements:

20 *"Received January 6th, 1863, three hundred and thirty-five dollars on the within."

"Received on the within note eighty-four dollars and fifty-eight cents, this being the interest for the years 1866 and 1867.

A. Stephenson,
One of the ex'ors of John Lightner, dec'd.
May 25, 1868."

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*Agency—Promissory Notes.—As to this point, see Matthews v. Jenkins, 80 Va. 466. Principal case is distinguished in State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 228; Miller v. Fletcher, 27 Gratt. 408, and *note*.

The defendants pleaded payment and nil debit, and also filed two special pleas of illegality of consideration; both of them stating, in substance, that the note was given for the price of cattle sold and delivered by John Lightner for the support of the armies of the Confederate States, and for the purpose of aiding in carrying on war against the United States; and that said cattle were so used. The second special plea differed from the first, in substance, only in stating that the said sale and delivery were made to the defendants as agents of the commissary department of the Confederate government, engaged in buying cattle for the use and support of the armies of the Confederate States, then carrying on war against the United States; the said Lightner well knowing that the defendants were such agents and were so engaged.

When the case was called for trial, the plaintiffs moved the court to strike out the special pleas; which the court accordingly did; and the defendants excepted. Upon the trial of the case the defendants, to sustain their plea of nil debit, introduced and offered evidence tending to prove that the said Lightner sold and delivered the said cattle to the said defendants, as the agents of the Confederate States government, and upon the credit of the said government. But the court, being of opinion that it was not competent to introduce evidence 21 tending *to vary or alter the note in writing, or to change its legal effect, refused to permit the defendants to introduce the evidence aforesaid; and the defendants again excepted. Thereupon the defendants, further to sustain their said plea of nil debit, offered to introduce evidence to prove the allegations set forth in their two special pleas; but the court refused to permit them to do so; and they again excepted. The jury then rendered a verdict for the debt in the declaration mentioned, with interest thereon, subject to the credits endorsed on the note; and judgment was given accordingly. To the said judgment the defendants applied to a judge of this court for a supersedeas, which was accordingly awarded.

H. W. Sheffey and Bumbgardner, for the appellants.

The court erred in striking out the two special pleas. It is well understood that a distinction has been taken between the case of ordinary dealings in the usual course of business, coupled with a mere knowledge of the fact that the goods sold were to be turned over to the use of the military authorities, at war with the United States, and that class of cases which would be held to be founded on illegal contracts; that is, contracts strictly and immediately in aid of the rebellion. In this case there is no escaping the point by making the distinction suggested. Here was a sale and delivery of cattle, to well known, recognized and acknowledged agents of the Confederate government, for the purpose and intent of aiding in carrying on the war with the United States. If the contract would be vicious, if made directly with the Confederate government, for the purpose aforesaid, surely it must be equally so, if made with said government, by and through its recognized and accredited agents.

The Supreme court of the United States has very recently passed upon the 22 mildest form of this question, in *the case of Hanawer v. Doan, upon an appeal from the Circuit court of Arkansas. The action was to recover for goods sold for the use of the rebel army. The court below charged, that if the goods were sold in the common and ordinary course of trade, and the only inducement to the sale of the goods, on the part of the party making the sale, was the price to be paid, then the sale was legal and valid, although the seller knew that the vendee expected to turn the goods over to the rebel army. Attention is also invited to the case of Kennett v. Chambers, 14 How. U. S. R. 38; where the Supreme court hold that a contract made with a citizen of Texas, before its admission into the Union, or before its independence was acknowledged, to enable him to raise men and to carry on the war with Mexico, was void, and could not be enforced after the admission of Texas into the Union. If policy or amity required this in respect to a sister nation, how much more is the rule mandatory where the power is of the government assailed and imperiled by the contract?

In the opinion delivered by Justice Bradley, the Court held, that where the sale is accompanied with a knowledge of the fact, that the goods sold are to be used not for a purpose, merely malum prohibitum, but for a purpose malum in se, no recovery can be had upon the contract: and the judgment of the Circuit court was reversed.

In the case now presented, there was not only a knowledge of the intended use, but a purpose in making the sale, that the goods should be applied to that use; and the sole question, in this aspect, is, can a court, acting under the sanctions of the constitution and laws of the United States, execute a contract, the direct aim and purpose of which were to overturn and destroy the government, laws and constitution of the United States?

It will hardly suffice as an answer 23 to this to say, that *the Confederate States government was a de facto government, and that all acts done under its authority are valid and to be protected. The protection, arising out of the de facto character of an insurrectionary or rebellious government, does not extend to contracts made for the purpose of furnishing the means of resisting and destroying the rightful government, where the intent is direct and clear; but only to those agreements which rest upon laws of the de facto government, not at war with those of the rightful government, or upon the necessities of the case. It is submitted that it is rather too much to ask a court of the rightful government to enforce a contract, made and

entered into for a purpose, which, if it had been pushed to success, would have resulted in closing the court itself, and destroying the government it has sworn to support.

Second—The Circuit court erred in refusing to permit the defendants to prove that they were public officers, were dealt with by John Lightner as such officers, and as agents of the Confederate government; that, in fact, the sale was made to and upon the credit of the Confederate government; that the note or due bill given was understood by said Lightner, in accordance with a custom and usage of commissary department, well known to him to be a mere memorandum, left by the public officers, as evidence of what the government owed him, until they could obtain the means of paying the government debt from their superior officer; and that Lightnor accepted the note with that understanding, and not as the personal obligation of the defendants.

The principles enunciated by this court in the case of Walker v. Christian, 21 Gratt. 291, would seem to cover this case, and to render this ruling of the Circuit court clearly erroneous.

Third—For the reasons first aforesaid, the Circuit *Court erred in refusing to allow evidence to be introduced before the jury, to prove the facts alleged in the second and third pleas, which were rejected.

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Hanger and Woodson, for the appellees.

1. This is an action of debt, upon a promissory note in the usual form, dated December 2d, 1861, signed by the proper name of the defendants.

The evidence offered by the plaintiffs in error in the court below, to prove that the said note was executed by them, as agents, was properly rejected, because that was to vary and contradict the written instrument.

Greenleaf on Ev., § 275 to 281; 1 Kent, 455 and notes; 8 Mees & Welsh 833; Stackpole v. Arnold, 11 Mass. R., 27; Early v. Wilkinson, &c., 9 Gratt. 68; Towner v. Lucas, 13 Gratt. 705.

2. There is no difference between an agent of an individual and the government, as to their liabilities; the question being, to whom was the credit given? If the contract shows, on its face, that it was made for the government, then the presumption will always be that the credit was given to the government. 1 T. R. 172, Macheath v. Haldeman; 1 T. R. 674, Unwin v. Wolseey; 1 Cranch 345, Hodgson v. Dexter; 15 John. R. 1-3.

But, if it does not so appear on the face of the contract, that it was made for the benefit of the government, then the person making it, though a known public agent, binds himself, and parol testimony cannot be admitted, to add to or vary the written agreement. 1 Mass. R. 268, Brown v. Austin; 12 John. R. 385, Gill v. Brown; 3 Caines R. 69, Sheffield v. Watson; 13 John. R. 313, Swift v. Hopkins; 5 East's R. 148, Appleton v. Binks.

3. Walker v. Christian, 21 Gratt. 291, does not rule this case, because there the testimony was admitted to explain *the ambiguity in the contract; which reason does not exist here.

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4. The second and third pleas, alleging illegality, were properly rejected; the facts stated presenting no bar to the action, because the Confederate government having been a government de facto, exercising supreme authority and control over the territory within its limits, the contract is one which the parties had a right to make, and can now be enforced. Walker v. Christian, 21 Gratt. 291; Newton v. Bushong, 22 Gratt. 628.

Moncure, P., delivered the opinion of the court. After stating the case, he proceeded:

Two questions only arise, and they arise on the three bills of exception which were taken in the case. One of them arises on the first and third bills of exceptions, and is as to the supposed illegality of consideration. The other arises on the second bill of exceptions, and is as to the admissibility of the parol evidence offered by the defendants and rejected by the court. We will consider these questions in the order in which they are above stated.

And first, as to the supposed illegality of consideration.

It is unnecessary for us to enquire and decide in this case, whether the States which lately seceded from the United States, and formed the new political association called the Confederate States, had a right so to act or not; and whether the new government, thus organized, was a de jure government or not. Those are questions about which there have been, and no doubt always will be, honest differences of opinion among men. In the South, the prevailing opinion has decidedly been, and yet is, that the right of secession existed, whatever may have been, and yet be, thought as to the expediency of resorting *to such a measure. In the north, on the other hand, the prevailing opinion, no doubt, has been, and yet is, as decidedly to the contrary. But, however that may be, there can be no doubt but that the Southern States, eleven in number, embracing a territory greatly larger than that of the whole original United States, including a population of more than eleven millions of souls, did, in fact, secede, and form a new Confederate Government; and carried on, for about four years, with the United States, which forcibly resisted such secession, one of the most gigantic wars that ever existed on the face of the earth; that during the greater part of that period, the issue of the war was at least very doubtful; and that during the whole of it, the power of the new government, in the territory over which it extended, was complete and absolute, to the utter exclusion of the power of the pre-existing national government. That the government of the Confederate States was at least a defacto government of the highest order, if not indeed a de jure government, would seem

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to be a truth too self-evident to be denied. That it was a de facto government for many purposes, and to a great extent, has been expressly admitted by the Supreme court of the United States in several cases. Whatever rights may have been denied to it, certainly belligerent rights were not among the number. Those rights were conceded to it by all, even by its enemies. It was admitted to be at least a government of paramount force. And that admission is, alone, decisive of the question we are now considering. If it was a government of paramount force, it certainly had power to raise and support armies; and to do so was a necessity of its nature and existence. It might have enrolled in its armies every man residing on its territory; and it might have taken for their support, and without compensation, every barrel of corn or
27 bushel of wheat, or *head of cattle raised upon its soil. No man, nor combination of men, was able to resist, successfully, this paramount force. If, instead of taking these supplies from the people without compensation, the government preferred to make just payment to the owners, was it contrary to law or public policy in them to receive such payment? Would they not have strengthened, rather than weakened the government, by declining to receive such payment? Suppose the agents employed by government to purchase supplies for the army, and furnished with funds for that purpose, had retained and employed the funds for their own use, and bought the supplies on their own credit, (as may have been, and probably was the case in this instance,) would it consist with public policy, any more than reason or justice, to permit them to retain money to which they certainly were not entitled, and withhold it from those whose property had been used by the public, and who had not the power to prevent such use? This would be to reward the guilty, if any of these parties were guilty, and punish the innocent and helpless. The purchasing agents might, perhaps, have declined to be agents; but the owners of the property purchased could not have declined to part with their property, with or without compensation, if required for the public use. It would certainly have been taken from them, if necessary, nolens volens. The whole southern country was the store-house of the Confederate States, for the supply of their armies, out of which they could draw their supplies at pleasure, and even without making compensation to the owners of such supplies. That they chose to make such compensation, cannot make the contracts of themselves or their agents for that purpose void, as being contrary to public policy. The principles laid down in the able opinion of Judge Staples, concurred in by all the
28 other Judges of this court, *in Newton's ex'or v. Bushong, &c., 22 Gratt. 628, fully sustain the views above expressed. No other authority need be referred to in support of those views, but that case, and the cases therein referred to. We are of opinion that the special pleas were not sufficient in law, and presented no bar to the plaintiff's action; and that the circuit court did not err in striking out the said pleas.

Secondly. As to the admissibility of the parol evidence offered by the defendants and rejected by the court.

We are clearly of opinion that the said evidence was inadmissible, and was properly rejected by the court. The law in regard to the inadmissibility of parol evidence to vary or contradict a written contract, is too well settled to require argument or reference to authority, unless there be something peculiar in the case, which does not exist here. The note on which the action was brought is a promissory note, in the ordinary form, and is as plain as language can make it. Had it been actually intended by the makers of the note, Ruckman and Glendy, (as must be presumed to have been the case,) to make themselves personally liable for the debt, to the exclusion of every other liability, they could not possibly have employed language more apt for the purpose. No name appears upon the face of the note but the names of the makers and of the payee. The makers promise to pay, in the first person plural. There is no reference whatever in the note, express or implied, to any supposed principal for which they could have been acting; nor to any supposed use for which the purchase could have been made but for their own individual use. They do not even specify the property for the purpose of which the note was given, but merely say that it was given "for value received." There is not a mark nor sign upon it which can afford the slightest pretext for a resort to parol evi-
dence. Upon what ground, then, can
29 it be argued that parol evidence *is admissible to show that the makers are not personally responsible? The only ground upon which such an argument has been made, is, that the note was given for cattle purchased for the public use; and that when a contract is made for the public use, the presumption is, that the public, and not the agent, is liable. Certainly a public agent can make himself personally liable on a contract made by him on the public account; and whether he actually does so or not, in any given case, is a question of intention, depending upon the terms of the contract. The terms of the contract in this case plainly show an intention, on the part of the agents, to bind themselves personally. There is nothing on the face of it which warrants the introduction of parol evidence for the purpose of explanation. If it had been stated on the face of the note that it was given for cattle bought for the use of the army, or of the public, then there might have been room for the presumption and the argument that the public, and not the agents, were to be liable. The case of Walker v. Christian, 21 Gratt. 291, is supposed by the learned counsel of the plaintiff in error, to afford some authority for their argument on this

branch of the case; but such is certainly not the fact. The contract there was not a formal bill of exchange or promissory note, signed by the agent in his own individual name, without showing on its face the name of any principal. It was a mere bill of parcels, showing that a certain number of cattle, of a certain weight, had been bought at a certain price, of James Walker, with a memorandum thereunder written, signed by John Christian, directed to Wm. M. Tate, requesting him to "settle with Major Walker the above account." The action was brought by said Walker against said Christian. The paper, on its face, was of equivocal import, and was considered to be open to explanation by parol evidence of surrounding circumstances.

30 *Such evidence was admitted and introduced, and made the meaning of the paper perfectly plain; and that it was not intended to bind the agent personally. Here the contract was a formal promissory note, signed by the defendants in their own individual names, without referring on its face to any principal; and the legal construction of the instrument to bind the makers personally is confirmed by the fact that creditors are indorsed on the note, showing that payments were made by the makers upon it afterwards; one during, and another after the end of the war; they thus treating the note, long after it was made, as their own individual debt; as no doubt it was.

We are, therefore, of opinion that there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

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31 *Bolanz & al. v. Commonwealth.

November Term, 1873, Richmond.

1. **Scire Facias—Return.***—A *scire facias* upon a recognizance is made returnable to the term of the court. It is properly placed upon the docket at that term.
2. **Continuance—Passing Over a Term.**†—Prisoner charged with a felony in the county court, appears at the August term, and on his motion his case is continued until the first day of the October term; passing over the September term. This is not error.
3. **Variance between Indictment and Scire Facias.**‡—Prisoner is indicted for embezzlement, which is a felony, and he is admitted to bail. The recognizance is conditioned for his appearance to answer an indictment for embezzlement. The *scire facias* upon the recognizance recites it, that he was to appear "to answer of a certain felony whereof he stands accused." This is not a variance.
4. **Recognizances—Sureties on—Liability.**—The fact that after the recognizance was executed by his sureties, the prisoner was appointed a deputy United States marshal, and continued to act as such until the time for his appearance in court, does not relieve his sureties in the recognizance from their liability.

*Return of Scire Facias.—As to this subject, see McVeigh v. Bank, 76 Va. 268.

†Continuance—See monographic *note* on "Continuances," appended to Harman v. Howe, 27 Gratt. 676.

‡Variance between Indictment and Scire Facias.—See citation of principal case on this point in Allen v. Com., 90 Va. 358, 18 S. E. Rep. 437.

At the August term for 1870, of the County court of Pittsylvania, William Leahy, who was sheriff of the county of Pittsylvania in the year 1870, was indicted for feloniously embezzling the moneys of the county, amounting to $9,413.29, which were under his care and management by virtue of his office of sheriff. At the same term of the court Leahy, who had been arrested and bailed for his appearance, appeared in court, and upon his motion his case was continued until the first day of the next October court; and he entered into a recognizance with Mathias Bolanz and John A. Giles as

32 his *sureties, in the penalty of $5,000 on his part, and the like sum on the part of his sureties, conditioned for his appearance in court on the first day of the next October court, to answer the indictment; and not to depart thence without the leave of the court. This order, in stating the charge against Leahy, says: "Wm. Leahy, who stands indicted for embezzlement, appeared," &c.

On the 17th of October, that being the first day of the October term of the court, Leahy failed to appear, and his recognizance was forfeited, and it was ordered that a writ of scire facias be issued against him and his sureties, returnable to the next court. The scire facias was issued on the 21st of October. In reciting the condition of the recognizance entered into by Leahy and his sureties, it says, upon condition that he "should make his personal appearance before the said court on the first day of the next October term of said court, to answer of a certain felony whereof he stood accused." It was served on Bolanz on the 21st of October, and on Giles on the 8th of November 1870.

On the 21st of November, which was the first day of the term of the court, Bolanz appeared, and demurred to the scire facias; and the attorney for the commonwealth joined in the demurrer. On the next day he obtained leave to withdraw the demurrer; and he then moved the court to strike the cause from the docket, as being improperly docketed; but the court overruled the motion; and he excepted. Bolanz then again demurred to the scire facias, and filed the plea of nul tiel record; and the attorney for the commonwealth joined in the demurrer, and took issue on the plea. And on the motion of said defendant the cause was continued until the next term.

At the February term for 1871, the defendants had leave to file special pleas in writing; and the cause was continued until the next term.

33 *At the March term of the court Giles demurred to the scire facias and pleaded nul tiel record; and the attorney joined in the demurrer and took issue on the plea. And each of the defendants filed

a special plea, the substance of which was, that, by the laws of the State he was authorized at any time before the first day of the October term 1870 of the court, the time at which Leahy was recognized to appear, to apprehend said Leahy and deliver him into custody, and thereby discharge his obligation as bail. But that Leahy had been appointed by D. B. Parker, marshal of the United States for the district of Virginia, his deputy, and he had been acting as such from a short time after the execution of the recognizance by the defendant, until and after the said first day of the October term 1870 of the court; and that the defendant had, therefore, no power or authority to avail himself of said provision in the laws of the State, &c.

The attorney for the commonwealth demurred to the pleas. And the cause coming on to be heard, the court overruled the demurrer of the defendants to the scire facias, and sustained the demurrer of the attorney for the commonwealth, to the special pleas; and upon the plea of nul tiel record, held that there was such a record; and rendered a judgment in favour of the commonwealth against the defendants for $5,000, the sum mentioned in the writ, with costs. And thereupon they applied to the judge of the Circuit court of Pittsylvania for a writ of error to this judgment; which was awarded. The cause came on to be heard upon the appeal in November 1872, when the Circuit court affirmed the judgment of the County court: and then Bolanz and Giles obtained a writ of error to this court.

Dabney, for the appellants.

1. The sci. fa. was improperly
34 docketed at the November *term of
the court. A sci. fa. is a civil suit, which may be pleaded to, and must be matured as any other civil suit, the only difference being that the declaration is contained in the writ served on the defendant, and which is the commencement of the action. Foster on sci. fa., 73 Law Library, p. 305; Alice v. Gale, 10 Mod. R. 112; 2 Coke Inst. 470; 2 Wm. Saun. 72; Com. Digest Title Pleader, 3 and 10; Rex v. Hare & Mann, 1 Strange R. 146. It may be made returnable to the rules; and if so, upon failure of the defendant to appear at the first rules, a judgment nisi is entered against him, and a rule to plead at the next rules; if he fails to appear and plead at the next rules, the conditional judgment is confirmed, and so docketed at the next issue term of the court; at which time it becomes final, unless set aside by the defendant. That a sci. fa. is treated by the Code in the same light as an ordinary summons will be seen by reference to Code of 1860, chap. 170, § 6, p. 707. The 30 day limitation contained in this section, was intended to prevent judgment by default from being matured in those cases in which, by the provisions of ch. 171, sec. 1, and as amended by subsequent acts of assembly, two rule days, and an issue term in the same court may take place within thirty days. It is true (see sec. 5, ch. 171,) that a suit may be brought to a term of the court; but if so, it must be matured from term to term by analogy to the rules; or, perhaps, it may be matured at the rules following the term to which the process is made returnable. See opinion of Judge Green in 2 Rand. R. 1. The sci. fa. being regulated by the same rule, must be matured in the same way; and therefore it was error in the court to compel Bolanz to plead at the November term, 1870.

2. The court erred in overruling the de-
murrer to the sci. fa. Leahy was in-
35 dicted at the August term, 1870, *of
the County court. He was recognized to appear on the first day of the October term, no notice being taken of the intervening September term, and the case having been continued to the October term previously to the application for bail. By the general principles of the common law a court must ex necessitate rei continue its judicial power and existence only by acting from term to term in the regular order in which such terms are appointed; any deviation from this course, unless provided for by special legislation, is irregular and void. Hence we see that in Virginia it has been deemed necessary to provide such special legislation. See Code of 1860, ch. 162, §§ 15, 16, p. 686. The 16th section declares the old common law and principles, and prescribes that all continuances not otherwise specially provided for, shall be from term to term; and the only special provision is in the 15th section of the same chapter. The acts of 1866–7, ch. 208, § 2, p. 982, provide that a person indicted for felony shall be tried at the same term at which he is indicted, unless he show good cause for continuance, and then he shall be tried at any term, whether monthly or quarterly. See acts of 1866–7, ch. 208, sec. 2, p. 932. See also in this connection sec. 13 of chap. 207, pp. 928–9. Clearly, then, the case of Leahy should have been continued to the September term, and if admitted to bail he should have been recognized to appear at that term. If it was competent for the County court to skip one term, it could, in its discretion, have skipped twenty; and thus would have been authorized to recognize Leahy to appear at some term in the year 1880; and upon default of appearance have held his sureties liable on the recognizance. It scarcely requires any citation of authority to show that bail is not bound upon a recognizance illegally taken, or requiring performance of conditions not
authorized by law, or not within the
36 *jurisdiction of the officer or court
taking the recognizance; the cases, however, of Hamlett v. Commonwealth, and Saunders v. Commonwealth, 3 Gratt. 82 and 214; Byers v. Floyd, Governor, 7 Leigh, 641; Bartoletts v. Commonwealth, 1 Leigh 586; Archer v. Commonwealth, 10 Gratt. 627 (see op. of Daniel, J., p. 638;) Wood v. Commonwealth, 4 Rand. 329, are referred to as clearly establishing this principle.

It is true that the act of a court of general authority, where it acts under colour of jurisdiction, is more liberally construed than the act of an officer with special authority, who must show his precept for his act; but it is equally true, that where a court plainly usurps jurisdiction and violates the direct mandate of the law under which it exists and acts, its order is not voidable, but ipso facto void. Suppose the County court had recognized Leahy to appear at some day in vacation, could the bail, in the event of his default, have been held liable on the recognizance? Plainly not. Is not the present case equally strong? To aid the court with the power to skip a term would enable it, by skipping more than three terms after indictment, to allow a prisoner to evade all responsibility to the law and to escape a trial altogether.

3. The court erred in not finding for the defendants on the plea of nul tiel record. The acts of 1866–7, ch. 209, § 4, p. 942, prescribe what shall be the condition of a recognizance. The recognizance of record in this cause, of which oyer was craved, is conditioned for the appearance of the defendant on the first day of October term, to answer an indictment for embezzlement. The sci. fa. recites no such record, but merely recites that the recognizance was conditioned that Leahy should appear, &c. to answer us of a certain felony whereof he stood accused, &c. The record recited 37 is clearly and fatally variant *from the record produced, and the cases already cited are relied on to show that the issue on the plea should have been found for the defendants.

It may be proper to mention in this connection, that as the recognizance was made part of the record in the cause by the demand of oyer, this defect could also have been considered on demurrer, and furnished a conclusive ground, in the absence of any other, for sustaining the demurrer filed in the cause.

4. The court erred in sustaining the demurrer to the special pleas filed by the defendants.

The commonwealth, in cases of bail, undertakes to assure to them the right to arrest and surrender to the proper officers of the law, their principal at any time before appearance day, and thereby to discharge themselves from all liability. See 2 Tidd. Prac. 1129; Reese v. United States, 9 Wall. U. S. R. 13. This is in the nature of a contract with reciprocal conditions; and if for any reason the commonwealth is unable to assure to the bail the enjoyment of this right, or to protect them in its exercise, their liability ceases.

The gist of the plea is, that the bail was prevented from exercising this right by the qualification and acting of their principal as a United States deputy marshal, protected by the laws of the United States, as such, from all arrests and interference except at the hands of the officers of justice; that the laws of the United States, protecting such officers, are paramount over the State laws, and imposed heavy penalties on any private person interfering with or arresting such officers. Of these laws the court must take judicial notice; and the facts of the plea having been admitted by the demurrer, it would be a monstrous proposition for the commonwealth to hold the bail bound on their contract when it has been unable 38 *to protect them in the exercise of their right to arrest and surrender their principal.

The Attorney-General, for the Commonwealth.

Anderson, J., delivered the opinion of the court.

The purpose of the writ of scire facias is to give notice to the defendant of an application for award of execution. The writ may be returnable at rules in the office, or in court. And the order awarding execution is made upon due return of the process, unless good cause be shown against it. If the writ is returnable to rules, it is made at rules, and if not set aside at the next succeeding term, becomes a final judgment of the last day of the term. If the writ is returnable to the court, the order is made in court. It is not necessary to send the case to rules, because it is not a proceeding which requires a declaration or a rule to plead; the purpose for which rule days are required in the office. Code of 1860, ch. 171, sec. 4. The default of the defendant in not appearing is a sufficient foundation for award of execution. Williamson v. Crawford, 7 Gratt. 202. But now, by sec. 6, chap. 170, of Code of 1860, no judgment by default on a scire facias or summons shall be valid, if it become final within one month after the service of the process; which is not the case here. The court is, therefore, of opinion that there is no ground for reversal in the first assignment of error.

As to the second assignment of error: Where the law provides that a term of the court shall be held monthly, it would not be competent for the court to pass over one term prescribed by law, and adjourn to a subsequent term. That is, it would not be competent for the county court, at its July term, to adjourn to the first day of the September term, passing over the August 39 term, if the *law required a term to be held in the month of August. But if the court failed to meet at the August term, by section 15, chap. 161, of Code of 1860, it would work no discontinuance; but every notice, recognizance or process given, taken or returnable to the August term, and all matters ready for the court to act upon at the August term, shall be in the same condition and have the same effect, as if given, taken or returnable, or continued to the next court in course. And the 16th section provides for the continuance of all causes to the next term, where no order of continuance is made. These sections provide for cases in reference to which no order has been made, and the 16th section provides for a general continuance of the causes to

the next term in course, where no order has been made by the court on the subject; but if the court had made an order continuing the trial of any particular cause to any particular day in the next term, or to the subsequent term, passing over the intervening term, the case would not fall within this provision of the statute. And no good reason can be perceived why the court may not, for good cause shown, on the motion of the accused, postpone the trial of a cause, to any particular day in the next term, or to a term subsequent to that. It could work no discontinuance; for the record shows that the cause was continued to a day, in the term of a court competent to try it; which would not be the case, if it were continued to a day in vacation. In Sands' case, 20 Gratt. 800, the cause was continued upon the motion of the commonwealth's attorney, at the June term of the Hustings court of the city of Richmond, to the September term of that court, passing over the July term of the court. It had no term for the month of August. In this case the continuance of the trial from the August to the October term, was ordered on motion of the accused. The court is of opinion
40 that *there is no error in that; and that the demurrer to the scire facias, on that ground, was properly overruled.

But it is contended that there is a variance between the scire facias and the recognizance; which question was raised by the demurrer, the defendant having craved oyer of the recognizance; that for that cause the demurrer should have been sustained, or the recognizance should have been excluded as evidence.

It appears from the recognizance that the accused was indicted for embezzlement, and was recognized to appear to answer that offence; as required by chap. 209, § 40, of acts of 1866-7, p. 942. The scire facias recites that he was to appear and answer, not for "a felony" generally, but "a certain felony whereof he stood accused." Embezzlement being made felony by statute, the court can perceive no variance between the recognizance and the scire facias. Section 11, of chap. 211, of acts of 1866-7, p. 943, provides that "no action or judgment on a recognizance shall be defeated or arrested by reason of any defect in the form of the recognizance, if it appear to have taken by a court or officer authorized to take it, and be substantially sufficient." The court is of opinion that the recognizance in this case is substantially sufficient, and is substantially set out by the scire facias, and that there is no ground in this assignment of error for reversal.

The court is further of opinion, that there is no error in sustaining the demurrer of the plaintiff to the defendant's special pleas. While it is true that the bail may be excused for his default in performing the condition of the recognizance, when it becomes impossible of execution by the act of God, or of the law, or of the cognizee, it is not competent for the accused to absolve himself or his bail by accepting office under the government of the United States.
41 *The court is, therefore, of opinion to affirm the judgment of the court below.

Judgment affirmed.

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42 *Burtners v. Keran.

November Term, 1873, Richmond.

1. **Conveyances—General Warranty—Conditions—Records of Foreign Court.***—K conveys land in Illinois to B, with general warranty. B conveys this land to his two infant children C and M, with general warranty. B afterwards removes to Virginia, and here conveys the same land to K with general warranty; and K then obtains a conveyance of the land from L the prior owner. K files a bill in equity in the proper court in Illinois, which has both common law and equity jurisdiction, against B and C and M, to establish his claim to the land. A formal answer is filed by a guardian *ad litem* for the infants, and B is proceeded against by publication, according to the laws of Illinois. Upon the hearing the court decides in favor of the infant children, C and M, and dismisses K's bill. K then sues B in Virginia in covenant on the general warranty of title in the deed from B to him. The issues were upon the pleas of covenants performed, covenants not broken, and a general plea of *non est factum*. On the trial K offers in evidence the record of the suit in Illinois. HELD:

1. **Same—Same—Same—Same—As Evidence.**—The fact that B had no notice of the suit, is not a valid objection to the record as evidence in the cause; it having been proceeded in according to the laws of Illinois.

2. **Same—Same—Same—Same—Presumption as to Jurisdiction.**—The Illinois court being a court of general jurisdiction, this court must presume that it had jurisdiction to try the cause in equity; and the record cannot be objected to on that ground.

3. **Same—Same.**—In fires, feoffments and other common law recoveries, the warranty not only concluded the grantor or feoffer but actually transferred the after acquired estate or interest to the grantee or feoffee.

***Conveyances—General Warranty.**—As to the operation of a general warranty, by way of estoppel, on after acquired property, see Raines v. Walker, 77 Va. 95; Baugh's Ex'or v. Walker, 77 Va. 102; Gregory v. Peoples, 80 Va. 357, and Young v. Young, 89 Va. 678, 17 S. E. Rep. 470, all citing the principal case. And see Reynolds v. Cook, 83 Va. 817, 3 S. E. Rep. 710. And this estoppel will operate though there is no general warranty if the deed of conveyance recites or affirms that the grantor is seized of a particular estate which the deed purports to convey and upon the faith of which the sale was made. Nye v. Lovitt, 92 Va. 710, 24 S. E. Rep. 345. But see, Reynolds v. Cook, 83 Va. 817, 3 S. E. Rep. 710. Though the grantor have an equitable estate at the time of the conveyance, if there be no general warranty and no recital in the deed that grantor has a legal estate, such deed only gives a lien on the equitable estate and does not operate by way of estoppel as to the after acquired legal estate. Doswell v. Buchanan's Ex'ors, 3 Leigh 365.

4. **Same—Same—Under Statute of Uses.**—Conveyances under the statute of uses only pass such estate as the grantor had at the time: the warranty merelyserving as a remedy, or operating to estop the grantor from denying the ownership of the estate at the time of the conveyance executed.

43 *5. **Same—Same—Same—Effect of Warranty.**—If a person conveys land with general warranty, and does not own it at the time, but afterwards acquires the same land, such acquisition enures to the benefit of the grantee, because the grantor is estopped to deny, against the terms of his own warranty, that he had the title in question; but it does not operate actually to transfer the estate subsequently acquired.

6. **Same—Same—Same—Same.**—Though, therefore, the deed from B to K enured to the benefit of C and M under the operation of K's warranty, and estops him from claiming the land against them, it does not pass the interest in K, or operate as a conveyance.

7. **Same—Same—Same—Same—As to Third Parties.***—Though the estoppel of K's warranty operates in favour of C and M, B can derive no benefit from it. He can not say that his deed vested no beneficial interest in K.

8. **Same—Same—Same.**—Though an assignee can only take advantage of the covenant of warranty when an estate passes by the deed, yet it is, in favour of the grantee, a covenant in gross, and binds the warrantor though no estate passes by the deed.

9. **Same—Same—Fraud—Effect.**—Though the deed from B to K was fraudulent in its intent as to C and M, it was valid between the parties, and K may maintain an action against B upon the covenant of warranty.

10. **Same—Same—Same—Same.**—The motives influencing K to take the deed from B, cannot be the subject of enquiry before the jury to defeat or vary its legal operation and effect.

11. **Same—Same—Same—Same.**—Under the issues in this case, K is entitled to recover, though the jury may believe that the covenant in B's deed to K was executed by B, induced by the fraudulent misrepresentations of K as to the effect of said covenant.

12. **Same—Same—Same—By Statute.**†—Where a deed is procured by fraudulent misrepresentations, the defence can only be made at law, in the mode provided by the statute; Code of 1860, ch. 172, § 5; and the defendant should file a special plea averring the fraud, or special circumstances which entitle him to relief in equity. And the facts should be set forth with sufficient precision and certainty to apprise the plaintiff of the character of the defence intended to be made; and to enable the court to decide whether the matter relied on constitutes a valid claim to equitable relief.

44 *13. **Same—Same—Same—Instructions.**—As the question of fraud was not in issue before the jury, though the evidence of the fraudulent misrepresentation was introduced without objection, the court, on the motion of the plaintiff, properly instructed the jury to disregard it.

This case was argued at the last term of the court at Staunton, and was decided in Richmond at its present term.

This was an action of covenant in the Circuit court of the county of Rockingham, brought in March 1860, by Eli Keran against Ezra and Solomon Burtner. The covenant sued on is a covenant of general warranty, in a deed bearing date the 21st day of January 1858, by which Ezra and Solomon Burtner and their wives, in consideration of $2,000, conveyed to Eli Keran, a tract of land of one hundred and twenty acres, lying in Edgar county, in the State of Illinois; it being "the same land formerly conveyed to the said Eli Keran by James Lilley, by his deed duly admitted to record in said county."

By deed bearing date the 25th day of March 1854, Eli Keran and his wife, in consideration of one dollar, conveyed with general warranty, to Ezra Burtner, who was his son-in-law, a tract of land in the county of Edgar in the State of Illinois, containing one hundred and twenty acres, "it being the same land which was formerly conveyed to the said Eli Keran by James Lilley, by his deed duly admitted to record in said county." This deed was duly recorded on the 27th of February 1855.

By deed dated the 28th of November 1855, Ezra Burtner, in consideration, as stated in the deed, of $1,500, conveyed with general warranty, this land with the same description, to his two infant children, Cornelius A. and Mary M. Burtner. This deed
45 was executed *in Illinois, and was admitted to record on the 2d of January 1856. And by deed bearing date the 18th of December 1855, the same Ezra Burtner and his wife conveyed the same land, with general warranty, to Solomon Burtner. This deed was executed in the county of Rockingham. It was acknowledged before a notary on the day of its date; and was admitted to record in Edgar county, Illinois, on the 21st of December 1855.

Although the deeds from Keran to Ezra Burtner, and from Ezra and Solomon Burtner to Keran, describe the land conveyed in them as "the same land formerly conveyed to the said Eli Keran by James Lilley by his deed duly admitted to record in said county," no such deed from Lilley of prior date to these deeds, is to be found in the record; but by a deed dated the 26th of May, 1857, Lilley and wife, in consideration, as stated in the deed, of one dollar, grant to Eli Keran, with special warranty of title, all their right, title, interest and claim to the land. And this deed was admitted to record November 9th, 1857.

In July 1858 Eli Keran instituted a suit

*Same—Same—As to Third Parties.—Recitals in deeds do not operate as estoppels in favor of strangers that have not acted on or been misled by them; and formal statements and admissions, not acted upon, are not conclusive. McCullough v. Dashiell *et al.*, 78 Va. 640.

†Same—Fraud—By Statute.—At law the defence of fraud in the indictment can only be made by virtue of a statute allowing it and the statute should be followed. Va. Code 1887, § 3299. As to what constitutes fraud, see monographic *note* appended to Perry & Co. v. Shen. National Bank *et als.*, 27 Gratt. 755.

in equity in the Circuit court of Edgar county, in the State of Illinois, against Ezra and Solomon Burtner and Cornelius A. and Mary M. Burtner, the infant children of Ezra Burtner. In his bill he set out the deed from Ezra Burtner to Cornelius A. and Mary M. Burtner; the deeds from Ezra to Solomon, and from both of them to himself; and he refers to the fact that though the deed to Cornelius A. and Mary M. Burtner was executed before the deed to Solomon Burtner, the last was first recorded; and he charges that Solomon had full and complete notice at the date of his conveyance, of the previous conveyance to the said children; but by vigilant caution and speedy travel he had procured the recording of the deed to him, before that of the deed to the children. He says that though he was
46 aware of the *deed to the children, it was only on taking steps for the recording of the deed to him, that he was apprised that the said Solomon was a purchaser with full notice of the title of said children. He says he is in possession of said land, but by reason of the situation of his title, as before set out, he is unable to dispose of the same, whilst he is deterred from enjoying and improving it. The prayer of the bill is, that his title to the land may be quieted and confirmed as against the claim, as well of the said Cornelius A. and Mary M. Burtner, as against that of Ezra and Solomon Burtner and their heirs; and for general relief.

A guardian ad litem was appointed for the infant defendants; who filed an answer for them, submitting their rights to the protection of the court. Ezra and Solomon Burtner were proceeded against as absent defendants, by publication, according to the Illinois statute; which appears to be much the same as that of Virginia.

The cause came on to be heard on the 24th of May, when the bill was taken for confessed as to Ezra and Solomon Burtner; and the court held that the deed from Ezra Burtner to Solomon Burtner, and their deed to Eli Keran were fraudulent and void in law and equity, as affecting the prior title of the infant defendants; and that the prayer of the bill be refused; and that the bill be dismissed. And Cornelius A. and Mary M. Burtner were decreed to be seized of the said land, and lawfully entitled to the quiet and undisturbed possession thereof, free from all claims made or to be made under the said fraudulent conveyances to Solomon Burtner and Eli Keran.

In this action Solomon Burtner filed a plea of non est factum; and both the defendants filed the pleas of covenants performed, and covenants not broken; and issues were made up upon them.

47 *On the trial of the cause, after the plaintiff had introduced in evidence the deed from Ezra and Solomon Burtner to himself, and proved the execution of said deed, he offered in evidence an official copy of the record of the case in the Circuit court of Edgar county, and with it he introduced a witness, who stated that he was a lawyer, and had practised law in the State of Illinois for some years, and during the years of 1858 and 1859. He referred to the two volumes containing a compilation of the general laws of the State, and which he said were in force in 1858, 1859, and read the provisions of the law regulating proceedings in chancery causes, and in relation to conveyances; by which it appeared that the case had been proceeded in according to the provisions of the statute of that State; and that conveyances by parties, of land in the adverse possession of another were valid; and that the grantee had the same right of action for the recovery thereof, as if the grantor had been in actual possession.

The defendants objected to this mode of proving the laws of Illinois; and also objected to the admission of said record with or without proof in relation to the laws of Illinois. But the court overruled the objections, and admitted the evidence; and the defendants excepted.

After all the evidence had been introduced, including the deeds herein before referred to, and it had been proved that Keran had never got possession of the land in Edgar county, Illinois, but the same had been in possession of the guardian of Cornelius A. and Mary M. Burtner, and that Keran knew of the conveyance to them by Ezra Burtner, before he received or contracted for the deed from Ezra and Solomon Burtner to him, the defendants moved the court to give to the jury the following instruction:

If the jury shall believe from the
48 evidence, that the *plaintiff by deed with a covenant of general warranty, conveyed the tract of one hundred and twenty acres of land, in Edgar county, in the State of Illinois, to the defendant Ezra Burtner; and that afterwards the said defendant conveyed the said tract of land by deed with like warranty, to Cornelius Burtner and Mary Burtner; and that afterwards the said Ezra Burtner conveyed the same tract of land to defendant Solomon Burtner; and that afterwards, and whilst the said Cornelius and Mary still held such title as had been so conveyed to them, the said defendants united in a deed, with a covenant of general warranty, such as is described in the declaration, to the plaintiff Eli Keran; the latter conveyance could not confer upon the plaintiff any beneficial interest to vest in him, in conflict with his warranty which had passed to and rested with Cornelius and Mary Burtner; but could only operate in favor of the said Cornelius and Mary, by bringing in to them an outstanding, conflicting claim to said land; and that the deed of defendants to plaintiff failing to take effect in favor of the plaintiffs, the covenants therein also failed to take effect. To the giving of this instruction the plaintiff objected; and the court refused to give it. And the defendants excepted.

The defendants then moved the court to give the following instructions:

If the jury shall believe from the evidence

in the cause, that the plaintiff conveyed the tract of one hundred and twenty acres of land in Edgar county, Illinois, to the defendant Ezra Burtner, and that the latter afterwards conveyed the same to Cornelius Burtner and Mary Burtner; and that the defendant Ezra, without any reconveyance to him, and without being in any way reinvested with the title in said tract of land; but the title thereto then remaining
49 in the said Cornelius and Mary; *conveyed the same tract to the defendant Solomon; the said Solomon and Ezra then well knowing the rights of said Cornelius and Mary; and that the said Ezra and Solomon the said rights of the said Cornelius and Mary still subsisting, and the said Solomon and Ezra having acquired no other title to said tract of land, made the deeds upon a covenant in which this action is founded, to the plaintiff, who well knew the facts above supposed: And if the jury shall also believe it was the purpose of the said Eli Keran, when he took said supposed deed and covenant, to secure the said land to himself, as against the said Cornelius and Mary, then the covenant was so far tainted with fraud that the plaintiff can not recover upon it in this action.

And if the jury shall believe from the evidence, the above facts, hypothetically supposed, except as to the intent with which Keran took the said grant and covenant to him from the defendants; and that it was the intent of the said Eli Keran thereby merely to remove a cloud upon the title of Cornelius and Mary, who were his grandchildren; and the object has been accomplished; then there has been no breach of said covenant. These instructions the court refused to give; and the defendants again excepted.

The plaintiff then asked the court to instruct the jury as follows:

If the jury believe from the evidence, that the defendants did, in fact, voluntarily execute the deed of the 21st day of January 1858, to the plaintiff, knowing what were the covenants in said deed, they are to regard the covenants as binding upon said defendants, though they may believe the execution of said covenants by them was induced by the fraudulent misrepresentations of the plaintiff, of the effect of said covenants between said parties, varying the written contract *sued upon.
50 The court gave the instruction; and the defendants again excepted.

The jury found that the writing obligatory, in the declaration mentioned, was the deed of the defendants; and upon the issues joined, upon the pleas of covenants performed and covenants not broken, they found for the plaintiff, and assessed his damages at the sum of sixteen hundred and twenty-five dollars, with interest thereon from the 24th of May 1859 until paid: And the court rendered a judgment according to the verdict. The defendants thereupon applied to a judge of this court for a writ of error and supersedeas; which was awarded.

Robert Johnston and Harris, for the appellants.

We think it perfectly clear that the record of the Illinois court ought not to have gone before the jury:

1st. Because it is clearly fraudulent upon its face, as the bill and whole proceedings show the real object of the suit was to have the title in the children confirmed, and the title of himself, Keran, of whom he speaks as "one Keran," pronounced bad. This is inevitable, because upon his own statement of the case he puts himself out of court, and is careful to so state it as to secure that result. If the decree in this case had been procured by fraud not appearing upon the face of the papers, then it would have been passed upon by the jury; but the whole proceedings bearing upon their face fraud plain and palpable as the sun, it was the duty of the court to have rejected it as evidence and not have allowed a jury to act upon a record thus obtained. See Beale v. Sievely, 8 Leigh 658.

2d. It ought to have been rejected, because at the time of the institution of this suit the decree was not final, as three years had not elapsed between its rendition and the institution of this suit; in fact,
51 less than one year. *See sec. 15, page 29 of the Illinois law, which gives non-resident defendants, on whom process has not been served, three years in which to appear and answer the bill; "and thereupon such proceedings shall be had as if the defendants had appeared in due season and no decree had been made." Thus showing clearly that the decree did not become final and binding on the parties until the expiration of the three years.

3d. It ought not to have been admitted, because no notice of the suit was served on Solomon and Ezra.

The doctrine that "full faith and credit shall be given in each State to the judicial proceedings of every other State," is too well established to be controverted; yet that law has its exceptions, one of which is, when no personal notice has been served on a defendant, the said proceedings cannot be used against him beyond the prime and immediate object of the suit. See D'Arcy v. Ketchum, 11 How. U. S. R. 175.

The cases referred to on this point by the appellee's counsel, all concede the doctrine that a judgment or decree obtained without personal notice, cannot be used for any other than the immediate object of the suit. See Rootes v. Tompkins, 3 Gratt. 98; Wilson v. Bank of Mount Pleasant, 6 Leigh 570; Mankin v. Chandler & Co., 2 Brock. R. 125; Magee v. Beirne, 39 Penn. St. R. 50; Woodruff v. Taylor, 20 Verm. R. 65; The Bold Buccleugh, 7 Moore P. C. 267, 282.

The appellee's counsel insist that "eviction need not be by process of law; that the grantee may surrender possession to a superior title."

Admit this to be true, it cannot avail the appellee in this suit, for he declared eviction by the record of the Circuit court of

Edgar county, Ill., and in his declaration claims his right to recover solely on that ground and none other.

52 *Suppose the record of that case had not sustained the appellee on the trial before the jury, would he have been permitted, without amending his declaration, to prove an entirely different case? We think not. Hence, if the law be as he claims, he cannot get the benefit of it in this case.

4. We do not doubt the general jurisdiction of the Circuit court of Illinois, over the property in question; but we deny the court had jurisdiction in equity to try the question of title raised by the bill of Keran. The right of courts of equity to "cancel deeds" and other contracts under given circumstances, as claimed by the appellee's counsel, no one denies, but we do deny that a vendee (as Keran) has a right to come into a court of equity to have his own deed cancelled, or pronounced fraudulent. The jurisdiction is given to plaintiffs to cancel deeds and titles against them, surely not to cancel those in their favor, in order that they may sue upon their breach of covenant and then use the record so obtained as conclusive on the subject. Stuart's heirs v. Coalter, 4 Rand. 74; Lange v. Jones, 5 Leigh 192; Carrington v. Otis, 4 Gratt. 235.

3d. The first instruction should have been given. The propositions upon which the defendants rested their first instruction are,

1st. That as Ezra had previously conveyed the land by deed, with general warranty, to Cornelius and Mary Burtner, he was estopped by his general warranty; and that Solomon, and Keran, as subsequent purchaser under and from him, were also estopped. The estoppel of purchasers in such cases is an ancient as well as a modern doctrine

"Privies in blood as the heir; privies in estate as the feoffee, lessee, &c.; privies in law, the lords by escheat; tenant by the curtesy, tenant in dower, &c., that come in by the act of the law or in the post,

53 shall be bound and *take advantage of estoppels." 3 Coke on Litt. 431, 352 a. "If the conveyance be with general warranty, (says C. Kent. 4 Com. 98,) not only the subsequent title acquired by the grantor will enure by estoppel to the benefit of the grantee, but a subsequent purchaser from the grantor, under his after acquired title, is equally estopped, and the estoppel runs with the land."

Judge Story, Carver v. Jackson, 4 Peters R. 86, in speaking of what was said by the court in the case of Trevivan v. Lawrance, 1 Salkeld R. 276, says: "In the next place, it shows that such estoppel binds all persons claiming the same land, not only under the same deed but under any subsequent conveyance from the same party; that is to say, it binds not merely privies in blood but privies in estate, as subsequent grantees and alienees. In the next place it shows that an estoppel which (as the phrase is) works on the interest of the land, runs with it into whosoever's hands the land comes," &c. As to the estoppel of a subsequent purchaser, see also Smith v. Sheeley, 12 Wall. U. S. R. 358; Myers v. Croft, 13 Wall. U. S. R. 391.

2. Eli Keran was estopped or rebutted by his own general warranty, which ran with the land and descended to Cornelius and Mary Burtner, through Ezra's conveyance of the land to them. For if Keran should, by after acquired title, recover the land from Cornelius and Mary, then they could recover its value from him on his warranty; and to prevent multiplicity of suits Keran is rebutted.

3. Eli Keran was concluded by the recital of his deed to Ezra Burtner. It not only recited a good title in himself, but purported to convey the same. There was some discussion upon this subject in Doswell v. Buchanan, in 3 Leigh 394, but the doctrine is well settled. Van Renssalaer v. Kearney, 11 How. U. S. R. 297.

54 *That, inasmuch as the deed of Ezra and Solomon Burtner to Keran could not take effect beneficially to Keran, there could be no recovery on the covenant, there may be cited what is said by Judge Moncure in Dickinson v. Hoomes, 8 Gratt. from 395 to 406; 2 Lomax Digest, 242, chap. 21, § 4; note p. 2; Thomas Coke, Litt., top 301; Randolph v. Kinney, 3 Rand. 394, Munday v. Vawter, 3 Gratt. 518.

The covenant for quiet enjoyment is more extensive than, though similar to, the covenant of general warranty. The former [see Code of Virginia, chap. 117, § 14, and Platt on Covenants, § 3 of chap. 11,] guarantees that it shall and may be lawful to and for the purchaser to enter into and upon, use, occupy and enjoy the said messuages, &c.; and may be perhaps broken before entry of the grantee, if that entry should be unlawful. But the covenant of general warranty cannot have a separate existence; it is a parasite, it is inherent in the land, runs with it, and, if for any reason the deed in which it is found, cannot take effect, the breath of life is never breathed into its nostrils.

The deed of Ezra and Solomon to Keran conveyed nothing, because there was nothing in them. There was not even a contingent right of dower in the wife of Ezra when she united with her husband in his deeds to Solomon and Keran. Ezra was apparently not seized of the land during the coverture, but had conveyed it to his children by a former marriage, before he became the husband of Eliza. At least there is no evidence of a contingent right of dower in Eliza, the wife of Ezra; and, if such right existed in her, it was not the subject of a grant, as it was mere possibility; nor of a release, except to the owner of the land. The only operation of the deed, with privy examination of the wife of Ezra Burtner, would be by estoppel, in favor

55 of the owners of *the land with which it runs, when the contingency upon which the right of dower depends happened.

The case is in this regard very different from Dickinson v. Hoomes; thus, John Hoomes' deed passed the base fee in the land, and Richard's the possibility; though they united in the same deed and covenants. Here nothing whatever passed by the deed of January, 1858, to Keran.

Woodson & Compton and Liggett & Hays, for appellees.

It is claimed by appellant's counsel, that the record of the suit is not evidence in this cause, and that it was inadmissible for any purpose, as the defendants were all non-residents of Illinois, and the Circuit court of Edgar county had no jurisdiction over them. This court being a court of general jurisdiction, it must be presumed that it had jurisdiction of the case, and that the proceedings were all according to the laws of Illinois. This land being situated in the State of Illinois, the courts of that State alone had jurisdiction over it; and no matter where the parties reside, the decision of the Circuit court of Edgar county is conclusive as to the title; and this is not only so by the statutes of Illinois, especially by sec. 1, chapter 18, but is so upon general principles of law. Freeman on Judgment, p. 463; Story's Conflict of Laws, (seventh edition,) p. 731 to 766, chap. 15. Real property is governed by the lex rei sitae, and contracts representing it must be made and dissolved according to the laws of the county where it is situated. Story's Conflict, sec. 364, 367, 424, 463, and the case of Mills v. Duryee, and notes to it in 2d American Leading Cases, p. 778, &c., fifth edition. Independently of any statute or judicial regulation of the State of Illinois, the Chancery court had unquestioned jurisdiction to decree the cancellation or invalidity of the deed from Ezra Burtner
56 to his children, *or the deed from Ezra to Solomon, or the deed from Ezra and Solomon Burtner to Eli Keran, on account of the fraudulent conduct by which Solomon got his deed; and with notice of the prior legal and equitable right of the children of Ezra Burtner, attempted to make it effective against them. See 2d Story's Eq., chap. 17, title "Cancellation of Deeds;" 2d U. S. Eq. Digest, p. 526 to 528; also Chitty's Eq. Digest, p. 663–664.

As is stated in the notes to Mills v. Duryee, 2d American Leading Cases, p. 778, "judicial proceedings may be either in rem or in personam. In the one case the object is to establish an obligation against the defendant personally; in the other, to bind the title to some specific thing." Boswell's Lessee v. Otis, 9 How. U. S. R. 336; Hall v. Williams, 6 Pick. R. 332; Green v. Van Buskerk, 7 Wall. U. S. R. 139.

We think, therefore, it is clear that the proceedings in Illinois were legal and regular, and that the title to the land was and is finally settled against Keran, and is in law equivalent to eviction: and while the record from Illinois might be impeached for fraud or want of jurisdiction, this has not been successfully attempted; and the legal presumption continues, that the proceedings there were legal and regular. 2 American Leading Cases, p. 632, &c.; 10 Peters R. 742; 2 How. U. S. R. 219. The cases from the Va. Reports do not claim a different doctrine. See also 2 Wall. U. S. R., p. 328; and other cases cited in 2d American Leading Cases, p. 647–8. The cases cited, on the other side, and most of those referred to in the Books, are cases in which a suit was brought to enforce a debt or demand evidenced by a foreign judgment, in a suit in a foreign State; but the rule may be very different when the record of the foreign judgment is not the cause of action, but is
57 collateral, and *is introduced to show the decision of the foreign court in regard to the title to the land, as in this case: a question as to which the foreign court has exclusive jurisdiction. Wharton's Conflict of Laws, sec. 828, 830, 835; Freeman on Judgment, sec. 592–3; Bigelow on Estoppel, p. 164 to 264.

This record was then clearly admissible to prove the judgment in rem: the loss of the land to Eli Keran; and under the decree of the Circuit court of Illinois, taking the bill for confessed, as to Solomon and Ezra Burtner, under the laws of the State, (of which that court was the judge,) everything is established necessary for the recovery by the plaintiff in the court below.

An eviction need not be by process of law; the grantee may surrender possession to a superior title; but in that case, he assumes the burden of proving the superiority of the title to which he surrenders. Sedgwick on the Measure of Damages, p. 158, 173–5; Hill, 590; 4 Mass. R. 349; 2 Mass. R. 433; 17 Mass. R. 586; Winslow v. McCall, 32 Barb. R. 241; 2 Greenl. Ev. p. 235, sec. 244; 2 Lomax, 274; 11 Leigh, p. 88. And it is proven in this cause, that the title of Solomon Burtner and Ezra Burtner was worthless, because they both knew, when Solomon took his deed and hastened to Illinois to have it recorded, that the land belonged to the children.

2d. The Circuit court did not err in refusing to give the instruction asked by the defendants, set forth in their 2d exception.

It assumes as a legal proposition, that as Eli Keran had sold the land to Ezra Burtner, who then sold it to his children, Cornelius and Mary Burtner, and afterwards sold it to Solomon Burtner, and then Solomon and Ezra Burtner sold to Keran, then this latter conveyance operated only in favor of
58 Cornelius and Mary *Burtner, by virtue of the warranty of Keran to Ezra Burtner, and passing no title to Keran, the covenant of warranty to Keran never took effect. If it is true at common law that a warranty did not take effect, and was void, when the grantor was out of possession, or when there was an adverse possession, this was because of the policy of the common law, as expressed and confirmed by statute of 27, Henry VIII; which made such conveyances void; and until the revision of 1849, we had such a statute against pretended titles; but that statute was repealed; and by our Code a deed is valid and effec-

tual to convey all the rights of the grantor, whether in possession or not. See 2d Lomax's Digest, p. 9, 10 and 11; 2d Matthew's Digest, p. 27, notes to sec. 5; and the notes to the Report of the Revisors of the Code, p. 602-3. These statutory regulations, taken in connection with the statute in regard to covenants for title—1st Matthew's Digest, p. 530, 531, 535—were intended to remove such difficulties as these, and to get rid of the absurdity that a grantee who had obtained his deed with general warranty, and paid his money, could not recover upon the warranty in his deed, because some squatter in a distant State had possession of the land at the time of the deed. Moreover, the Illinois statutes, which must govern this case, as the land lies there, authorizes such a conveyance, and establishes the doctrine here contended for. See also Wead v. Larkin, 54, Illinois Reports, found at p. 149 of American Reports. This instruction also involves the doctrine of Estoppel, as to which doctrine and the exceptions to it, we refer the court to Bigelow on Estoppel, p. 269 to 363. The doctrine of estoppel does not apply to this case; and if it did, the title of Cornelius and Mary Burtner has not been disturbed. The title which Solomon and Ezra Burtner made to Keran, was adjudged fraudulent and void, because of the act of Solomon Burtner 59 *in attempting to get a good title to the land, when he knew it belonged to Cornelius and Mary Burtner. Of this guilty knowledge on the part of Solomon Burtner, Keran was ignorant, as set forth in his bill, until he was taking steps to record his deed. Solomon's title was prima facie good, having been recorded before the deed to Cornelius and Mary; and Keran had a right to buy that title by the record. It was not until the decree of Edgar Circuit court against Keran, that Solomon's title failed. Keran was not estopped by the deed to the children, from purchasing the alleged title of Solomon. If Solomon had gotten a title from Ezra Burtner, after the deed to the children, and had made it a superior title by reason of superior diligence in having his deed first recorded, Keran could not be liable upon his warranty to Ezra Burtner, because the title was perfect which Keran conveyed, and the defect has only occurred from the failure of the children to have their deed promptly recorded; and it was under these circumstances that Keran purchased the title of Solomon Burtner, which was at the time the superior legal title.

3. The instruction in the 3d exceptions was properly refused, because there was no evidence upon which to predicate it, and it was not sound as a legal proposition.

4. The instructions asked for by the plaintiff were properly given.

Staples, J. The first question to be considered is, whether the court below erred in admitting as evidence the record of the proceedings and decree of the Circuit court of Edgar county, Illinois. It is insisted that this record was not competent evidence for any purpose; for the reason, that the defendants in that suit were not residents of the State of Illinois, were not served with process, or otherwise notified of the 60 institution of the *suit. It is true that none of the defendants lived in that State; but the land is located there, and that is sufficient to give the court jurisdiction. It is the settled doctrine of the common law, that the lex rei sitae governs exclusively, in respect to the rights of parties, the modes of transfer and alienation, and the nature and extent of the interest to be alienated. And, although property within a country does not make the owner generally a subject of the sovereign, it subjects him to the jurisdiction secundum quid et aliquo modo. And as immovable property is to be held "according to the laws of the country where it is located, controversies relating to such property can only be decided in the State where it belongs." Story, Conflict of Laws. S. p. 552, 557, 592.

Now, it is clear that if Cornelius and Mary Burtner had been before the Illinois court by appearance or the service of process upon them personally, the record of the suit, so far as it tended to establish the eviction of the plaintiff, would have been competent evidence in the present action.

The land being in Illinois, the non-residence of Cornelius and Mary Burtner could not deprive the plaintiff of his right to institute his suit there, provided the statutes of Illinois conferred upon the courts authority, in proper cases, to proceed against absent defendants. That these statutes do authorize proceedings and decrees against non-residents, is unquestioned. The practice in such cases is substantially the same as that in Virginia.

The plaintiff has, therefore, done no more nor less than was his clear right to do. He brought his suit in the courts of the country where the land is situate, and he has perfected it according to the laws of that country. Decrees and judgments ren- 61 dered in such suits are *treated, to a certain extent, as proceedings in rem; they bind the property which is the subject of the suit; though they create no personal charge against the defendants. Whether they are of a conclusive character, it is not material to enquire, as no such question arises in this case. Conceding that they are examinable when introduced collaterally in foreign courts, they are certainly prima facie evidence, so far as they affect the title or status of the property which is the subject of adjudication. Cochran v. Fitch, 1 Sandf. Ch. R. 142; Rootes' ex'or v. Tompkins' trustees, 3 Gratt. 98; Boswell's lessee v. Otis, 9 How. U. S. R. 336; Green v. Van Buskerk, 7 Wall. U. S. R. 139; Cooper v. Reynolds, 10 Wall. U. S. R. 308. See especially Freeman Judgments, sec. 607, 611, 612.

There is no difficulty in applying these principles to a controversy between vendor and vendee. When the vendee sues upon the covenant of warranty, it devolves upon him to show an eviction, or what is equivalent to it, under a paramount title. This

fact may be established by the production of the record of the recovery in ejectment or other real action, brought by the adverse claimant, in connection with evidence of a change of possession. If the vendee has given the vendor proper notice of the pendency of the ejectment, and required him to defend it, in the action upon the covenant, the judgment in ejectment is evidence, not only of the recovery, but of the existence of a valid paramount title. The vendee is, however, not compelled to give the notice. When he omits it, the vendor is not regarded as a party or privy to the adverse proceeding; and as against him, the record cannot be relied on to show a paramount title. It is, however, prima facie evidence of a recovery and of the eviction; the vendee being then required to establish, by independent evidence, that the recovery was by
62 lawful *right and paramount title. Rawle on Covenants for Title, 225 to 232; 2 Barb. R. 171.

According to this view, the plaintiff might have given defendants notice of the Illinois suit; it would have been better that he should have given it, but it was not essential to the maintenance of this action, or to the admissibility of the record as evidence. Having failed to do so, the record is evidence of a recovery and eviction only, open to examination by defendants for fraud or collusion and want of jurisdiction in the court.

The rule is not varied by the fact that the plaintiff himself was the party suing in the courts of Illinois, and thereby seeking an adjudication of the validity of his title; for whether the vendee yields the possession to the rightful owner, or is evicted by him, or brings his suit ineffectually to recover the possession, the result is the same. In either case there is a breach of the covenant.

The authorities are not entirely agreed whether a mere recovery sufficiently establishes an eviction without some evidence of a disturbance or cessation of the possession. The decision of this point is not necessary in this case, inasmuch as evidence was adduced tending to show that the plaintiff was at no time in possession of the land which was the subject of controversy. It is to be observed that the plaintiff did not offer the record as conclusive of any question. There is nothing to show it was so treated by the court or by the jury. No complaint is made that defendants were not permitted to impeach it for want of jurisdiction in the court, or for fraud in obtaining it; or even that they were precluded from showing it was erroneous, or against equity and conscience. For aught that appears to the contrary, each and all these defences were open to the defendants. All that appears in connection with this record is, that the
63 *defendants objected to it as evidence, and the objection was overruled by the court. The ruling was clearly correct, unless there is more weight in defendant's other objections.

One of these is, that the Circuit court of Edgar county, sitting in chancery, is not authorized to adjudicate questions of title to land; and the plaintiff's remedy was by action of ejectment. The Circuit court of Edgar county is a court of general jurisdiction, exercising both common law and equity powers vested in the same judge. Thus constituted, the court had plenary jurisdiction of the subject-matter of the suit. Whether this jurisdiction belonged to the common law or equity side of the court, depends upon the course of practice and precedent in the State of Illinois. The jurisdiction of equity, as distinguished from common law, in a large majority of cases is not defined or fixed by any statute. It depends upon principles and precedents announced by equity judges and by learned commentators. The practice varies in different States and at different eras, according to an infinite variety of circumstances. It may be, that in Virginia equity has no jurisdiction to settle the title or bounds of land between adverse claimants. But even here there are well established modifications of this rule. I shall not stop to enumerate them. They may be found in the reports and in the works on equity jurisprudence. When the decree of a sister State court is offered here as evidence, is the judge to look into the bill and proceedings to determine whether the case comes within the rule, or some qualification or exception to it; and if he is of opinion the jurisdiction appertained to the common law rather than the equity side of the foreign court, is he to declare the decree null and void? No case has gone that far. It is impossible to foresee the mischiefs
64 and confusion that would arise *in the administration of justice, if this was the established doctrine of the courts.

If a court of general jurisdiction may, under some circumstances, on its equity side, settle a controversy concerning the title to land, it is the province of the court in which the controversy is pending, to determine for itself whether those circumstances exist which justify the adjudication; and however erroneous the decision may be, it is of universal obligation, until reversed by the proper appellate tribunal. This, I think, is a well settled principle. It is fully sustained by the case of Cox et als. v. Thomas, 9 Gratt. 312; where the whole question is fully considered, and all the principal authorities reviewed by Judge Allen. In the course of his opinion, he declares: "If the jurisdiction of the court extended over that class of cases, it was the province of the court to determine for itself, whether the particular case was one within its jurisdiction. And the correctness of such judgment can be enquired into only by some appellate court." The same rule must be applied to the Circuit court of Edgar county, in the exercise of its chancery powers. It was the province of that court to determine whether the case before it was within its jurisdiction; and until reversed, its decree must be deemed valid

to the same extent as if pronounced in a case of acknowledged equity jurisdiction.

The next objection is, that the decree was obtained by fraud—fraud apparent on the face of the record; and this was still more manifest when the evidence came to be heard on the trial of the cause. This question of fraud in procuring the decree is, for the first time raised in this court. At any rate, it does not distinctly appear it was brought to the attention of the court below as a specific ground of objection to the record as evidence. Are we to assume that it was? I think not. The defendants
65 *may have preferred to take their chances upon that question before the jury. Whether they did or not, we have no means of determining, as the evidence is not before us; the judge having declined to give a certificate, in consequence of the contradictory character of the testimony. It is to be inferred, however, from the statement of counsel, that the question was brought to the consideration of the jury: for he tells us, that the plaintiff's fraud in obtaining the decree was made more manifest when the evidence came to be heard on the trial. If we are permitted to consider this statement of counsel, it would seem that the whole matter was the subject of investigation before the jury; and they, by their verdict, have gone very far in relieving the plaintiff of the charge. In the face of this finding—in the uncertainty as to what occurred at the trial—it would be a very strong exercise of an appellate jurisdiction for this court to say that the record so conclusively shows fraud on its face as to require its exclusion from the jury, and to render a new trial of the cause as necessary and proper.

I admit that the record does not exhibit the plaintiff in a very favorable light; but the whole subject was peculiarly proper for the jury. It was more just to submit it to them, and thus afford the plaintiff an opportunity of explaining all the facts and circumstances connected with the institution and conduct of the Illinois suit, rather than for the court to cut off all investigation by arbitrarily rejecting the evidence.

After the evidence was concluded the defendants asked the court to give the jury three instructions; which were objected to by the plaintiff; and the instructions refused. To this ruling the defendants excepted.

The first instruction affirms substantially, that the plaintiff having first con-
66 veyed the land with general *warranty to Ezra Burtner, and Ezra Burtner having conveyed it with general warranty to Cornelius and Mary Burtner, the subsequent conveyance of the same land by the defendants to the plaintiff did not vest any beneficial interest in the plaintiff; but said conveyance enured to the benefit of Cornelius and Mary Burtner exclusively: and so the deed in favor of the plaintiff failing to take effect, the covenants of warranty therein contained also failed to take effect. The proposition here asserted is, that where a deed is executed containing a covenant of warranty, and the vendor afterwards acquires an estate which is within the scope of the covenant, such after acquired estate enures to, and is actually transferred to the purchaser, by operation of the doctrine of estoppel. In other words, the warranty creates an estoppel which takes effect on the subsequent interest, and passes it to the vendee.

Now, this proposition may be correct when applied to fines, feoffments and other common law recoveries. In this class of cases, it seems that the warranty not only concluded the grantor or feoffer, but it possessed the high function of actually transferring the after acquired estate or interest. But deeds of bargain and sale and other conveyances, operating under the statute of uses, have never had any such effect. They only pass such estate as the grantor has at the time; the warranty merely serving as a remedy, or operating to estop the party from denying the ownership of the estate at the time of the conveyance executed. In such cases the principle of the estoppel is, that if a person conveys land with general warranty, and does not own it at the time, but afterwards acquires the same land, such acquisition enures to the benefit of the grantee; because the grantor is estopped to deny, against the terms of his warranty, that he had the title in question; but
67 it does *not operate actually to transfer the estate subsequently acquired.

I admit that this view is not in accordance with a number of American decisions, which give to the estoppel the effect of passing an interest; but it is sustained by the English cases, by many well considered decisions in the United States, and by the most approved text writers of the present day. See Judge Carr's opinion in Doswell v. Buchanan's ex'ors, 3 Leigh 365, 407; 1 Smith Lead. Cases, marg. 626; Bigelow on Estoppel, 337, 360-3; Rawle on Covenants for Title, chap. 11, pages 375 to 456 inclusive.

According to this view, and it seems to be a sound one, the interest conveyed by defendants to plaintiff enures to the benefit of Cornelius and Mary Burtner, under operation of plaintiff's warranty in their favor; and that warranty estops plaintiff to claim the estate against them; but it does not pass such interest, or operate as a conveyance. As against the plaintiff, the defendants are not bound by any such estoppel; and they can derive no benefit from it. It is not for them to say their deed vested no beneficial interest or title in the plaintiff. They cannot avoid the effect of their warranty by claiming the benefit of an estoppel created by the law solely for the benefit of Cornelius and Mary Burtner and those claiming under them.

But if it be conceded that defendants' deed enures to the benefit of Cornelius and Mary Burtner exclusively, it does not therefore necessarily follow, that the plaintiff cannot maintain an action thereon. It may be true that an assignee can only take ad-

vantage of the covenant of warranty when an estate passes by the deed. This, however, is only because at common law a covenant, like every other chose in action, was incapable of assignment. It could only pass as an incident to an estate; 68 *and if the grantee had no estate, his assignment could not transfer the covenant of warranty. In such case there was nothing to which the covenants could attach.

A very brief consideration will show that these principles do not apply to the original contracting parties. Warranty, as known to the earlier common law, was exclusively a covenant real, running with the land. The remedy for its breach was not in damages, but primarily in the recovery of other lands. In this sense, however, it has since been discontinued; and warranty is now considered a personal covenant, sounding merely in damages. Under our statutes and decisions it is treated as a covenant to warrant and defend, while it has also all the effect of a covenant for quiet enjoyment. Tabb's adm'r v. Binford, 4 Leigh 132; 2 Rob. Prac. 86. It creates personal rights, wholly independent of the estate, and which may survive long after it is extinguished, for the benefit of the covenantee. When the deed containing the covenant of warranty passes no estate, it is considered a covenant in gross, to be enforced, and only enforced, by the covenantee or his representatives. The contract being made with him directly and in person, he takes the benefit of it by virtue of his contract, and not as incident to the estate. 2 Lomax Dig. 260-8; 1 Smith's Lead. Cases 158.

This rule of construing the warranty as a covenant in gross for the protection of the covenantee, where no estate passes, attains substantial justice, and effectuates the intention of the parties. In Virginia the rule is absolutely necessary to prevent the gravest injustice and wrong. The covenant of warranty is almost universally the only covenant resorted to under our system of conveyancing. And in no other State has the government pursued to the same extent the policy of granting the same lands to successive grantees. As the 69 first patent *confers both title and seizin, the second patent confers neither; and as a necessary consequence, the deed of the junior patentee in many instances passes no estate whatever. In all this class of cases, according to the theory of the learned counsel for defendants, as the deed does not operate to pass any estate the warranty fails to take effect. It is wholly valueless to the purchaser when most needed for his indemnity against a paramount title. As was said by Judge Moncure, in Dickinson v. Hoomes, 8 Gratt. 353, 399, "of what avail would be these covenants if an outstanding paramount title would render them ineffectual. They could only be broken by an eviction or ouster by title paramount; and yet the very existence of such an outstanding title would render the covenant ineffectual. So far from affording any protection to the assignee, they would afford none, even to the covenantee."

It follows from what has been said, the court did not err in refusing to give defendants' first instruction.

The second instruction declares, that if the plaintiff, at the time of the execution of the deed by the defendants to them, had notice of the rights of Cornelius and Mary Burtner to the land in question, and it was his purpose, in taking the deed, to secure the land to himself, the defendants also being apprized of the title of Cornelius and Mary Burtner, the covenant was thereby so far tainted with fraud as to prevent a recovery in this action. This instruction was doubtless intended to assert the common law doctrine of ex turpi causa non oritur actio.

How far this doctrine applies to a case of this character, it is not material now to enquire, as the point involved may be disposed of upon other grounds, which do not admit of much controversy under the previous rulings of this court. In the 70 case of Harris v. Harris' *ex'ors, decided at the last Staunton term, 23 Gratt. 737, this court held that a bond executed by a debtor in fraud of his creditors, though void as to them, is nevertheless valid between the parties; and that the debtor will not be permitted to set up his own fraud in avoidance of the bond. The whole question is fully considered in that case, and all the authorities carefully examined by Judge Christian. The same principle applies to a grantor executing a deed in fraud of a previous purchaser from him. The deed from the defendants to the plaintiff, with all its covenants, is valid between the parties. Whatever fraud the plaintiff meditated they were privy to and participated in; and they cannot now rely upon their own turpitude to defeat the covenants contained in their deed.

The third instruction affirms that if the jury are satisfied that the plaintiff took the deed from the defendants with intent merely to remove a cloud upon the title of Cornelius and Mary Burtner, who were his grandchildren, and this object has been accomplished, there has been no breach of covenant. It does not appear there was any evidence whatever before the jury of the supposed intention of the plaintiffs in taking the deed. If the defendants desired to rely upon the point here, it was incumbent upon them to spread upon the record so much of the testimony as would show the relevancy of the instruction proposed. As they have failed to do so, this court cannot say there was any error in refusing it.

But the instruction is objectionable in itself. It proposes that the jury shall enter into an examination of the plaintiff's private reasons for taking a deed, in order to vary and defeat the legal operation and effect of the most solemn covenants taken by him for his protection. This would be to substitute parol evidence, in its worst

form, for the written contract of the
71 parties. It would *be, indeed, to say that a plain covenant, express and unequivocal in its terms, is not a covenant. It is to be conclusively presumed that the plaintiff, in taking a deed with general warranty, intended the covenant for his own security against any and every paramount title; and no averment can be received to rebut this plain and very reasonable legal intendment.

The defendants also excepted to an instruction given at the instance of the plaintiff. This instruction is to the effect that the covenants in the defendants' deed to plaintiff, are binding upon defendants, although the jury may believe the execution of said covenants was induced by the fraudulent misrepresentations of the plaintiff as to the effect of said covenants. The only question we are now to consider, is, whether this instruction was proper under the pleadings in the cause. It is very clear, according to the common law rule, that in a court of common law fraud may be given in evidence to vacate a deed, if the fraud relates to the execution of the instrument. But where the deed was procured by fraudulent misrepresentation, relief can be obtained only in a court of equity. Under the 5th section of chap. 172, Code of 1860, the defendant in any action is now permitted to allege and show any such fraud in the procurement of the contract as would entitle him to relief in a court of equity. In this case issue was joined upon the pleas of covenants performed, covenants not broken, and a general plea of non est factum. Leave was given the defendants to file a special plea of non est factum in writing; but it does not appear that any such plea was ever filed. And the question is, whether the defence contemplated by the statute, can be made under either of these pleas. It is very manifest from the whole scope and spirit of the statute, that a special plea should be filed, averring the fraud, or special circumstances, which
72 entitle the defendant *to relief in equity. And it would seem that the facts should be set forth with sufficient precision and certainty to apprize the plaintiff of the character of the defence intended to be made, and to enable the court to decide whether the matter relied on constitutes a valid claim to equitable relief. This is plainly to be inferred from the language of the 6th section, in which it is provided: "If any such plea be rejected by the court as bad, or adjudged insufficient on demurrer, or if when issue in fact is joined therein, such issue be found against the defendant, he shall be barred of all relief in equity, upon the matters alleged in the plea.

These provisions plainly contemplate a plea stating the whole matter of defence with such particularity that if found against the defendant on demurrer, or by the jury, he shall be barred of all relief in equity upon the same ground. Whether the defendant is so barred, is to be determined, not by parol evidence of what occurred on the trial at law, but by a reference to the form and matter of the plea itself. The plea must, therefore, disclose the ground of the defence in all cases under this statute.

In this case no such plea having been filed, the jury was rightfully instructed that the defendants were bound by the covenant, notwithstanding it may have been executed under the influence of fraudulent misrepresentations on the part of the plaintiff.

The learned counsel insists, however, that the evidence establishing the fraudulent misrepresentations was admitted without objection; and it was the duty of the jury to base their finding upon the evidence before them. The question of fraud was not in issue. All testimony upon that point was, therefore, irrelevant; and it was competent for the plaintiff to object to its introduction, or to move to exclude it,
73 or to ask the court to instruct *the jury to disregard it. The latter course was pursued; and it is not perceived that the defendants were in any manner prejudiced by this mode of raising the question. Kinchloe v. Tracewell, 11 Gratt. 600.

I have thus considered all the material points presented by this record; and am satisfied the judgment should be affirmed. This result is the more satisfactory because it is substantially just. The land which has been in controversy is in the possession of Cornelius and Mary Burtner, to whom it rightfully belongs; and the defendants have only been required to refund to the plaintiff a consideration to which they have no claim in law or equity, as the case is now exhibited by the record.

The other judges concurred in the opinion of Staples, J.

Judgment affirmed.

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74 ***Field v. Brown & al.***

November Term, 1873, Richmond.

1. **Evidence—Competency of Parties.**†—The plaintiff in a cause is not a competent witness under the statute, to prove the acts and declarations of a deceased person, under whom the defendants claim.

2. **Same—Same.**—But when the question is whether the acts of such deceased person, in building a dam across a stream, injured the land of the plaintiff, the plaintiff is competent to prove the condition of his land, the character of the stream doing the injury, the effect of the dam on the stream and on the adjacent lands of the plaintiff, and other independent facts, as to which his testimony, if untrue, could be rebutted by others, as readily as by the deceased.

3. **Same—Same—Cross-Examination.**—The plaintiff's

***For monographic note on Depositions, see end of case.**

†**Evidence—Competency of Parties.**—On this subject, see Carter v. Hale, 32 Gratt. 115, and *note*; Ellis v. Harris, 32 Gratt. 684, and *note*; Mason v. Wood, 27 Gratt. 783, and *note*. See also, Henry v. Ohio River R. Co., 40 W. Va. 243, 21 S. E. Rep. 867, citing the principal case, and see Owens v. Owens's Adm'r, 14 W. Va. 88.

deposition having been taken, and the defendants having cross-examined him, they can not have the questions and answers on cross-examination struck out, though they may refer to the acts and declarations of a deceased person, under whom the defendants claim.

4. **Same—Proof of Adverse Possession.**—In an action by F against B for injury to his land by B's continuing a dam across a stream which had been erected by a previous owner, the defence of B, is, that of adversary possession by him and those under whom he claims for more than twenty years. To rebut the presumption arising from the possession, F may prove what passed between his agent and M, a former occupant of the premises of B, showing that the agent of B denied the right of M to raise the dam, and that M asked it as a privilege for a short time.

5. **Same—Same—Rebuttal.**—Proof of adversary possession for twenty years, such as would create the presumption of a grant, is only presumptive and not conclusive, and may be rebutted by evidence showing that the adversary use and enjoyment relied on, was not acquiesced in, but the right thereto was contested; and any evidence tending to show such resistance, is proper evidence to rebut the presumption.

75 *6. **Same—Same—Same.**—A witness for the defendant who had been examined on a former trial of the cause, not being able to be present when the case is again tried, sends a written statement of what his evidence would be if he was present, and this is introduced in evidence by the defendant with the consent of the plaintiff. The defendant will not be allowed to prove that the witness has omitted one material fact, testified to by him on his former examination.

7. **Same—Same—Same.**—To rebut the defendant's evidence of adversary possession for twenty years, under such circumstances as would give him a prescriptive right to a dam across a stream, the record of a suit by the plaintiff against the administrator of a former owner of the premises, under whom the defendant claims, brought within twenty years from the date of the raising of the dam, for the injury sustained by the same, and in which the plaintiff recovered damages, is competent evidence for the plaintiff.

8. **Same—Instructions.***—Instructions asked by the plaintiff based upon the assumption that there can be no legal dam across a water-course unless established by legal proceedings under the act of assembly, ignoring entirely rights acquired by actual grant, by permission and by presumptive right derived from long use and enjoyment, where there is any evidence in respect to such rights, were properly refused.

9. **Same Adverse Possession.**—The fact that a dam was built in 1824 by G, and that from that time he and those claiming under him have claimed and held the possession and use thereof and of the water power on the stream afforded by said dam and used in working the mill for the use of which it was built, adversely and uninterruptedly as to the plaintiff and those under whom he claims, for twenty years from the building of the dam, is not conclusive of the right of the defendant to continue said possession and use of said dam and mill; but is only presumptive, and may be rebutted by circumstances.

10. **Pleading—Declaration.**—In 1824 G built a dam across H river, and that did the land of F on H, above the dam, no injury. But in 1845 G raised his dam; and that did injure the land of F. F sues B who claims under G, for continuing the dam to the injury of his land, and in his declaration recites that G erected the dam without authority of law. Under this declaration F may prove that the dam was raised in 1845, and the injury to his land done by raising it.

76 *In May 1866 Lewis Y. Field brought an action on the case in the Circuit court of Culpeper, against John Brown and F. T. Brown. The declaration recited that whereas the plaintiff, on the —— day of ——, 1850, and long before that time, and ever since, was and is the owner of a tract of land of about seven hundred acres, bordering on Hazle river in said county; and one George Ficklin, now deceased, the former owner of the land on said river, just below the lands of the plaintiff, upon which there was a mill seat, erected across the bed of the river a dam —— feet in height, and a long abutment on the east side of said river, of —— feet in height, without authority of law, and greatly to the injury of the land of the plaintiff, so that the water of the said river was thrown back upon the lands of the plaintiff, whereby the said lands were much debased in value, and some portions of them utterly destroyed: And whereas the said defendants, after the erection of the said dam as aforesaid, possessed themselves of the said mill-seat under a claim of title from the heirs at law of the said George Ficklin, dec'd, and have continued the said dam and abutment across the bed of the said river, greatly to the injury of the lands of said plaintiff and the health of his family residing thereon; and the said plaintiff, afterwards, to wit: on the 6th day of April 1863, notified the said defendants of the illegality of the said obstructions to the water of said river, and required them to remove the same. Nevertheless, the said defendants, well knowing the premises, and having been duly notified in writing, to remove the said obstructions, to wit: on, &c., as appears by a copy of said notice filed herewith, did not remove the same; but intending to injure the plaintiff in the health of his family residing upon said tract of land, and to debase the value of the land, and to destroy the same by 77 refluent water, saturation, *sobbing, &c., continued the said dam and abutment across the bed and upon the bank of said river, and failed and refused to remove the same: In consequence of which the said plaintiff says he is injured and hath sustained damages to the amount of $5,000. And, therefore, he sues.

Issue was made up on the plea of "not guilty;" and two trials of the cause were had in the Circuit court of Culpeper, in 1868, when the juries failed to agree: And the cause was then removed to the Circuit

*Same—Instructions.—On the subject of instructions, see monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

court of Madison county; where it came on again to be tried at a special term of the court held in August 1870.

In the progress of the trial, it being proved that the plaintiff was old and unable to attend the court, his deposition was offered in evidence on his behalf. It shows that he was examined for the plaintiff, and then cross-examined by the defendants' counsel. Upon its being offered in evidence, the defendants excepted to the questions and answers from No. 6 to No. 20, both inclusive, and to No. 22, and to the last paragraph of the answer No. 21, and to the questions and answers Nos. 8, 9, 10, 11 & 12, upon the cross-examination, upon the ground that George Ficklin, under whom the defendants claimed title, was then dead, and was alive at the time referred to in said questions and answers, and was then the owner of said dam and mill, and was one of the original parties to the transaction which was the subject of investigation in this suit; and the witness was the plaintiff. And the court sustained the exceptions as to the questions and answers in chief Nos. 6 to 12, and also Nos. 15, 20, and 22; and to all excepted to asked and answered on the cross examination, and overruled the exception as to Nos. 16, 17, 18, 19 and the last paragraph of the answer to question No. 21. And as to the question and answer 13, the court sustained the exception as
78 to so much of the *question as referred to effects of the present dam upon the old dam, and to so much of the answer as responded thereto in the following words: "The old dam was submerged by the water from the new dam:" and refused to allow said questions and answers to be read in evidence to the jury. To this opinion of the court both the plaintiff and the defendants excepted. This was the plaintiff's first exception, and the third of the defendants. Of these questions and answers see the opinion of Judge Bouldin.

In the further progress of the trial the plaintiff introduced Henry S. Field, his son, as a witness, who, during his examination, stated that George Ficklin died in 1852, and after his death one James Mozingo rented the mill; and after stating that he was the agent of his father, and that on one occasion he saw Mozingo, with several hands, engaged in putting a log about ten or twelve inches thick upon the comb of the dam, and that he forbade him to do it, he was proceeding to state what further passed in conversation between him and Mozingo, at that time, about putting on said log; but the defendants objected to the evidence, and the court sustained the objection. The plaintiff then asked the following question of the witness: At the time referred to, did said Mozingo claim it as a right to put said log across said dam, or simply ask it as a privilege for a short time? To which question the defendants objected, and moved the court to exclude it: which motion the court sustained. And the plaintiff excepted to both the rulings of the court. This is the plaintiff's second exception.

A witness, Fayette Mauzy, had been examined as a witness by the defendant at a former trial of the cause; and not being able to attend this trial, he sent a certificate of the facts he would prove if he was present, and to prevent a continuance of the cause the plaintiff had consented
79 *that the certificate should be read as evidence; which was done; and the defendants then asked to be allowed to examine D. H. Grimsley, one of their counsel, to prove that the said certificate failed to state one or more facts which Mauzy had deposed to on a previous trial of the case, when examined in person, and which were regarded by the defendants' counsel as material for their defence, and to prove what those facts were. To this the plaintiff objected: but complaint of Mauzy's absence having been frequently made by the defendants, and the said certificate having been frequently alluded to in remarks by counsel upon both sides, in the presence of the jury, the court overruled the plaintiff's objection in part; and allowed the said Grimsley to prove that the said certificate did not contain one fact deposed to by Mauzy on the previous trial which the defendant's counsel regarded as material; but refused to allow any enquiry or answer to prove what that fact was. And the plaintiff again excepted. This is his sixth exception.

For the purpose of rebutting the testimony introduced by the defendants, tending to prove a prescriptive right to their dam at Castleton, they having acquired their title from Hobson and Smith, grantees of A. J. Coons and wife, who were heirs at law of Ficklin, the plaintiff offered in evidence the record of the suit of Field v. Ficklin's adm'r. This was an action on the case in the Circuit court of Rappahannock county, brought by Lewis Y. Field, the plaintiff in the present suit, against Thomas Hill, jr., adm'r of George Ficklin, deceased, to recover damages for the injury to his lands by the same dam; and in which there was a judgment in favour of the plaintiff. To the introduction of this record as evidence, the defendants objected, on the ground that the record of a suit or judgment against an administrator was not evidence against an heir or those who
80 are privies to the *heirs, and moved the court to exclude it: which motion the court sustained. And the plaintiff again excepted. This is his seventh exception.

After the court had refused to permit the record of the suit of Field v. Ficklin's adm'r to be introduced as evidence, the plaintiff, called James J. Field, for the purpose of rebutting the testimony of the defendants, tending to prove title by prescription. He proved that he was a practising lawyer, resident at Culpeper C. H.: And he was then asked by the plaintiff "if he had or had not instituted a suit in the Circuit court of Culpeper for the plaintiff, against A. J. Coons, under whom the defendants claim, to recover damages for continuing the dam in the Hazle river at

Castleton; and if so, when said suit was instituted." To this question the defendant objected, on the ground that a copy of the record of said suit should be produced as the best evidence. But the court overruled the objection, and allowed the question to be asked and answered: the answer being that he did, as attorney of the plaintiff, in the year 1856 or '57, institute suit against A. J. Coons, in the Circuit court of Culpeper; and that the suit was still pending. And the defendants excepted. This is their fourth exception.

After the evidence and arguments of counsel had been fully heard, the plaintiff asked for five instructions, and the defendants asked for three. But the court refused to give any of the instructions asked for by the plaintiff, and refused to give the first and third asked for by the defendant; but gave the second, and also gave an additional instruction. All these instructions are set out at length in the opinion of the court. The plaintiff, thereupon, excepted to the opinion of the court: and on his motion the court certified the facts
81 and evidence to *which the instructions referred. This is the plaintiff's eighth exception.

The material facts and evidence are as follows:

The plaintiff was the owner of a tract of land on Hazle river, in Culpeper county, which he inherited from his father, and has resided thereon ever since about the year 1833. His father had owned and occupied the same for a great many years previous to 1833. This tract contained —— acres, the lower end of which was about — feet above the Castleton mills. Of the plaintiff's low grounds on this tract about —— acres were seriously injured by water. The defendants were the owners of the Castleton mills, having derived title to them through intermediate conveyances from A. J. Coons and wife; the wife having inherited them from her father George Ficklin. About two hundred and forty-one yards above the present site of the Castleton dam, there was an old dam which was used to work a tub grist-mill and saw-mill: This old dam was built probably before 1806. George Ficklin owned these mills and dam, and about the year 1822, 1823 or 1824, removed the same to the site of the Castleton mills, and then elevated the dam above the level of the old one; and he continued to use and enjoy uninterrupted and exclusive possession of the Castleton mills and dam until his death in 1852. About the year 1845 or 1846 he repaired the dam, and raised the level about two feet. The defendants adduced no evidence to show any authority from the courts or the Legislature of Virginia authorizing the original construction of the dam or any alteration in the location or height thereof; but they introduced in evidence the certificate of Fayette Mauzy, the clerk of the county court of Culpeper, that the minute books of the county court, from the beginning of the county in 1749 down to the 4th of July 1798, were all
82 destroyed during the war; *and that all the papers in suits, motions, &c., usually filed away in bundles labeled "judgments," according to the custom of the office, were all destroyed during the war to a much later date than July 1798. The clerk had an impression, not very distinct, that before the late war and while the suit of Field v. Ficklin's adm'r, about the same matter of controversy, was depending in Rappahannock county, he was called upon by some one interested to examine for an order of court and proceedings to establish the dam of the mill now owned by the defendants, and was not able to find any such order or proceedings, if any such did exist. He stated further, that in indexing the minute books of the office it was the custom to index an application for a mill in the name of the applicant only.

Much testimony was adduced before the jury from many witnesses, on both sides, respecting the amount and extent of the injury of which the plaintiff complains and the cause of it, showing the location of the adjoining hills, the elevation of the lands above the level of the dam, the means which had been employed by the plaintiff to drain his lands and carry off the water from the hills above. It was proved by the plaintiff that his low grounds were more liable to overflow from freshets than the lands above him and the lands below the dam, and that this was the natural consequence of his proximity to the dam.

It also appeared that his damages were comparatively small, and no specific damages were proved, until after the repair of the dam by Ficklin in 1845 or 1846; but that since then the lands had been seriously injured, and their productiveness greatly diminished.

Before the trial a report with a map and survey of the grounds was made under
83 an order of the court, by A. *Tutt, a surveyor and engineer, and is referred to in the instructions asked for by the plaintiff.

There was a verdict and judgment for the defendants: and Field thereupon applied to a judge of this court for a supersedeas; which was awarded.

Field and Gray, for the appellant.

Forbes, for the appellees.

Bouldin, J., delivered the opinion of the court.

This case is before us on a writ of error to a judgment of the Circuit court of Madison county, at a special term thereof, held in August 1870, in an action on the case brought by the appellant against the appellees, to recover damages for injury alleged by the appellant to have been done to his land by a dam alleged by him to have been illegally erected across the stream below, by one George Ficklin, under whom the appellees claim, and continued by said appellees down to the institution of the suit;

and the single defence was, that the defendants were protected in their alleged right to continue said dam by lapse of time. It very plainly appeared that the dam was not erected under any order of court; and the right set up under an adversary use of the easement for more than twenty years constituted the entire defence. The injury to the land of the plaintiff was plainly proved. The land was sobbed and rendered unfit for cultivation.

Under the rulings of the court, some of which were excepted to on both sides, the jury rendered a verdict of not guilty, which was approved by the court; and a judgment rendered for the defendants; and the case comes before this court on a writ of error and supersedeas to that judgment.

The deposition of the appellant
84 Field was taken, to be *read, de bene esse; and the first error assigned was to the exclusion by the court of certain questions and answers in that deposition.

The defendants moved to exclude the questions and answers on the examination in chief from the 6th to the 20th inclusive, the 22d and the last paragraph of the 21st; and also questions from 8 to 12 inclusive on cross-examination, and the answers thereto, upon the ground that George Ficklin, under whom defendants claim, is now dead, but was alive at the period referred to in the questions, and was a party to the transaction which was the subject of investigation.

The court sustained the exceptions to all the questions and answers aforesaid, except to the answers to the 16th, 17th, 18th and 19th questions in chief, to the last paragraph of the 21st, and to a portion of the 13th. And this ruling formed the subject of the appellant's first exception. The defendants excepted to the same ruling, because the court did not sustain all their exceptions. These exceptions, on both sides, are embraced in the first bill of exceptions.

This court is of opinion that there was no error in excluding the 6th, 7th, 8th, 10th and 12th questions and answers in chief. These related to the acts and declarations of Ficklin; and he being dead, it was not competent to prove them by the appellant. But we are of opinion that the Circuit court erred in sustaining the defendant's exceptions to the other questions and answers in chief or any part thereof. The questions and answers did not relate to declarations of Ficklin to conversations between him and the appellant Field, or to transactions between them. They had reference to the condition of the appellant's land, the character of the stream, the effect of the dam on the stream and adjacent land of appellant, and other independent facts, as
85 to *which his testimony, if untrue, could be rebutted by others as readily as by Ficklin. Such testimony does not come within the principle on which the exclusion was asked.

The court is further of opinion, that the court below erred in excluding, on the motion of the defendants, the appellants' answers to their own questions from 8 to 12 inclusive, on the cross-examination. There is, perhaps, but one of these questions, No. 8, that would have come within the rule of exclusion, had it been propounded by the appellant. That question seems to have been based on something appellant had at some time said, or was supposed to have said, but which he certainly had not proved as a witness; and whilst he could not legally prove such fact, Ficklin being dead, it was certainly competent to the defendants, claiming under Ficklin, to call for it from him. This they have done; and there would seem to be no propriety in excluding, at their motion, the answers to that and the other questions aforesaid, propounded by themselves.

The next error assigned by the appellant, is to the exclusion of the testimony of Henry S. Field, as set forth in the second bill of exceptions.

It appears that after the death of Ficklin, one Mozingo rented the mill; and in the last year of his tenancy, 1856, H. S. Field, a son of the appellant, who attended to his business, heard a knocking at the dam, and found Mozingo fastening on the comb of the dam a log about ten or twelve inches thick. Field, in the name of his father, forbid the proceeding, and was proceeding to state what passed between him and Mozingo, when he was arrested by a motion, by the defendants, to exclude the testimony; which was sustained by the court: and the appellant excepted. The appellant then asked the witness the following
86 question: "At the time referred *to, did Mozingo claim it as a right to put said log across the dam, or simply ask it as a privilege, and for a short time?" This question was objected to by the defendants, and excluded by the court; and the appellant again excepted: And these two exceptions form the subject of the second bill of exceptions.

It will be observed that the log referred to was placed on the dam prior to the purchase of the property by the defendants; and it had been proved by the appellant that this log was on the dam when it went into the possession of the defendants, and had not been removed; that Mozingo, who had put it on the dam, had promised the appellant to remove it, but had failed to do so. It must be remembered also, that defendants relied only on a prescriptive right to the dam, as it was, which they sought to maintain by proof of adversary possession thereof for more than twenty years, under such circumstances as would create the presumption of a grant. Such evidence is presumptive only, and not conclusive; and may always be rebutted by evidence showing that the adversary use and enjoyment relied on was not acquiesced in, but the right thereto contested; and any evidence tending to show such resistance is proper evidence to rebut the presumption. Nichols v. Aylor, 7 Leigh 546.

If a mere denial of the right of the de-

fendants to the use and enjoyment of the dam within the period of prescription is proper evidence to rebut the presumption, a fortiori, would such denial be proper testimony, accompanied by acquiescence therein to a certain extent, on the other side, and an arrangement between the parties for a temporary raising of the dam, and the use thereof as thus raised, for a limited period. Such was the testimony sought to be elicited from H. S. Field. He was present when the dam was thus being raised; forbid
87 the *raising thereof; but was prevented by the court from disclosing the conversation with Mozingo, who raised the dam, at the time of the act, and from proving whether or not Mozingo claimed it as his right or asked it as a privilege to put on the log. We are clearly of opinion that the entire conversation of Mozingo, occurring at the time of the act aforesaid, was proper evidence as part of the "res gestæ;" and that the court erred in excluding that conversation, and the question subsequently propounded to the witness.

The court is further of opinion, that there was no error in the rulings of the court below, set forth in the plaintiff's 3d, 4th and 5th bills of exception.

In the progress of the trial the defendants not having been able to secure the attendance of a witness, Fayette Mauzy, clerk of the county court of Culpeper county, by consent of the plaintiff, read to the jury a statement or certificate, in writing, prepared and signed by said Mauzy, and sent to counsel as his testimony. The defendants then asked to be allowed to prove by one of their counsel, D. A. Grimsley, that the certificate failed to state one or more facts which had been deposed to by Mauzy on a previous trial, and what those facts were; to which the plaintiff objected; but the court overruled the objection, and allowed the witness to prove that one fact deemed material by defendants had been deposed to by Mauzy at the previous trial, and was omitted in his certificate; but would not allow the witness to state what that fact was. To this ruling the plaintiff excepted; and this constitutes his 6th exception.

We do not see how this ruling of the court operated seriously, if at all, to the prejudice of the appellant; but we regard it as plainly erroneous. The defendants having themselves introduced the written statement of their own absent witness, in lieu of
88 his personal attendance, *are not at liberty to discredit that statement by proving that it was variant from the witness' statement on a former trial. They were not compellable to read the statement; but having voluntarily done so, it became their own testimony; and it was error to allow them to impeach it to any extent.

The 7th exception of the plaintiff was to the exclusion by the court, as evidence on the trial, of the record of a suit brought by Field, in the Circuit court of the county of Culpeper, in June 1855, against the personal representative of George Ficklin, dec'd, to recover damages for the injury done his land in Ficklin's lifetime, by the dam aforesaid; and in which judgment had been rendered for the plaintiff. This record was offered, not as evidence to conclude the defendants, but for the purpose of rebutting the testimony introduced by the defendants to prove a prescriptive right to their dam. But the defendants moved to exclude it; and their motion was sustained by the court. In this we think the court erred. The injury for which the suit was brought was not the original erection of the dam in 1825, but was the result of the dam, as renewed and raised above its former height in 1845 or 1846. Both dams being wholly on the land of Ficklin, and no injury having resulted to the appellant from the dam of 1825, he had no cause of action by reason of the erection of that dam. It was the renewed dam of 1845 or 1846 which caused the injury of which he complained; and that is the dam for the use and enjoyment of which the defendants attempt to show a prescriptive right. To rebut such presumption, we have already seen that a denial of the right within the period of prescription is proper evidence; and we can conceive of no higher evidence of a denial of the right claimed, than a suit instituted within ten years from its inception, to recover damages for
89 the exercise of *the supposed right, and a successful prosecution thereof to final judgment. We are of opinion, therefore, that the record aforesaid was proper rebutting testimony, and that the court erred in excluding it.

It may be necessary to dispose of the defendants' exceptions in this case; but the court is further of opinion, that there was no error in the ruling of the Circuit court as set forth in their first and second bills of exception: but we are inclined to think that it was error to admit the parol testimony set forth in the defendants' fourth bill of exceptions. The plaintiff was allowed to prove by parol evidence, not only the pendency, but the object, of a pending suit. Of that object, being matter disclosed by the record, we think the record itself the best, if not the only evidence.

After the evidence and arguments of counsel on both sides had been fully heard, the court was asked by the plaintiff to give to the jury the following instructions:

1st. If the jury believe, from the evidence, that the mill-dam and abutment of the defendants at Castleton was built without an order of court, or without the return of the inquest of a jury of ad quod damnum, and that the lands of the plaintiff have been injured by the building of said dam and abutments, then they must find for the plaintiff.

2d. If the jury believe, from the evidence, that the dam and abutment at Castleton, across Hazle river, was built under an order of court, and upon the return of an inquest of a jury of ad quod damnum, and that the lands of the plaintiff have been injured thereby, they must find for the plaintiff, unless they believe, from the evidence, that

the injuries to the plaintiff's land were actually foreseen and estimated for by said jury of ad quod damnum.

90 *3d. If the jury believe, from the evidence, that the dam and abutment of defendants across the Hazle river, at Castleton, were built without authority of law, and in pursuance of the act of assembly, and that thereby the lands of the plaintiff have been injured, then the said dam and abutment constitute a private nuisance; and each day they are continued creates a fresh nuisance, for which the plaintiff has a right of action against the defendants, and is entitled to recover any damages sustained between the 6th of April 1863, when the notice to abate was served, and the date of the writ in this suit.

4th. If the jury believe, from the evidence, that George Ficklin, and those under whom he claimed, had legal authority to build the dam across the Hazle river at Castleton, at the point P on the diagram of A. Tutt, made under the order in this cause, and that said Ficklin, in his lifetime, abandoned the dam at P, and built another dam across said river two hundred and thirty-one yards below the point at P, without authority of law, then the said dam last mentioned is an illegal structure, and the plaintiff is entitled to recover for any injuries done his lands by reason of the continuance of said illegal structure in the said river by the defendants.

5th. The court further instructs the jury, that the right to a dam at "P," on the diagram of the survey of A. Tutt, made under an order in this cause, and known as the "old dam," which did no injury to the lands of the plaintiff, conferred no right to a dam at "O," on said diagram, known as the "new dam," which does injure the lands of the plaintiff. And if the jury believe, from the evidence, that the lands of the plaintiff are injured by the dam of the defendants at "O," then they must find for the plaintiff, unless they believe that the last mentioned dam was built by authority of law,

91 and the *said damages to the plaintiff's lands were foreseen and estimated for by the jury of ad quod damnum.

And the defendants moved the court to give the following:

1st. Defendants move the court to instruct the jury as follows: If the jury believe, from the evidence, that the dam and mill in the declaration mentioned were erected by George Ficklin, dec'd, in the year 1824, or prior thereto, and that from the date of their erection he claimed and held the possession, use and enjoyment thereof, and of the water power on Hazle river afforded by said dam and used in the working of said mill, adversely and uninterruptedly as to the plaintiff and those to whom he is and was in privity, for twenty years from the period of such erection, then the said Ficklin had, and those claiming under him have, a lawful right to continue the said possession, use and enjoyment of said dam and mill.

2d. If the jury believe, from the evidence, that in the year 1845 George Ficklin claimed to be the owner of the dam and mill in the declaration mentioned, and had so claimed and held adversely to the plaintiff for twenty years prior thereto, and in the said year 1845, or subsequently thereto, he raised the said dam higher than it had been previously thereto; and also believe that the injury to the lands of the plaintiff, in the declaration specified, was thereby occasioned, inasmuch as the plaintiff's declaration does not cover said raising of the dam and damages arising therefrom, he has no right to recover said damages in this action, and they must find for the defendants.

3d. The jury are instructed to disregard as inadmissible, under the pleadings and issue in this cause, so much of the evidence as pertains to the proposition, that the dam in question has, since its original

92 erection, been *raised above its original height, and as pertains to the proposition, that the plaintiff's lands have been damaged by such raising of the dam.

But the court refused to give any of the instructions asked by the plaintiff; and refused to give numbers 1 and 3 asked by defendants; but gave the defendants' 2d instruction, and added the following:

If the jury believe, from the evidence, that George Ficklin erected the mill and dam and abutment referred to in the declaration, and that thereafter the said Ficklin and parties claiming under him, continued in the exclusive and uninterrupted possession and enjoyment of the said mill and dam and abutment and water-power of Hazle river, afforded by said dam and used in the working of said mill, with claim of right and title thereto, from a period more than twenty years prior to the institution of plaintiff's suit v. A. J. Coons and wife, (who inherited the property from Ficklin, and through whom the defendants claim title,) now pending in the Circuit court of Culpeper county, Va., up to the time of the institution of the said suit, such possession, use, &c., entitle the defendants in this action to the benefit of the presumption that the construction of said mill and dam and abutment was authorized by law; and as there is no evidence to the contrary, presented to the jury, they must presume that the plaintiff and those under whom he derives title to the lands alleged to have been damaged, was at the time of the erection of the mill, &c., or prior thereto, fully compensated for all injury which might be occasioned by such mill-dam and abutment, to his lands; and they must find upon the issue joined in this cause for the defendants.

To this action of the court the plaintiff excepted; and on his motion, the court certified all the evidence on which the instructions asked for and given were based.

93 *We are of opinion, that there was no error in the refusal of the court to give the instructions moved by the plaintiff, in the form in which they were presented. They are, all of them, evidently based on the assumption that there can be

no legal dam across a water course, unless established by legal proceedings under the act of assembly; ignoring entirely rights acquired by actual grant, by permission and by prescriptive right, derived from long use and enjoyment. They were properly rejected, therefore, by the court. We are also of opinion that there was no error in refusing to give the 1st and 3d instructions moved by the defendant.

The first instruction ignores utterly the important distinction between lapse of time as evidence, and lapse of time as a bar. In the latter case, it is conclusive; in the former, presumptive only, and liable to be rebutted by circumstances. The case before us is of the latter character. In the case of Nichols v. Aylor, 7 Leigh 546, already cited, this court held, 1st: that "the use and enjoyment, by the defendant and those under whom he claimed, although it was exclusive and adversary, and existed for more than twenty years, was not conclusive evidence of the defendant's right; but presumptive merely: Secondly—that evidence tending to show that such use and enjoyment was not acquiesced in, but the right thereto contested, was proper evidence to rebut the presumption." Such rebutting evidence is abundant in this record; and it would have been plainly erroneous to declare that twenty years exclusive and adversary use and enjoyment of the easement was conclusive of the right. The instruction was, therefore, properly refused.

Nor was there error in refusing to give the defendants' 3d instruction. That instruction affirmed that under the pleadings in the cause, evidence to show that since the original erection of the dam it had
94 been raised in *height, and that injury to plaintiff's land had resulted therefrom, was inadmissible. This instruction, although directly pertinent to the facts, the court refused to give, and we think properly; thereby affirming, in effect, that such evidence was admissible under the pleadings.

But we are of opinion that the court did err in giving the second instruction moved by the defendant; and also in giving the instruction added by the court.

The second instruction affirms, substantially, but in different form, what was disaffirmed by the court in its refusal to give the third instruction. It affirms, in substance, the proposition that if Ficklin, prior to 1825, had erected a dam across the stream which did no injury to the plaintiff, and held and used this dam adversely until 1845, and then repaired the dam and raised its height so as to injure the lands of the plaintiff, that this raising, and the injury resulting therefrom, was not covered by a declaration counting on said act as an erection of a dam, and claiming compensation for damages resulting from the continuance thereof by defendants. We think the declaration does cover the case; and the court below had itself so decided, in refusing to direct the jury to disregard the evidence tending to establish the raising of the dam in height since its original erection, and the injury resulting therefrom.

The court erred, also, in giving the last instruction prepared by the court. It decides, instead of leaving that question to the jury, that there was no proof to rebut the presumption of a prescriptive right, and gives substantially the first instruction asked by the defendant, which we have already seen had been properly rejected. The law should have been laid down by the court, as it was held to be in Nichols v. Aylor, above referred to.

95 *Judgment reversed, with costs to the appellant; and cause remanded to the Circuit court of Madison county, to be further proceeded in, according to the principles above declared.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred, to the prejudice of the plaintiff in error, as follows, viz:

First. In sustaining the defendants' in error exceptions to any of the questions and answers in the deposition of the plaintiff in error, either on his examination in chief or on cross-examination, except to the 6th, 7th, 8th, 10th and 12th questions, and answers in chief, as set forth in the plaintiff's in errors first bill of exceptions.

2dly. In excluding the testimony of Henry S. Field, in relation to his conversation with Mozingo, as set forth in the plaintiff's in error second bill of exceptions; all that passed between the witness and Mozingo, at the time of and relating to the act of Mozingo therein referred to, was proper evidence as part of the res gestæ.

3dly. In allowing the defendants in error, after they had, with the consent of the plaintiff in error, introduced and read to the jury, the written statement of an absent witness of their own, to prove by one of their counsel, that at a former trial of the cause, this witness had stated a material fact not contained in his written statement, as set forth in the plaintiff's in error sixth bill of exceptions. The defendants in error should not have been allowed to discredit that written statement in any respect whatever.

4thly. In excluding from the jury, as rebutting evidence, the record set forth in the plaintiff's in error seventh bill of exceptions: That record, for the purpose
96 *for which it was offered, was proper testimony, and should have been admitted.

5thly. In giving to the jury the second instruction moved by the defendants in error, and in adding thereto the instruction prepared by the court, as set forth in the plaintiff's in error eighth bill of exceptions. On the facts of this case the court should have instructed the jury, in substance, as follows, it being the law of the case, as laid down in Nichols v. Aylor, 7 Leigh 546. The use and enjoyment of the dam in question by the defendants in error, and those under whom they claim, although it may have been exclusive and adversary, and had

existed for more than twenty years, is not conclusive evidence of the defendants' in errors right, but presumptive merely; and evidence tending to show that such use and enjoyment was not acquiesced in, but the right thereto contested, is proper evidence to rebut that presumption.

The judgment of the Circuit court is reversed, with costs to the plaintiff in error; the verdict of the jury set aside, and the cause remanded to the Circuit court, for a new trial to be had therein, in accordance with the foregoing principles.

Judgment reversed.

DEPOSITIONS.

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- B. Application for.
- C. When Issued.

II. Persons Authorized to Take.

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VII. Making and Requisites of Return.
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XI. Objections.
- A. Right to Object.
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- E. Waiver of Objections.
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  - 4. Failure to Make Timely Objection.
    - a. In General.
    - b. Objection First Made on Appeal.

I. COMMISSION TO TAKE DEPOSITIONS.

A. Necessity.—Prior to the statute allowing depositions, except in will cases, to be taken without a commission, Va. Code 1887, § 3361, a deposition taken in another state was not admissible in evidence unless taken under a commission. Unis v. Charlton's Adm'r, 12 Gratt. 484.

B. Application for.—The deposition of a nonresident witness which was taken under a commission, issued without notice of the intended application for it, cannot be admitted in evidence, although the adverse party was present at the taking. Blincoe v. Berkeley, 1 Call 405.

C. When Issued.—A commission to examine one of the defendants as a witness should be awarded on the motion of the plaintiff as a matter of course, saving all just exceptions. Plainville v. Brown, 4 Hen. & M. 482.

After a cause has been argued, a commission to take depositions can only be obtained upon the affidavit of the party and a special order of the court for that purpose. Anonymous, 4 Hen. & M. 409; Dangerfield v. Claiborne, 4 Hen. & M. 397.

A commission cannot issue at the instance of the defendant to examine the plaintiff as a witness in the cause. Ross v. Carter, 4 Hen. & M. 488.

The act of 1826 providing that "from the filing of the bill to the final hearing of the cause either party may, without order of the court, obtain commissions to take depositions therein" does not authorize depositions to be so taken after an interlocutory decree as to open matter which has already been fairly in issue and decided upon, but was intended to enable a party to take evidence after a cause was set for hearing, without special leave first obtained. Moore v. Hilton, 12 Leigh 1.

II. PERSONS AUTHORIZED TO TAKE.

A commissioner appointed by a circuit court to take depositions had authority, under the acts of 1831, Supp. Rev. Code, p. 165, § 80, and 1834, Sess. Acts, p. 75, ch. 62, § 2, to take depositions in a common-law cause. McGuire v. Pierce, 9 Gratt. 167.

A master commissioner of a circuit court, to whom a cause is referred to take, state and settle an account of indebtedness, has authority not only to take and state the account referred to him, but also to take depositions. Hickman v. Painter, 11 W. Va. 386.

Joinder of Commissioners.—A commissioner directed to five persons, "any three of whom to act," cannot be executed by one only; and a return by one that three others were present when the deposition was taken is not sufficient. It should be certified by three, at least, who were present. Marshall v. Frisbie, 1 Munf. 247.

Guardian Ad Litem Acting as Commissioner.—It is no valid objection to proceedings for the sale of an infant's land, that the depositions were taken before the same person as commissioner who was guardian *ad litem* of the infant. Durrett v. Davis, 24 Gratt. 302.

III. NOTICE OF TAKING.

A. Necessity.—When a deposition is read at common law, whether it was taken *de bene esse* or in chief, it should appear in the record, upon an appeal, that notice of the time and place of taking it had been given to the adverse party. Collins v. Lowry, 2 Wash. 75.

A deposition cannot be read to affect the interests of any party to whom no notice of the time and place of taking it had been given. Stubbs v. Burwell, 2 Hen. & M. 536.

A deposition taken without notice is not admissible in evidence; and the objection to it may be taken when it is offered to be read to the jury. Unis v. Charlton's Adm'r, 12 Gratt. 484.

Notice to Guardian Ad Litem.—Where the guardian *ad litem* had no notice, depositions taken in the cause cannot be read against the infant parties. Walker v. Grayson, 86 Va. 337, 10 S. E. Rep. 51; Strayer v. Long, 83 Va. 715, 3 S. E. Rep. 372.

B. Form and Sufficiency.—The notice of taking a deposition should indicate to the adverse party with reasonable certainty when, where and in what suit it is to be taken. A notice which recites that the suit is pending in one county, when in fact it is pending in another, is insufficient. Bowyer v. Knapp, 15 W. Va. 277.

In taking an account, the commissioner may take the depositions of witnesses to enable him to act upon the subject, under his general notice, and a special notice is not necessary. Miller v. Cox, 38 W. Va. 747, 18 S. E. Rep. 960; M'Candlish v. Edloe, 3 Gratt. 330.

C. Certainty.

1. As to Place.—A notice to take depositions is insufficient if it omits the place where the depositions are to be taken. Hunter v. Fulcher, 5 Rand. 126, 16 Am. Dec. 738.

2. As to Time.—A notice was given by a plaintiff to the defendant, for taking the depositions of several witnesses at a specified place in Missouri on six successive days, between certain hours of each day. *Held*, that considering the distance of the place appointed for taking the depositions; and the uncertainty of the precise time at which the party would be enabled to have things in readiness for taking them, the notice was sufficiently definite. Kincheloe v. Kincheloe, 11 Leigh 401.

D. Reasonableness as to Time.—A notice given at 8 P. M. to take a deposition between 8 and 9 A. M. of the next day, in the city where both parties and their counsel reside, would generally be reasonable notice. And such notice, given directly the plaintiff learned that the witness would leave for a distant state on the next evening by 3 o'clock and would not return again, is sufficient, though the court was in session in the city at the time, and though the defendant and his counsel had been occupied on a case in the court on the day of the notice and would be so occupied on the day after, so that they could not attend the taking of the deposition. McGinnis v. Washington Hall Ass'n, 12 Gratt. 602.

A party has a right to be personally present when depositions are taken by his adversary, and a notice which does not afford him an opportunity to be present is insufficient; and his exception to the deposition on that ground ought to be sustained. Fant v. Miller, 17 Gratt. 187.

Va. Code 1873, ch. 172, § 36 (Va. Code 1887, § 3362), requires reasonable notice to be given to the adverse party of the time and place of taking every deposition. But what is reasonable notice is a question dependent upon the peculiar circumstances of each case, the principal of which are the distance, traveling conveniences, condition of the roads, and other such matters as affect the ability of the party to attend, personally or by counsel, and to return in time for trial. Trevelyan's Adm'r v. Lofft, 83 Va. 141, 1 S. E. Rep. 901.

E. Service of Notice.—Where a notice to take depositions was left with the wife of the party at his dwelling house, when it was known by the adverse party that he was absent on a journey to another state, and where it appeared also that the notice might previously have been given to the party himself, and that the taking of the deposition might have been postponed till his return, it was held that the notice was insufficient, and the deposition taken under it was suppressed. Coleman v. Moody, 4 Hen. & M. 1.

Service on Attorney.—Notice of taking depositions is not sufficient if given to the attorney at law, in the absence of the principal from the commonwealth, but ought to be given to the agent or attorney in fact, or, if there be none, by publication in the manner prescribed by law. Cahill v. Pintony, 4 Munf. 371.

Service on Overseer.—A notice to take depositions, given to the overseer of the party, who resided part of his time in the state and part out, is not sufficient. Chapman v. Chapman, 4 Hen. & M. 426.

Service by Publication.—The publication of notice to take depositions, under the West Virginia statute requiring the notice to be published once a week for four successive weeks, is completed on the fourth issue of the newspaper containing it; and if a reasonable time elapses between the date of said fourth issue and the taking of the depositions, the notice is sufficient. Miller v. Neff's Adm'r, 33 W. Va. 197, 10 S. E. Rep. 378.

Proof of Service.—The return of a sheriff upon a notice to take depositions is only *prima facie* evidence of its truth. Bowyer v. Knapp, 15 W. Va. 277.

IV. TIME OF TAKING.

A. In General.—A deposition taken at so late a day that the other party cannot attend at the time and place of taking it, and then get to the court where the cause, in which it is to be taken, is to be tried by the commencement of the term, is not admissible in evidence. Unis v. Charlton's Adm'r, 12 Gratt. 484.

Where, pending a petition for the rehearing of an interlocutory decree, the defendants' motion for a continuance to enable them to procure testimony is denied, and by agreement the cause is ordered to be submitted for hearing and decision in vacation, not later than a day named, the defendants may take depositions until the day for hearing is fixed by further agreement; especially, when the petitioners have apparently so construed the order by appearing and cross-examining defendants' witnesses, it being provided by Va. Code 1873, ch. 172, § 36, that depositions in a chancery cause may be taken and returned at any time before the final hearing. Radford v. Fowlkes, 85 Va. 820, 8 S. E. Rep. 817.

Where the defendant was notified by the plaintiff's attorneys that they would take depositions in Georgia on the same day that depositions were taken by them in New York, this fact does not vitiate either deposition, where the defendant was interested in only one of the causes and the objection was not made until the case was called. Wytheville Ins. & Banking Co. v. Teiger, 90 Va. 277, 18 S. E. Rep. 195.

B. During Term.—Depositions taken during the term are admissible where the counsel of both parties were present and examined and cross-examined the witnesses, no objection being made until the hearing. Fisher v. Dickenson, 84 Va. 318, 4 S. E. Rep. 737.

C. During Progress of Trial.—A party cannot be required, during the progress of a trial, to take a deposition at a point so distant from the court house that he cannot attend the taking of the deposition and return to the court house by the time the case is proceeded with. Wise v. Postlewait, 3 W. Va. 452.

Where a cause has been referred to a commissioner, and ample opportunity has been afforded to both parties to introduce their witnesses, and the commissioner has made his report, and the cause is ready for hearing, a deposition afterwards taken as to a controverted matter in the report ought, generally, to be disregarded by the court. Buster v. Holland, 27 W. Va. 510.

Depositions will be suppressed, where they are taken after the argument of the cause, without special order. Dangerfield v. Claiborne, 4 Hen. & M. 397.

D. After Interlocutory Decree.—There is no rule of law which precludes a party from taking new evidence after an interlocutory decree, even before a rehearing is obtained. Summers v. Darne, 31 Gratt. 791.

E. After Verdict.—The depositions of witnesses, taken after the verdict to which there is no sufficient objection, and before the decree, cannot be read upon the final hearing of the cause. Nease v. Capehart, 15 W. Va. 299.

V. EXAMINATION OF WITNESSES.

A. Direct Examination.—Objection to questions on the ground that they are leading should be made at the examination, if the adverse party is present, and if not, then within a reasonable time after the deposition is returned to court. M'Candlish v. Edloe, 3 Gratt. 330.

B. Cross-Examination.—The magistrate or commissioner who has taken a deposition should, within the hours appointed by the notice, open it again at the instance of any party who was not present when it was taken and wishes to cross-examine the witness. Jeter v. Taliaferro, 4 Munf. 80.

C. Re-Examination.—As a general rule depositions cannot be retaken without an order of court. Booth v. McJilton, 82 Va. 827, 1 S. E. Rep. 137. But the courts possess much latitude in permitting a second examination; and when the circumstances of the case and justice require it, an order for the second examination of the same witness will be made. Carter v. Edmonds, 80 Va. 58.

Unless it was palpably improper to grant leave for the second examination of a witness, an appellate court will not, for this reason, reverse the decree; as the circuit court ought to possess much latitude of discretion in the decision of such questions. Fant v. Miller, 17 Gratt. 187; Brooks v. Wilcox, 11 Gratt. 411; Burke v. Shaver, 92 Va. 345, 23 S. E. Rep. 749; Tate v. Bank, 96 Va. 765, 32 S. E. Rep. 476.

Independently of the statute, Va. Code 1887, § 3362, a commissioner, acting under an order of court directing an account, may, in a proper case, without leave of court, reopen depositions that have been closed and re-examine the witnesses. Atwood v. Shenandoah Valley R. R. Co., 85 Va. 966, 9 S. E. Rep. 748.

Where a deposition has been taken in a cause and excepted to, it may be retaken by the party desiring to use it, before the cause is heard, without an order from court for that purpose. Fox v. Jones, 1 W. Va. 205, 91 Am. Dec. 383.

It is not error in a court of equity to give a party leave to retake depositions, which the court, upon an exception, determines cannot be read for want of sufficient notice, at the term at which it is so determined. Vance v. Snyder, 6 W. Va. 24.

VI. ADJOURNMENT OF DEPOSITIONS.

A magistrate taking a deposition upon a day appointed cannot resume the taking of such deposition at any future day, without an adjournment to such day. Hunter v. Fulcher, 5 Rand. 126, 16 Am. Dec. 738.

An adjournment in taking depositions must specify the date to which the adjournment is made. Bennett v. Bennett, 37 W. Va. 396, 16 S. E. Rep. 638, 38 Am. St. Rep. 47.

VII. MAKING AND REQUISITES OF RETURN.

A. Necessity of Certificate.—When depositions are taken under a decree for account, the usual certificate is unnecessary. Smith's Ex'x v. Profitt's Adm'r, 82 Va. 832, 1 S. E. Rep. 67.

B. Matters Certified.—The caption of a deposition, describing it as taken in a proceeding of forcible entry and detainer, is sufficiently accurate to authorize the reading of the deposition, though the proceeding is for an unlawful detainer. Cales v. Miller, 8 Gratt. 6.

Names of Parties.—A deposition was taken to be read in a case in which Franklin Bartley was defendant, and that was the name given in the summons and to which he appeared; but the name in which the action was carried on was William F. Bartley. The person was obviously the same, and Franklin was part of the defendant's name. *Held*, that the deposition could not be objected to on this ground. Bartley v. McKinney, 28 Gratt. 750.

A deposition was taken at the time and place specified in the notice, to be read, etc., but in the certificate of the officer who took it the plaintiff was styled William Robertson, Administrator, etc., when the suit was Wallace Robertson, etc. *Held*, that the mistake in the name of the plaintiff (who had sued in his representative character) could not have misled the defendants, and was not sufficient to exclude the deposition. Hunter v. Robinson, 5 W. Va. 272.

C. Authentication.—A deposition is duly authenticated where it purports in the caption to have been taken in the state and county designated in the commission and notice, and is certified by a person who adds to his name the letters J. P. Hobbs v. Shumates, 11 Gratt. 516.

A person taking a deposition under a regular commission and notice certified that the deposition was taken before him and signed his name to the certificate with the addition of the letters J. P. *Held*, that it sufficiently appeared that he was a justice of the peace. Pollard v. Lively, 2 Gratt. 216.

D. Filing—Endorsement by Clerk.—It is proper, though not indispensable, for the clerk, when depositions are filed in his office, to endorse upon them the time when they were filed, and to verify such entry and endorsement with his official signature. Turnbull v. Clifton Coal Co., 19 W. Va. 299.

VIII. BILL IN EQUITY TO PERPETUATE TESTIMONY.

Upon a bill in chancery to perpetuate testimony, there must be an order of the court to take the testimony sought to be perpetuated, and a final decree to perpetuate it. A decree perpetuating testimony without such order and before the filing of the bill should be set aside upon appeal. Smith v. Grosjean, 1 Pat. & H. 109.

The provision of Va. Code 1849, ch. 176, § 34, p. 666, for the perpetuation of testimony, merely prescribes a new mode in which testimony may be perpetuated, and does not change the form of proceeding by suit in equity for the same purpose. Smith v. Grosjean, 1 Pat. & H. 109.

IX. RECITAL OF DEPOSITIONS IN DECREE.

Where depositions are taken and filed in a cause, both parties being present when they were taken, and the decree is obviously based upon them, the omission to refer to the depositions in the decree will be considered a clerical mistake, and the cause will be considered as having been heard upon them, as well as upon the other papers. Day v. Hale, 22 Gratt. 146.

X. ADMISSIBILITY IN EVIDENCE.

A. In General.—Depositions ought not to be admitted in an action at law unless it appears by the record in what suit and by what authority they were taken, and that the witnesses could not attend at the trial. Butts v. Blunt, 1 Rand. 255.

Depositions in a chancery suit, taken in 1794, of persons then from 40 to 80 years of age, and read at the hearing without exceptions, are admissible 50 years later as evidence of pedigree, the presumption being that the witnesses are dead. Colvert v. Millstead's Adm'x, 5 Leigh 88.

The deposition of a party, to be read in a pending cause at law, was commenced before the passage of the act of March 2nd, 1866, Acts 1865-66, p. 86, requiring that parties should testify *ore tenus*, but was not completed until that law went into effect. *Held*, that the deposition was inadmissible if objected to. Crawford v. Halsted, 20 Gratt. 211.

A deposition taken before the decree was pronounced in the court of chancery, but not filed until after an appeal was taken from the decree, was received by the court of appeals. Auditor v. Pauly, 5 Call 331.

Signature of Witnesses.—A deposition not signed by the witness is admissible in evidence if certified by the officer who took it. Barnett v. Watson, 1 Wash. 372.

Upon an Issue out of Chancery.—Upon the trial of an issue out of chancery, depositions taken in the cause in the chancery court are not to be read to the jury, unless proof be given that the witnesses are dead, abroad or otherwise unable to attend the trial. Powell v. Manson, 22 Gratt. 177.

Depositions Taken by Coroner.—On a trial for murder, to contradict a witness for the prisoner, it is competent to introduce in evidence a deposition given by him before the inquest, taken down at the time by the coroner and read to the witness, and signed by him. Wormeley v. Commonwealth, 10 Gratt. 658.

Taken in Absence of Guardian Ad Litem.—Where the guardian *ad litem* had notice of the taking of depositions in an action to cancel a deed in which an infant is interested, the depositions are not rendered inadmissible by the failure of such guardian to be present when taken. The provision of Va. Code 1887, §§ 2435, 2619, that depositions shall be inadmissible in a suit against an infant or insane party, unless taken in the presence of the guardian *ad litem* or on interrogatories agreed on by him, relates only to suits for the sale of land of persons under disability and does not extend to cases generally in which infants are parties. Moore v. Triplett (Va.), 23 S. E. Rep. 69.

Amendment of Pleading after Taking Deposition.—A deposition which was taken after a replication had been entered in the cause cannot be read after the replication has been withdrawn. Clarke v. Tinsley's Adm'r, 4 Rand. 250.

B. Attendance of Witness Impossible.—Depositions taken in a suit to perpetuate testimony are not to be read as evidence in a subsequent suit, unless it appears that the witnesses are dead or otherwise out of the power of the court. Lawrence v. Swann, 5 Munf. 332.

The fact that a witness has been summoned and fails to attend is not sufficient to authorize the reading of his deposition taken *de bene esse*; but it must be proved that he is dead, or, if living, unable to attend. Minnis v. Echols, 2 Hen. & M. 31.

Witness Not within Reach of Process.—A party desiring to introduce a deposition on account of the absence of a witness must show that he has used due diligence to find the witness, or that he is not within the jurisdiction of the court or reach of its process. Tompkins v. Wiley, 6 Rand. 242.

Disability of Witness.—Where a party taking the deposition of an aged and infirm witness to be read *de bene esse* fails to serve a subpœna on him to attend the trial, the deposition should nevertheless be read, upon satisfactory proof that the witness is unable to attend the trial by reason of ill health. Lynch v. Thomas, 3 Leigh 682.

The affidavit of a witness, taken eight days before a cause is called for trial, that from age and infirmity he is unable to attend court is sufficient to authorize his deposition to be read in evidence. Tayloe v. Smith, 10 Gratt. 557. See also, Pollard v. Lively, 2 Gratt. 216; Nuckols's Adm'r v. Jones, 8 Gratt. 267.

The deposition of a witness may be read at the trial, where it appears from the evidence that he is physically unable to attend court. Taylor v. Mallory, 96 Va. 18, 30 S. E. Rep. 472.

C. Incompetency of Witness.

1. Virginia Rule.—An objection to the admissibility of a deposition on the ground of the incompetency of the witness will not avail where the witness was competent at the time the deposition was taken. Smith's Ex'x v. Profitt's Adm'r, 82 Va. 832, 1 S. E. Rep. 67.

Although the death of a party to a suit has rendered the deposition of his adversary inadmissible, his own deposition may nevertheless be read in evidence. Keran v. Trice's Ex'ors, 75 Va. 690.

Deposition of Person under Whom Party Claims—Interest.—The deposition of a person, under whom the party in whose favor it is offered claims, is not admissible as evidence, unless it appears from the deeds that no recourse can be had against the witness in case of eviction. Woodward v. Woodson, 6 Munf. 227. See Va. Code 1887, §§ 3345-49, abolishing incompetency on account of interest, with certain qualifications.

2. West Virginia Rule.—Within the meaning of the West Virginia statute, a party testifies in his own behalf at the time when his deposition is used in a chancery cause and not at the time when it was actually taken. Hence, if the witness is incompetent at

the time of the trial, his deposition cannot be used, although he was competent when it was taken. Seabright v. Seabright, 28 W. Va. 412; Zane v. Fink, 18 W. Va. 698.

Though a witness was incompetent to testify when his deposition was taken, yet, if he was afterwards rendered competent by virtue of a statute, and at the time such deposition is read at the hearing of the cause he is competent, such deposition will be read and considered just as if it had been taken when it was read, and when the witness was competent to testify. Vanscoy v. Stinchcomb, 29 W. Va. 263, 11 S. E. Rep. 927.

A deposition which was read on the hearing in the circuit court cannot be suppressed on appeal because, since the decision in the circuit court, an adverse party has died. Hinkson v. Ervin, 40 W. Va. 111, 20 S. E. Rep. 849.

D. Depositions Taken in Other Proceedings in Same Action.—Under Va. Code 1873, ch. 172, § 36, a deposition in a chancery cause, taken after an interlocutory decree, cannot be read as to any matter adjudicated by such decree. Richardson v. Duble, 33 Gratt. 780.

A deposition, admissible in the original suit, may be read upon the hearing of a cross-bill, under an order so directing. Smith's Ex'x v. Profitt's Adm'r, 32 Va. 832, 1 S. E. Rep. 67.

A deposition taken after an appeal from an interlocutory decree may be read upon the hearing of the appeal. Alexander v. Morris, 3 Call 89.

New Parties.—If after answer filed and depositions taken, the plaintiff makes new parties and files a new bill, the depositions previously taken cannot be read against the new defendant. Jones v. Williams, 1 Wash. 230.

E. Depositions Taken in Other Actions between Same Parties.—Where two suits are brought by a trustee and *cestui que trust* at the same time against the same parties and to recover the same trust property, they are not so connected that testimony taken in one may be read in the other. Sheppards v. Turpin, 3 Gratt. 373.

Three successive actions were brought on a bond. The plaintiff was nonsuited in the first and second. Pending the second action, which was referred to arbitrators, the deposition of a witness was taken by the defendant to be read *de bene esse* and was used before the arbitrators without objection. On the trial of the third action, the deposition was offered in evidence by the defendant, and was objected to by the plaintiff on the ground that there was no affidavit made before the clerk of the court in which the second action was pending for a commission to take the deposition. *Held*, that if an affidavit was necessary, it may well be presumed after the lapse of so long a time, and under all the circumstances of the case, that it had been taken and lost; and that, independent of such presumption, the deposition was admissible, as no objection was made when the deposition was first used, and as the witness was dead. Perkins' Adm'r v. Hawkins' Adm'x, 9 Gratt. 649.

Depositions taken in a suit with the factor may be read in a suit with the principal for the same cause. Ritchie v. Lyne, 1 Call 489.

On the trial of an action at law, depositions taken in a suit in chancery between the same parties, are not proper evidence, unless the witnesses are dead or otherwise incapable of attending the trial. Pleasants v. Clements, 2 Leigh 474.

Depositions Used as Admissions.—The depositions of a witness in one suit may be read as evidence against him, as an admission, in another suit, where the subject matter is the same. Hatcher v. Crews, 78 Va. 460.

F. Depositions Taken in Other Actions between Different Parties.—Where two actions are pending by the same plaintiff against different obligors on the same bond, a deposition taken by the defendant in one of the actions can, under no circumstances, be competent evidence for the defendant in the other. Brown's Adm'r v. Johnson, 13 Gratt. 644.

Depositions relating to pedigree, taken in a former suit to which the plaintiff but not the defendant was a party, are competent evidence touching the descent of slaves, the deponents themselves being dead. Colvert v. Millstead's Adm'x, 5 Leigh 88.

Depositions taken in a cause relative to the same subject, but not between the same parties, cannot be read in evidence in a subsequent suit. Rowe v. Smith, 1 Call 487.

G. Admissibility against Party Taking.—The compulsory deposition of one's adversary in the nature of a discovery cannot be used by such adversary, if the party taking it neglects to put it in evidence. M'Farland v. Hunter, 8 Leigh 489; Vaughn v. Garland, 11 Leigh 251.

It is competent for one party, on the trial of a cause, to read in his own behalf a deposition regularly taken and filed by the other party; and although a deposition in such case may be certified jointly with the deposition of other witnesses, it may be detached and read separately. Echols v. Stauntons, 3 W. Va. 574.

H. Giving Depositions to Jury.—A deposition which has been read to the jury may be taken with them in their retirement, if what is objectionable in it has been erased. Hansbrough v. Stinnett, 25 Gratt. 495.

A contrary rule obtains in West Virginia. In Welch v. Ins. Co., 23 W. Va. 288, the court says: "It often happens * * * that the evidence on one side is oral testimony introduced before the jury, the witnesses being examined in person before the jury. The mass of the testimony on the other side is in the form of depositions read to the jury. If the case is an important one and the trial lasts for many days, if the depositions are permitted to be taken to the jury room, and the minds of the jurors refreshed by the reading of the depositions, while the oral testimony of the other side has in a measure faded from the memory of the jury, it is obvious, that an undue advantage is given to the side, which is sustained by depositions. The Virginia decision [Hansbrough v. Stinnett, 25 Gratt. 495] would seem to have been rendered upon but little consideration, and no reason is given for their departure from the English practice. We hold this English practice as obligatory upon us until changed by statute-law." See also, State v. Cain, 20 W. Va. 679.

XI. OBJECTIONS.[1]

A. Right to Object.—Where both parties to a suit obtain special commissions to take depositions, subject to all just exceptions, and only one party acts under his commission, the other party is not precluded from objecting to the competency of the witness by having himself obtained a special commission. Beverley v. Brooke, 2 Leigh 425.

In a suit brought to set aside as fraudulent a conveyance made by a husband to his wife, the wife cannot object to depositions, taken after notice to her, on the ground that notice was not also given to her husband. Silverman v. Greaser, 27 W. Va. 550.

Where Improper Interrogatories Are Filed by Permission of Court.—Where the court permits improper interrogatories to be filed and directs them to be answered, the party to whom they are directed may answer them, and then on the trial of the cause may object to their admission as evidence. Poindexter v. Davis, 6 Gratt. 481.

B. Sufficiency and Scope of Objection.—If depositions offered as evidence contain matter supposed to be exceptionable, the proper course is to point out the exceptionable passages, and then move the court to instruct the jury to disregard them. Buster's Ex'or v. Wallace, 4 Hen. & M. 82; Harriman v. Brown, 8 Leigh 697; Friend v. Wilkinson, 9 Gratt. 31; Trogdon's Case, 31 Gratt. 862; N. & W. R. Co. v. Ampey, 93 Va. 108, 25 S. E. Rep. 226.

The grounds of exception to depositions must be given in the exception. A mere general exception is not sufficient, except for incompetency. Long v. Perine, 41 W. Va. 314, 23 S. E. Rep. 611; Richardson v. Donehoo, 16 W. Va. 685; Sulphur Mines Co. v. Thompson's Heirs, 98 Va. 298, 25 S. E. Rep. 232.

If, on the trial of a cause in the court below, a party objects to the introduction of a deposition as evidence, for any irregularity in taking it, his exception to the opinion of the court overruling the objection must state the grounds of the objection. Barker v. Barker's Adm'r, 2 Gratt. 344.

A deposition was objected to so far as it stated the mere belief of the deponent as to the matters spoken of by him, the sayings or doings of others not parties to the suit, and the understanding, reputation or tradition of the neighborhood; and also so far as the answers were given to leading questions. *Held*, that it was not sufficient to make the objection in these leading terms, but that it was incumbent on the party objecting to point out the exceptionable passages and move the court to expunge or disregard them. Harriman v. Brown, 8 Leigh 697; Dillard v. Collins, 25 Gratt. 343.

A party objected to the admission of so much of certain depositions as gave evidence of hearsay. The exception, however, did not specify the particular parts objected to, and the court allowed the depositions to go to the jury under instructions that they should consider those parts which gave evidence of hearsay only for the purpose of corroborating the testimony of other witnesses whose testimony had been assailed. *Held*, that the exception to the deposition was valid, notwithstanding its generality, as the portions excepted to were brought to the notice of the court. Charlton v. Unis, 4 Gratt. 58.

A party will not be allowed to specify one or more grounds of objection to evidence offered in the trial court, and rely upon other grounds in the appellate court. He is regarded as having waived all other objections to the evidence except those which he specifically pointed out. Warren v. Warren, 93 Va. 73, 24 S. E. Rep. 913.

C. Necessity of Objecting before Trial.—Exceptions to depositions taken under a commission issued after a cause is set for hearing may be made at any time before the cause is gone into. Foster v. Sutton, 4 Hen. & M. 401.

Where, on a trial at law, a deposition is introduced, taken regularly under a commission, and an objection is made to some of the questions as leading, the court cannot suppress the improper questions and answers after the jury is sworn; but the objection should be made to the court before the jury is sworn, and the improper questions and answers suppressed. Jones v. Lucas, 1 Rand. 268.

A deposition taken without authority or notice is not admissible as evidence; and the objection to it may be taken when it is offered to be read to the jury. Unis v. Charlton's Adm'r, 12 Gratt. 484.

Although an exception to a deposition for want of notice, or other irregularity, must be brought to the notice of the court before the hearing of the cause, that it may be passed upon, or it will be considered as waived, and will not be noticed in the appellate court; this rule does not apply when the exception is to the competency of a party to the cause, and the court at the hearing may pass upon the exception; and whether so passed upon or not, it may be passed upon by the appellate court. Statham v. Ferguson's Adm'r, 25 Gratt. 28.

Without proof of loss, or inability to produce the original power of attorney, no copy thereof can be admissible as evidence, unless it be such a copy as is provided by W. Va. Code 1868, ch. 130, § 20. Nor is the objection to the introduction of such copy waived by failure to object before trial. Dickinson's Ex'ors v. Clarke, 5 W. Va. 280.

A deposition cannot be objected to at the trial, when it appears that the party wishing to reject it, or his counsel, was present at the taking and cross-examined the deponent. Detwiler v. Green, 1 W. Va. 109.

D. Renewal on Appeal of Previous Objections.—Though an exception is taken and entered at the time, that a question asked of a witness is leading, the exceptant should bring it to the attention of the court and obtain an order for the suppression of the objectionable testimony; and if he fails to do this, the exception will not be regarded in the appellate court. Summers v. Darne, 31 Gratt. 791.

An objection to a deposition for incompetency endorsed thereon, is not waived by a failure to insist thereon in the court below. Middleton's Ex'or v. White, 5 W. Va. 572.

E. Waiver of Objections.

1. In General.—After the defendant in a chancery suit had answered and depositions had been taken, another person was admitted as a party defendant upon condition that the cause should not thereby be delayed. *Held*, that the condition upon which the new defendant was admitted was a waiver of objections on his part as to irregularities in depositions which had been taken. Jones v. Janes, 6 Leigh 167.

Where notice is given to take depositions at two distant places on the same day, the other party may attend at one of the places and object to the depositions taken at the other place for want of notice; but if he attends by his counsel at both places, he cannot except to the depositions taken at either place. Latham v. Latham, 30 Gratt. 307.

Consent to the Taking.—Consent to the taking of a deposition does not waive objection to its competency, where the witness testifies to conversations with a deceased person. Middleton's Ex'or v. White, 5 W. Va. 572.

Attention of Trial Court.—Unless the record shows that an exception to the deposition of a witness for incompetency or other cause was brought to the attention of the trial court at the hearing, it will be taken by the appellate court to have been waived. McVeigh's Adm'r v. Chamberlain, 94 Va. 73, 26 S. E. Rep. 395; Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. Rep. 591; Simmons v. Simmons' Adm'r, 33 Gratt. 451; Fant v. Miller, 17 Gratt. 187.

2. Effect of Examination in Chief as a Waiver.—It is no waiver of objection to the competency of a witness that the exception was not made until after four questions had been propounded to him on his examination in chief. Warwick v. Warwick, 31 Gratt. 70.

Failure to object to the competency of a witness until after the examination in chief is not necessarily a waiver of such objection. Hill v. Postley, 90 Va. 200, 17 S. E. Rep. 946.

3. Effect of Cross-Examination as a Waiver.—Where a party to a cause is examined in his own behalf and cross-examined at length by the other party without objection to his competency, the objection is thereby waived and cannot afterwards be made. Neilson v. Bowman, 29 Gratt. 732; Hord's Adm'r v. Colbert, 28 Gratt. 49; Smith's Ex'x v. Profitt's Adm'r, 82 Va. 832, 1 S. E. Rep. 67. But where an objection to the competency of a party as a witness is written at the commencement of the deposition, the objection is not waived by the cross-examination. Neilson v. Bowman, 29 Gratt. 732.

Where the plaintiff's deposition has been taken and the defendants have cross-examined him, they cannot have the questions and answers on cross-examination struck out, though they may refer to the acts and declarations of a deceased person, under whom the defendants claim. Field v. Brown, 24 Gratt. 74.

Objection to the competency of a witness, known to be incompetent, should be made before he is examined in chief. It cannot be made after cross-examination. Pillow v. Southwest, etc., Imp. Co., 92 Va. 144, 23 S. E. Rep. 32; Spence v. Repass, 94 Va. 716, 27 S. E. Rep. 583.

If, after an exception has been taken to the competency of a witness, the exceptor cross-examines him as to matters not brought out on the examination in chief, against the objection of the party calling him, the exceptor thereby waives his exception to the competency of the witness and makes him his own witness. Miller v. Miller's Adm'r, 92 Va. 510, 23 S. E. Rep. 891.

4. Failure to Make Timely Objection.

a. In General.—If depositions are read on a trial without objection or if objection is made, without an exception taken to their admission, upon another trial of the cause, they will not be excluded for the failure to prove notice to take them, unless the party objecting has given notice to the other party of his intention to object to them in time to enable the party offering them to take them again and the witnesses are alive at the time of such notice. Peshine v. Shepperson, 17 Gratt. 472, 94 Am. Dec. 468.

b. Objection First Made on Appeal.—It is too late to urge as an objection that certain depositions were taken after the master's report was filed, when it appears by the record that the cause was finally heard below on the report of the master, and also on such depositions, without objection. Hunter v. Robinson, 5 W. Va. 272.

Where no objection was made to the use of a deposition in the court below, objections to the competency of the witness cannot be raised for the first time in the appellate court. Baxter v. Moore, 5 Leigh 219; Simmons v. Simmons' Adm'r, 33 Gratt. 451. See *contra*, Rose v. Brown, 11 W. Va. 122.

It is too late to object to a deposition for the first time in the appellate court, where it was read without objection in the court below. Burkholder v. Ludlam, 30 Gratt. 255, 32 Am. Rep. 668; Dickenson v. Davis, 2 Leigh 401.

Where a deposition in a chancery suit is taken subject to all just exceptions, the court should examine and decide the question of competency, although no exception is made to the deposition; and if on appeal the appellate court finds the deposition incompetent it will disregard it. Beverley v. Brooke, 2 Leigh 425.

Where no objection was made to the reading of a deposition in the court below, the witness being competent, it is too late to raise an objection in the appellate court. Linsey v. McGannon, 9 W. Va. 154.

Presumption as to Notice.—The certificate of a commissioner who took a deposition did not state that it was taken pursuant to notice, and, though the deposition was excepted to for lack of a commission and for failure of the certificate to state the names of the parties, no exception was taken to it in the lower court for want of notice. *Held*, that, although there was no notice or evidence of notice in the record, the objection for want of notice could not be taken in the appellate court. Steptoe v. Read, 19 Gratt. 1; Hill v. Bowyer, 18 Gratt. 364; Coffman v. Sangston, 21 Gratt. 263.

Where no objection was made in the lower court to the reading of depositions in an action for divorce, on the ground of insufficient notice, no such objection can be raised for the first time on appeal. Brown v. Brown (Va.), 24 S. E. Rep. 238.

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97 *Moss & Wife & als. v. Moorman's Adm'r & als.

November Term, 1873, Richmond.

1. **Personal Representatives—Receiving Confederate Currency.***—A personal representative is not warranted in receiving a specie debt due to the decedent's estate in a greatly depreciated currency, such as was Confederate currency in May and July 1863, unless there be something in the condition of the debt, or in the state of the demands of creditors or legatees of the estate, or otherwise, which makes it the interest of the estate that the debt should be so received.
2. **Same—Same—Bond Debts—Statute of Limitations.**—Under the circumstances bonds of P paid off by M, and held by him, continue to be bond debts, and not barred by the statute of limitations.

***Personal Representative—Receiving Confederate Money.**—On this point, see Peters v. Neville's Trustee, 26 Gratt. 557, citing the principal case. And see Hannah's Adm'r v. Boyd, 25 Gratt. 692; Mills v. Mills, 28 Gratt. 500; Williams' Adm'rs v. Skinker, 25 Gratt. 507; Kirby v. Goodykoontz, 26 Gratt. 298, and *note*; Campbell's Ex'ors v. Campbell's Ex'or, 22 Gratt. 649, 686; Crawford v. Shover, 29 Gratt. 81; Crickard's Ex'or v. Crickard's Legatees, 25 Gratt. 410; Patteson v. Bondurant's Ex'ors, 30 Gratt. 94, and *foot-note*; Sharpe's Ex'or v. Rockwood, 78 Va. 24; Leake's Ex'or v. Leake, 75 Va. 801; Carter v. Dulaney, 30 Gratt. 192, and *note*; Cole's Committee v. Cole's Adm'r, 28 Gratt. 365; Purdie v. Jones, 32 Gratt. 827; Ferguson v. Epes, 77 Va. 499; McClure, Adm'r, v. Johnson, 14 W. Va. 432, and cases cited; Omohundro's Ex'or v. Omohundro, 27 Gratt. 824, and *note*; Bedinger v. Wharton, 27 Gratt. 857, and *note*. See also, Taylor v. Lancaster, 33 Gratt. 1; Staples v. Staples, 24 Gratt 225; Myers' Ex'or v. Zetelle, 21 Gratt. 733; Williams' Adm'rs v. Skinker, 25 Gratt. 507;. Lingle v. Cook, 32 Gratt. 262; Walker's Ex'or v. Page, 21 Gratt. 636.

3. **Same—Sale by.**—M dies in November 1861, and by his will directs certain land to be sold. It is valued in December by commissioners at eight dollars per acre; and the administrator c. t. a. sells it within sixty days at private sale, the greater part at ten dollars, and the rest at eight, and the purchaser pays the purchase money, some of it before it is due, and takes the receipts of the administrator for the payments; but the land is not conveyed to him. The parties act in good faith in the transaction. The sale is valid, and the purchaser is entitled to a conveyance of the land, without any conditions to be imposed upon him.

4. **Same.**—An administrator out of Confederate moneys collected by him in the course of his administration, pays off specie debts of his decedent. He is to be credited in the settlement of his account with the debts so paid at their nominal amount.

5. **Practice—Decree—Partial Reversal.***—There is a decree against an administrator and his sureties; and on appeal by plaintiffs the decree is reversed, and the administrator is held liable for a larger amount than was decreed against him; though the decree is also reversed in favor of a purchaser of land from the administrator. Whilst the appellate court reverses the decree so far as it is erroneous, it will affirm it so as to continue the lien of the decree for the security *pro tanto* of the amounts which may be found due by the parties respectively, against whom the said decree was rendered.

98 *Samuel P. R. Moorman, of the county of Bedford, departed this life in October or November 1861, leaving surviving him, his widow and three children. He left a will which had been made on the 3d of November 1852, by which, after directing the payment of his just debts, he gave to his widow, for her life, the tract of land on which he lived, and another adjoining, with all the stock, provender, furniture, plantation tools, wagons, horses, &c., and six negroes which she should select, and two hundred dollars. The rest of his estate, except his slaves, he directed to be converted into money; which, with the negroes remaining after his wife's selection, he directed to be divided equally among his children; with certain directions it is not necessary to state.

This will was admitted to probate in the county court of Bedford, on the 25th of November 1861, and the testator not having named an executor, at the December term of the court James F. Johnson qualified as administrator with the will annexed; and Wilson Peters and three others were appointed to appraise the estate, in current money, and divide the slaves. These commissioners made their report to the January term 1862 of the court: This report shows that they valued the tract of land left to the widow at ten dollars per acre, a tract stated to contain three hundred and fifty-six acres, at eight dollars per acre, and a house and lot in the town of Liberty at $1,500.

In February 1866 John M. Moss and his wife, who was a daughter of Mrs. Richey, one of the children of Samuel P. R. Moorman, who had died since his death, and Charles P. Moorman, by his guardian, instituted a suit in equity in the Circuit court of Bedford county, against James F. Johnson, as administrator with the will annexed of Samuel P. R. Moorman, deceased, and his sureties in his official bond, and 99 the purchasers from *Johnson of the tract of land of three hundred and fifty-six acres, and the house and lot, asking for a settlement of his administration account; and that the sales of said real estate might be set aside, on the grounds that they were not sold at public auction, and were sold for inadequate prices, and for a depreciated currency.

A commissioner was directed to settle the accounts of the administrator; and he returned his report; to which the plaintiffs filed several exceptions: but the subject of only two of these were considered by this court. The first of these is to a credit allowed the administrator for a large sum paid to him by Wesley Peters in Confederate currency in 1863, in satisfaction of a debt due from Peters to Moorman, for money advanced for him in the years 1852 and 1853. The second was, to the crediting the administrator, at their nominal amount, for payments of ante-war debts made by him in Confederate currency, which the creditors received at par. The facts in relation to these questions are sufficiently stated by Judge Moncure, in his opinion.

In relation to the real estate sold by the administrator, it appeared that the house and lot in Liberty had been sold, the whole purchase money paid, and the property conveyed by the administrator to the purchaser. That the tract of land had been sold early in 1862, to Thomas Holland, much the larger part of it for ten, and the remainder for eight dollars per acre; and that the purchase money had been paid, and Holland had the administrator's receipts for the payments; but a deed had not been made to him. The facts in relation to this sale are also stated in the opinion of Judge Moncure.

When the cause came on to be heard, the court sustained some of the exceptions, but not those above mentioned; and the report being reformed in accordance with his views, showing the amount due from 100 the *administrator to the widow and each of two of the children, the other having received advancements to a larger amount in the life time of her father, the court, on the 6th day of May 1868, made a decree in their favor, according to the report. And holding that the evidence showed that the land purchased by Holland was worth all that he gave for it, in good money, and that he not having gotten a deed conveying it to him, he would require the aid of a court of equity to perfect his title, and terms might therefore be imposed upon

*Decree—Partial Reversal.—As to this point, see Shepherd's Adm'r v. Chapman, 83 Va. 215, 2 S. E. Rep. 278, citing the principal case, and Knifong v. Hendricks, 2 Gratt. 212. See Grafton & G. R. Co. v. Davisson, 45 W. Va. 12, 29 S. E. Rep. 1028, citing the principal case.

him, gave him the option to take the land at the price he contracted for, scaling his payments at the time they were made, and he paying the additional sum of $1,548 76 cents; or of surrendering the land, and receiving back the scaled value of the money he had paid, and accounting for rents and profits. From this decree Moss and wife and the other legatees applied to this court for an appeal; which was allowed.

Wm. and Jno. M. Daniel, for the appellants.

Kean and J. F. Johnson, for the appellees.

Moncure, P. There are four assignments of error in this case, three of them made by the counsel of the appellants in the petition of appeal, and one of them by the counsel of the appellee, Holland, in his printed argument. I will first consider those of the appellants.

1st. They assign as error, that a certain debt due to the testator, Samuel P. R. Moorman, at his death, by one Wesley Peters, and collected by the administrator, James F. Johnson, in May and July 1863, was charged to the administrator, in the settlement of his accounts, at the scaled value of so much Confederate currency at the time it was received, instead of being charged to him at its nominal amount in good money.

101 *A personal representative is not warranted in receiving a specie debt due to the decedent's estate in a greatly depreciated currency—depreciated to the extent to which it was depreciated when the money was received by the representative in this case—unless there be something in the condition of the debt, or in the state of the demands of creditors or legatees of the estate, or otherwise, which makes it to the interest of the estate that the debt should be so received. In this case it is not pretended that the debtor, Wesley Peters, was not perfectly solvent, and likely to continue so, at the time his debt was received by the administrator of the creditor; nor that the collection of the debt was required for the purpose of being paid to creditors or legatees of the deceased. The money was not, in fact, paid to creditors or legatees after it was received by the administrator, but was either used by him for his own purposes, or remained in his hands until after the war; on which subject there seems to be no evidence in the record. Where, then, was the necessity or propriety of receiving it in a depreciated currency—depreciated, it is said, to the extent of 8½ to one, as compared with gold? How was the estate benefited thereby?

The only way in which it is claimed by the administrator that the estate was benefited by this transaction, is, that a large portion of the debt due by Peters, to wit, $3,360 38 cents, was a simple contract debt barred by the statute of limitations; and payment of it could not, therefore, be coerced; and that the administrator was enabled to collect that part of the debt, and a balance of $1,786 66 cents, only by agreeing to receive, and actually receiving, both amounts, $5,147 04 cents, in Confederate currency.

The appellants' counsel argue, very strongly, to show that even if a large
102 portion of the debt was, in fact, *barred by the statute of limitations, and would not have been paid otherwise than in Confederate currency, still there was a balance of the debt remaining due in specie greatly exceeding the scaled value of the whole amount of Confederate currency received from the debtor in payment of the debt; so that, even in that view, the administrator was guilty of a devastavit in making the arrangement which he did.

Without considering and expressing an opinion upon that matter, however, I will proceed to consider other grounds which they take in their argument, viz: 1st, that no portion of the debt due by Peters was, in fact, barred by the statute of limitations; and 2dly, that if the statute were applicable to any portion of the debt, it does not appear that the debtor would have availed himself of the defence of the statute, if the administrator had not been willing to receive payment of the debt in Confederate currency.

The portion of the debt referred to, is the amount due upon three bonds of Wesley Peters and A. C. Rucker to Wm. B. Preston, commissioner, &c., for $858 14 cents each, dated the 27th day of August 1851, payable, one of them on or before the 27th day of February 1852, another on or before the 27th day of August 1852, and the other on or before the 27th day of February 1853. These bonds were due by Wesley Peters; and by an arrangement between him and the testator, S. P. R. Moorman, they were taken up by the latter for the former as they fell due. On each of the bonds is endorsed a receipt, dated about the time of its maturity, for the amount of the bond in full, received of S. P. R. Moorman, and signed by "Wm. B. Preston, Ex. E. H. Preston, dec'd," or "Wm. B. Preston, Com." On the second bond is a credit endorsed in these words: "The within bond is entitled to a credit of $531 92, Aug. 27th, 1852."

103 *This payment was no doubt made by the debtor to Moorman, as the receipt endorsed on that bond is dated two days before the date of said credit, and is for the amount of the bond in full. These bonds remained in the possession of Moorman until his death, and in the possession of Moorman's administrator until the settlement between him and Peters, when they were delivered to Peters. There cannot be a doubt, I think, but that they were considered by all parties concerned, as the still subsisting bonds of Peters, after they were taken up for him by Moorman; and the only effect of the transaction, so far as concerned Peters, was, that thereafter Moorman was to be his bond creditor instead of Preston; in other words, to substitute Moorman in the place of Preston, as the obligee of

the bond. The same thing, in effect, might have been accomplished by an assignment without recourse by Preston to Moorman. The receipt was, of "S. P. R. Moorman," not of "Wesley Peters, through S. P. R. Moorman." The bonds were not given up by Moorman to Peters to be cancelled, but were continued to be held by Moorman as still subsisting bonds. Moorman took no new note or bond of Peters, or any other evidence of the debt than the old bonds themselves, with the receipts endorsed thereon, showing his title to them. Would he have so acted if he had not regarded the bonds as due to him, after he paid the amount to Preston? He might, at his own costs, and for his own use, have sued upon the bonds in Preston's name, indemnifying Preston against the costs of the suit. Wesley Peters, whose deposition was taken by Moorman's administrator, therein confirms the foregoing view of the transaction between himself and Moorman. He explains the reason which induced Moorman to take up the bonds, and which need not be repeated here. In answer to a question propounded to him by the plaintiff's
104 counsel: *"Did you not consider that the amount you owed him on account of these bonds, was evidenced by them—and did you not, in fact regard your obligation to pay the bonds as merely transferred from Preston to Moorman—or, in other words, did you not regard Moorman as an assignee of the bonds?"—he answered: "When I gave these bonds I expected to pay them; and while Mr. Moorman paid them off for me, of course I felt bound to Mr. Moorman; and I considered that Mr. Moorman would hold the bonds until I paid them off; then, when I paid them off, I did not expect to hear of them. I did look upon him as holding the bonds against me. As to Mr. Moorman's being an assignee, I thought nothing about it. I expected Mr. Moorman to pay the bonds and hold them; and whenever I got able I was to pay him." In answer to another question put to him by the plaintiffs' counsel, he said: "There were other transactions between us (Moorman and himself) besides the bonds; and there was a running account kept between us. I regarded the indebtedness on account of the bonds as a separate transaction, because there was no entry or any account made of that sort. I considered that he held those bonds against me. I considered that I owed him that amount of money." In regard to an item of $958 96, charged in his account with Moorman, as having been paid to the latter May 15, 1857, he said: Moorman "was to credit me with said amount on my land bonds." C. C. Peters, whose deposition was taken by the plaintiffs, says: "The statement shown to me is in my hand-writing, and I made it. My recollection is, that Wesley Peters had purchased land of Wm. B. Preston, Commissioner, to sell lands of Elisha H. Preston, dec'd, and had executed his bonds to Preston for the purchase money. When the bonds became due, he, Peters, was not ready to pay them. Samuel P. R. Moorman
105 *paid the bonds to Preston, and held them; and the $958 96 was to be credited on those bonds. I have no recollection as to the time of payment, but suppose it was as stated on the paper, from my certificate." The statement above referred to is returned with the deposition. Under the item of "1857, May 15, to cash paid you $958 96," is the certificate of C. C. Peters, in these words: "I was present on the above date, and the understanding was, that the amount $958 96 was to be entered as a credit to the said Peters' land bond to Moorman. C. C. Peters."

I think, therefore, that these bonds were not discharged by the payment of the amounts of them by Moorman to Preston, but enured thereafter to the benefit of Moorman, who thereby became, not a simple contract, but a specialty creditor of Wesley Peters; and whose claim on that account was not barred by the statute of limitations when it was settled with his administrator by Peters, as aforesaid.

After expressing the foregoing opinion, it is hardly necessary to say any thing upon the other ground above mentioned, that if the statute were applicable to any portion of the debt, it does not appear that the debtor would have availed himself of the defence of the statute if the administrator had not been willing to receive payment of the debt in Confederate currency. If a portion of the debt had been actually barred by the statute, and Wesley Peters had refused to pay it except in Confederate currency, and had threatened to plead the statute if sued for the debt, the administrator would, doubtless, have been warranted in receiving at least that portion of the debt in Confederate currency. But it is not pretended that he ever said one word about any portion of the debt being barred by the statute; much less that he ever threatened to plead the statute, if sued for the debt;
106 *and there can be no doubt but that he considered his bonds to be in full force, for the security and indemnity of Moorman, for the money paid by him in taking them up; and that he would, if requested, have renewed his bonds to Moorman for the same amount. Not a word is said in the answer of the administrator about any objection by Peters to the payment of any portion of his debt on account of its being barred by the statute of limitations; and no question is asked him on that subject on either of his two examinations.

I am, therefore, of opinion that the Circuit court erred in scaling the amount received by the administrator of Moorman, in discharge of the debt due from Wesley Peters; and that, instead of doing so, that court should have held him liable for the whole amount received, as if it had been good money.

2d. The next ground of error assigned by the appellants, is, that the administrator, in the settlement of his account with the estate of his testator, was allowed credit for the full amount of the Confederate

money paid by him in discharge of certain debts due by the estate, instead of the scaled value of such money; the appellants contending that only such value ought to have been allowed, though the said debts, or most of them, were specie debts.

Clearly there is no error in the decree of the Circuit court in this respect. These payments were made out of Confederate money received by the administrator on account of the estate. If it was improperly received its being applied at par to the payment of debts which might have been demanded in specie, made it as valuable to the estate as if it had been specie; and thus prevented any loss to the estate, from the act of the administrator in receiving such money. If it was properly received, then the money of the estate was applied 107 to the payment *of the debts of the estate, which of course was right; and the estate was thus benefited by the payment of its specie debts in its own depreciated currency at par.

3d. The last ground of error assigned by the appellants, is, that the Circuit court, by its decree, instead of holding the appellee, Thomas Holland, liable in good money for the price agreed to be given for the land bought by him of the administrator, gave him an election to take the land on those terms, or to rescind the sale, and receive out of the proceeds of a resale of the land the value of the Confederate money paid by him for the land.

It will follow, from what I am about to say in regard to the error assigned in the brief of the counsel of the appellee, Holland, that I am of opinion that the appellants' third and last ground of error is not well founded. I, therefore, proceed to consider:

4thly. The ground of error assigned by the appellee, Holland. That error is, that the Circuit court, instead of making the decree which it did, in regard to his purchase of the land, ought to have decreed that the administrator, Johnson, should execute and deliver to him a deed with special warranty, conveying to him in fee simple the tract of land aforesaid.

The testator by his will, after making provision out of his estate for his wife—having first charged it with the payment of his debts—directed that the remaining part of his estate, except the negroes, should be converted into money; which, with the remaining negroes, after his wife's selection, should be divided into three equal parts; one part to be placed in the hands of Achilles H. Moorman, as trustee for the benefit of his daughter, Sarah J. Richey, and her children; and the other two parts to be placed in said Moorman's hands, as 108 guardian *for his daughter Mary James Moorman, and his son Charles Pleasant Moorman. The will is dated November 3d, 1852. The testator died in October or November 1861, and his will was admitted to probate November 25th, 1861; and his administrator qualified December 3d, 1861. The inventory and appraisement of the estate, real and personal, was made on the 27th of December, 1861; and on the same day the slaves were divided according to the will, by the same persons who appraised the estate, and who had also been appointed commissioners to make the said division. On the same day, also, the perishable estate was sold by the administrator. The land afterwards sold to Holland was appraised at $8 per acre. The appraisement was ordered to be made in current money, and was made accordingly: current money at that time being State bank notes and Confederate States treasury notes. The administrator was present at the appraisement; and then took Wesley Peters aside and told him if he would sell the land in question at $8 per acre, the appraisement price, to do so; that he, the administrator Johnson, was confined in Richmond (being a member of the State Senate) and could not attend to it, and would be glad for Peters to assist him in selling it. Very soon thereafter a negotiation was commenced by Holland, by letter, with Johnson, and afterwards carried on in person with Peters, until the 26th of February 1862, just two months after the appraisement, when a sale was effected by Peters for Johnson to Holland, with the knowledge and approval of the testator's widow, and with the sanction of Johnson, at ten dollars per acre for 280 acres, being the larger portion of the said land. One thousand dollars of the purchase money was paid in hand, in current money, and the balance was to be paid, one-half on the first of January 1863, and the other half on the first of 109 January *1864. For the cash payment, a receipt was given on the same 26th of February, 1862, by Johnson, as administrator. Shortly thereafter, the residue of said tract of land, 84¼ acres, was sold to said Holland at $8 per acre; and on the 24th of November 1862 the residue of the purchase money of the whole tract $2,159, was paid by the purchaser to the administrator, who thereupon executed a receipt in full for the purchase money of both portions of the said tract; the deferred instalments of the first portion being thus paid in advance. The quantity of that portion turned out to be 248½ acres, instead of 280 acres, as mentioned in the first receipt; which reduced the amount afterwards paid to that extent. No conveyance was executed by the administrator to Holland, during the war; no doubt because the parties were seldom if ever together; Johnson being generally in Richmond, attending to his duties in the Senate, and Holland probably at his residence on the said land, which was situated in a part of the county remote from the court-house, or perhaps in the military service of the country. At all events, there can be no doubt but that the administrator would, at any time when requested by Holland, have executed a conveyance of the land to him; and Holland knowing that fact, and having possession of the two receipts aforesaid, which showed that he was entitled to a deed, therefore delayed making a request for one until after the

war. Now the question is, whether he is entitled to demand a deed for the land, or whether he can be subjected, either to the terms which the appellants insist should be imposed upon him, or to the terms imposed upon him by the decree of the Circuit court? If he had gotten his deed, as Brosius, the purchaser of the lot in Liberty did, during the war, his title would have been held to be good, as the title of Brosius was, by the Circuit court. Can the mere accident
110 of his *not getting his deed during the war, to which he was clearly entitled, and which he could easily have gotten, have the important effect of preventing him from now getting it?

The power of the administrator to make the sale was express and unquestionable. He and his agent Peters, and the purchaser Holland, all acted in perfectly good faith. The property could only be sold at the time for current money, which consisted of State bank notes and Confederate notes. The currency was at that time but little depreciated in value; and it was not generally expected, if at all, that there would thereafter be any greater depreciation. All, or nearly all, were hopeful that the war would soon end, and we would then have a better and a stable currency. There was no impropriety in making a sale of the land, under the circumstances. It was made as soon as it well could be made, after the qualification of the administrator. That it was a private, instead of a public sale, makes no difference. The law does not require such a sale to be a public and not a private sale—the will being silent as to the manner of the sale. It ought to be made in such manner as may be most to the advantage of the parties concerned; and we all know that a better sale can sometimes be effected privately than publicly. The sale was made at a fair price, under all the circumstances, regarding it as a sale for current money. The land, just before the sale, was appraised at eight dollars per acre, by three gentlemen who were appointed by the county court for the important duties of appraising the estate and dividing the slaves, and who performed those duties under oath. The presumption is, they were very fit to perform them, and their fitness is not questioned. They were all well acquainted with the land, and owned land in the same neighborhood. They appraised the land at eight dollars per
111 *acre, though at least one of them was for fixing it at a lower price. The administrator, an eminent lawyer, residing in the county, and perhaps well acquainted with the land, concurred with the appraisers in thinking that eight dollars was a fair price, and requested one of them to aid him in effecting a sale at that price. In sixty days a sale was effected of most of it at ten, instead of eight dollars per acre; and shortly thereafter the balance was sold at eight dollars, the appraisement price. This evidence of the value of the land at that time is much more reliable than the evidence of its value introduced on the other side. The evidence of witnesses as to the value of land during the war, given after the war was over, and post litem motam, cannot be much relied on, even though the witnesses be persons of good character for veracity; as is no doubt the case here. But, if we suppose that in fact the land, at the time of the sale, was intrinsically worth more than was gotten for it, yet if the sale was fairly and bona fide made, and especially if it was as good a one as could be made at the time and under the circumstances, it is unquestionably valid. Although Confederate money was depreciated to some extent at the date of the sale, yet the depreciation was not large, and there was not much difference between the price of land then and before the war. Confederate money was, generally, current at par in payment of specie debts, and was worth more than its gold value for the purposes for which money is ordinarily used. If the whole amount of the purchase money had been paid in hand, instead of one thousand dollars only, on the 24th of February 1862, I presume there could have been no doubt of the propriety of the transaction. But the balance was not paid until the 24th of November 1862, when there was still greater depreciation of the currency. Was it proper in the purchaser, then to pay, and the
112 *administrator then to receive, that balance in the then depreciated currency, at par? That payment and receipt were long in anticipation of the maturity of the deferred instalments of the purchase money; and if they could have been lawfully discharged at maturity in Confederate money, at par, it was certainly a very beneficial arrangement for the estate that payment in full should be made and received on the 24th of November 1862. Without enquiring whether the deferred instalments could have been thus lawfully discharged at maturity, I think it was perfectly competent for the parties to settle the matter as they did on the 24th of November 1862. The purchaser then paid the full balance of the purchase money, as claimed by the vendor, and received from him an acquittance therefore; which he had full power to give. In this transaction both parties acted in good faith. It is not pretended that they did not. And upon the payment of the balance and the execution of the receipt in full by the administrator, Holland became entitled to demand the execution and delivery of a conveyance to him of the legal title. The administrator was thenceforward seized of the naked legal title, as trustee for Holland, and could not withhold it from him. No terms could be imposed upon him by a court of equity as a condition for decreeing him the legal title, whenever he chose to demand it. The administrator had no equity against him. He had fully performed his part of the contract, and nothing was left to be enforced against him, either at law or in equity. It is only when a party is in default, that equity can impose terms upon him. Hale v. Wilkinson, 21 Gratt. 75, 90 and 91. The purchaser could success-

fully defend himself in an action at law against him by the administrator, without a conveyance of the legal title. Code, ch. 135, § 20.

I am, therefore, of opinion, that
113 the Circuit court *erred in its decree in regard to the purchase of land made by the appellee Holland, of the appellee Johnson, administrator as aforesaid; that the said purchase was a valid and legal one; that the terms of it were fully performed on the part of said Holland, who is therefore entitled to have the land conveyed to him by the said administrator; that the said administrator ought to be charged in the settlement of his account with the amount of the purchase money of the said land, at the scaled value of so much Confederate currency at the time it was received; and that the said land should be decreed to be conveyed to the said Holland, in fee simple, by deed, with special warranty.

I am, therefore, for reversing so much of the said decree as is in conflict with the foregoing opinion, and affirming the residue thereof; and remanding the cause for further proceedings, in conformity with the said opinion.

Christian and Staples, Js., concurred in the opinion of Moncure, P.

Anderson, J., concurred in the results of the opinion, and generally in the opinion; except, that he did not think an administrator should be held liable for receiving payment of a debt due the estate in Confederate money, where it is used or invested for the estate. In this case as the administrator has not so used or invested it, he should be held liable.

Bouldin, J., concurred in all the results of the opinion; but he was not prepared to concur in what was said in relation to the application of the statute of limitations to the bonds of Peters.

The decree was as follows:

114 *For reasons stated in writing and filed with the record, the court is of opinion that the appellee, James F. Johnson, administrator of Samuel P. R. Moorman, dec'd, was not warranted in receiving in Confederate money the amount of the debt due by Wesley Peters to the said testator, depreciated as said money was in May and July 1863, when it was so received; and that in the settlement of the account of the said administrator, instead of being charged with the scaled value of so much Confederate currency as at the time at which it was received, he ought to have been charged with the par amount of the said debt and interest thereon in good money. The Circuit court, therefore, erred in that respect.

The court is further of opinion, that the sale of land made by the said administrator to the defendant Thomas Holland, was a valid and legal sale; that the terms of it were fully performed on the part of said Holland, who is therefore entitled to have the land conveyed to him by the said administrator; that the said administrator ought to be charged, in the settlement of his accounts, with the amount of the purchase money of the said land, at the scaled value, of so much Confederate currency at the time it was received; and that the said land should be decreed to be conveyed to the said Holland in fee simple, by deed, with special warranty. The Circuit court, therefore, also erred in that respect.

The court is, therefore, of opinion that so much of the said decree of the said Circuit court as is in conflict with what is above declared is erroneous; and it is decreed and ordered that the same, to that extent, be reversed and annulled, and the residue thereof affirmed; and that the appellee, James F. Johnson, administrator with the will annexed, of Samuel P. R. Moorman, dec'd, do, out of the assets of his testator in his hands to be administered, if so much he hath—and if not, then out
115 *of his own estate, and Albon A. Authur and Alexander Jordan, his securities, do pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And it is further decreed and ordered, that this cause be remanded to the said Circuit court for further proceeding to be had therein, in conformity with the foregoing opinion and this decree. And as the amount due by the parties against whom the said decree of the Circuit court was rendered, will be increased by the operation of this decree, it is further decreed and ordered, that any lien which may have been created by the said decree of the Circuit court shall remain in full force for the security, pro tanto, of the amounts which may be found to be due by the parties respectively against whom the said decree was rendered; and that to that extent, and for that purpose also, the said decree be affirmed. And the said parties are to have credit for any payments which may be made by them respectively under the said decree, on account of the amounts which may be found to be due by them, as aforesaid.

Which is ordered to be certified to the said Circuit court of Bedford county.

Decree reversed.

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116 *Effinger v. Kenney, Trustee.

November Term, 1873, Richmond.

1. **Supersedeas — Bond — Reduction of Penalty.**—Judgment in June 1866 in the County court. July 29th, 1866, defendant presents to a judge of the Circuit court his petition for a supersedeas to the judgment rendered against him, and the judge awards it and fixes the penalty of the supersedeas bond at $15,000. Afterwards, on the 18th December 1868, the petitioner applies to the same judge to reduce the penalty of the bond; which is done: and the appeal is perfected. It was competent for the judge to modify his first order; and it did not impair or annul the petitioner's right to the supersedeas which had been awarded to him in July 1866.

2. **Evidence—Competency of.**—In action of debt upon a bond given for the purchase of land at auction,

it is not competent for plaintiff to prove his declarations not in the hearing of the defendant, prescribing different terms of sale from those set out in the published advertisement, and announced on the day of the sale, unless shown to have been communicated to him.

3. **Bond—Payment—Kind of Money.***—Where a bond for purchase of land was executed March 30th, 1863, payable in two years, in the absence of any thing on the face of the bond to indicate the kind of money in which it was to be paid, under the statute there is no presumption of law on the question. The only presumption is a presumption of fact, from the circumstances proved; and is a question for the jury.

4. **Same—Same—Confederate Currency.**†—Land was assessed before the war at $80 per acre; and it was not worth more than $100 per acre. In March 1863 it is sold at auction by a trustee for creditors, and bought by E for $210 per acre, nothing having been said at the sale as to the kind of money to be paid. E pays two-thirds of the purchase money in cash in Confederate notes, and gives his note for the balance, payable in two years with interest; 117 and the money paid is *received by the creditors for ante-war debts at its par value. This money was then at the rate of five for one of gold, though in land sales it was rating at two or three for one. It was a Confederate contract, and should be scaled.

This case was argued at the last September term of the court in Staunton, and was decided at the present term in Richmond. It was an action of debt in the County court of Rockingham county, brought in September 1865, by James Kenney, trustee for A. C. Bryan, against Jacob P. Effinger, upon a bond for $7,607 70-100, executed by Effinger to Kenney for the last payment of a tract of land sold by Kenney as trustee of Bryan, and purchased by Effinger. The bond bears date on the 30th of March 1863, and was payable on the 30th of March 1865, with interest from its date; and it was silent as to the kind of money in which it was to be paid. Issue was made up on the plea of payment; and the cause was tried in June 1866.

There were four exceptions taken by the defendant, during the trial of the cause; but it is only necessary to notice the third and the fourth. Upon the motion of the plaintiff the Court gave the following instructions to the jury:

1st. If the jury believe from the evidence, that the true agreement of the parties to the bond on which the suit is founded, was that the said bond was to be paid in Confederate States Treasury notes, or was given with reference to such notes as a standard of value, the same should be liquidated by reducing the nominal amount due on such bond, to its true value at the time the said bond was given, to wit: 30th March 1863.

2d. But if the jury believe from the evidence, that according to the true agreement of the parties, said bond was to be paid in such money as the creditors of A. C. Bryan would receive, who were not willing 118 to take Confederate *money, then they should find the full amount of said bond.

3d. The bond in suit upon its face is for the payment of good money, and unless the defendant proves that the said bond was to be paid in some other way, the jury should find for the plaintiff the whole amount due upon said bond. To the giving of these instructions the defendant excepted.

The defendant also asked the court to give the following instructions; which were given:

1st. That no parol evidence is admissible to add to, diminish or vary the terms of the written terms of the sale of the land for which the writing obligatory in the declaration mentioned was given.

2d. That no evidence is admissible to prove the present value of said land, (whether it has appreciated or depreciated in value,) to affect the true or specie value of the land at the time of the sale.

3d. That no evidence is admissible in this cause, to prove other verbal conditions of sale than those embraced in the written terms of the sale on that day, unless the defendant had knowledge thereof, and purchased with reference to such other verbal terms and conditions.

4th. If the jury believe from the evidence, that the writing obligatory in the declaration mentioned, was payable in Confederate money, or that it was given with reference to Confederate money as the standard of value, the jury must ascertain the true value of said writing according to the value of Confederate money at such time as the court may designate before the jury retire to their chamber.

The jury found a verdict for the whole amount of the bond, principal and interest; and they further found that the said debt was not to be paid in Confederate 119 *notes. Whereupon the defendant moved the court for a new trial, on the ground that the verdict was contrary to the evidence, and to the instructions of the court given on the motion of the defendant. But the court overruled the motion, and rendered a judgment according to the verdict; and the defendant excepted. This exception sets out all the evidence, and the instructions asked by both parties. The facts are sufficiently stated in the opinion of the court.

On the 29th of July 1866, on the petition of Effinger, a supersedeas to the judgment was awarded by Judge H. W. Sheffey, of the Augusta circuit, and the penalty of the bond required, was fixed at $15,000. In December 1868 Effinger presented another petition to Judge Sheffey, stating his inability to give the bond in so large a penalty, and asking that it might be reduced. And the judge directed the supersedeas to be

*Bond—Payment—Kind of Money.—On this point, see Walker v. Pierce, 21 Gratt. 722, and see Jarrett v. Nickell's Adm'rs, 9 W. Va. 353, and Bierne v. Brown's Adm'r, 10 W. Va. 749, citing the principal case.

†Confederate Currency.—On this point, see Moss v. Moorman's Adm'r, 24 Gratt. 97, and *note*.

issued upon the execution of a bond in the penalty of $8,000.

The case came on to be heard in the Circuit court in February 1871, when that court affirmed the judgment of the County court. Effinger then applied to this court for a supersedeas; which was awarded.

Michie & Michie and Parker, for the appellant.

Woodson, for the appellee.

Anderson, J., delivered the opinion of the court.

This cause comes here upon a supersedeas to a judgment of the Circuit court of Rockingham county, affirming the judgment of the County court of said county.

Section 6 of chap. 182 of Code of 1860, p. 745, requires, that with the petition for an appeal, supersedeas, &c., there shall be a transcript of the record of so much of the case as will enable the court, if the 120 petition be *granted, properly to decide the questions that may arise before it. In this case, the transcript of the record of the County court, certified by the clerk of that court, was filed with the petition to the Circuit court; and that transcript, together with a transcript of the judgment of the Circuit court thereon, is certified to this court, by the clerk of the Circuit court; and is a substantial compliance with the requirement of the statute.

The supersedeas was granted on the 29th of July 1866, by Judge Sheffey, one of the Circuit judges, to the judgment of the County court of Rockingham; and on the 18th of December 1868 Judge Sheffey modified the order he had made awarding a supersedeas, so as to reduce the penalty of the supersedeas bond from 15,000 dollars to 8,000 dollars. The court is of opinion that it was competent for him so to do. And that the modification of the terms, upon which the supersedeas was awarded, did not impair or annul the plaintiff's in error right to a supersedeas, which had been awarded to him on the 29th of July 1866, but continued the same on terms less onerous. It was not the inception of the proceeding, but only the modification and continuation of the previous order. Consequently, by reason thereof, the plaintiff's in error right to a writ of error and supersedeas is not barred.

The court is further of opinion, that the declarations of the defendant in error to other persons, not in the presence and hearing of the plaintiff in error, prescribing different terms of sale from those set forth in the published advertisement, and publicly announced on the day of sale, were inadmissible as evidence against the plaintiff in error, unless shown to have been communicated to him; and that the second instruction, founded evidently upon this illegal testimony, and otherwise irrelevant, was calculated to mislead the jury.

The court is also of opinion that the 121 third instruction, *if not erroneous in terms, is expressed in language calculated to mislead the jury; and probably did mislead them. It implies that the bond upon its face imports a contract to pay in specie, according to the common law presumption, which it was held in Walker's Per. Rep. v. Pierce, 21 Gratt. 722, was designed to be altered by statute, in relation to contracts of that period. In that case it was said: "The obvious design of the act of 1867 [1866,] (meaning the adjustment act,) is to ascertain and enforce the actual contract between the parties; to do which, it in effect annuls the presumption of law as to the kind of currency in which the contract is to be solved, whether common law or statutory." This instruction might be understood to exclude, contrary to the terms of said act of assembly, and the repeated decisions of this court, an implication that the contract was made with reference to Confederate currency as a standard of value, or was solvable in that kind of currency, from the character of the currency which prevailed at the date of the contract, and the price paid for the land, which was the consideration of the bond, and other facts proved in the cause. The presumption was one of fact, and was a question for the jury.

It is certified by the court below, as proved on the trial, that the bond which is the foundation of the suit, was given for the last instalment of purchase money for a tract of land, which was sold at public auction on the 30th of March 1863; that nothing was said in the advertisement or public announcement, of the terms of sale, as to the kind of currency which would be received in payment of the purchase money; but that Confederate States treasury notes were the only currency of the country at the time; and that the land, which had been assessed at 80 dollars an acre before the war, and could not have been sold in March 1863, or any time during 122 *the war, at its assessed value in specie, and was not worth, in the opinion of any of the witnesses, more than $100 an acre before the war, was sold to the plaintiff in error for $210 an acre; that he paid $14,135 dollars in hand, and gave his bond for $7,067 70⅔, for the residue of the purchase money, payable on the 30th of March 1865, with interest from the 30th of March 1863, the date thereof; that the whole of the hand payment was applied to the payment of old debts by the vendor, and actually discharged 14,135 dollars of specie debts; that Confederate money at the time was rating at about 5 for 1 in gold; but in land sales was rating at from two to three for one; and the witnesses at the time of the sale considered it a sale for Confederate money. These facts plainly imply that it was a sale for Confederate money; which any rebutting testimony in the cause does not repel. And the defendant in error having already received payment of what was of far more value to him than the land, the court is of opinion that the verdict of the jury, which gives him in addition thereto

$7,067 70 cents, with interest thereon from the 30th of March 1863, (the face of the bond,) is not only manifestly contrary to the law and evidence, but is hard and oppressive, and ought to have been set aside. There were other questions raised in the cause, which the court deems it unnecessary now to decide; but for the reasons given, we are of opinion to reverse the judgment of the court below, and to remand the cause for further proceedings to be had therein, in conformity with this opinion.

The judgment was as follows:

This cause, which is pending in this court, at its place of session at Staunton, having been fully argued, but not determined at the said place of session, this day came here the parties, by their counsel; and the court having maturely considered the transcript of the record of the 123 *judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the declaration of the defendant in error to other persons not in the presence and hearing of the plaintiff in error, prescribing different terms of sale from those set forth in the advertisement, and publicly announced on the day of sale, were inadmissible in evidence against the plaintiff in error, the same not having been communicated to him before he purchased; and that the court erred in admitting such evidence; and that the second instruction given by the court to the jury, which is evidently founded upon it, was calculated to mislead the jury. The court is also of opinion that the third instruction, if not erroneous in terms, undertakes to instruct the jury as to what their presumption should be as to the kind of currency in which the obligation was to be discharged; which being a presumption of fact and not of law, was a question for the jury and not for the court; and was also calculated to mislead them, and ought not to have been given.

The court is also of opinion, that upon the facts certified the contract was plainly made with reference to Confederate money as a standard of value, and was solvable in that kind of currency; and that the verdict of the jury is plainly contrary to the law and evidence, and unjust and oppressive; and ought to have been set aside and a new trial granted.

Therefore it is considered, that the judgment of the said Circuit court be reversed and annulled; and that the plaintiff in error recover against the defendant in error his costs by him expended in the prosecution of his writ of error and supersedeas aforesaid here. And this court proceeding to render such judgment as the said Circuit court ought to have rendered, it is further considered, that the judgment of the 124 County court be reversed *and annulled, and the verdict of the jury set aside, and a new trial granted the defendant in that court; and that the plaintiff in error in the said Circuit court recover against the defendant in error in that court his costs by him expended in the prosecution of his writ of error and supersedeas aforesaid in said Circuit court. And the cause is remanded to the said Circuit court, for further proceedings to be had therein, in conformity with the principles herein declared.

And it is ordered, that this judgment be entered on the order book here, and be forthwith certified to the clerk of the court where the same is pending as aforesaid; who shall enter the same on his order book, and certify it to the clerk of the said Circuit court of Rockingham county.

Judgment reversed.

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125 *Rives v. Farish's Adm'r.

November Term, 1873, Richmond.

1. The case of *Henderlite* v. *Thurman*, 22 Gratt. 446 approved and sustained.
2. **Sale — Amnesty Oath — Pardon — Emancipation Proclamation.***—R owning slaves in A county, within the Confederate lines, in January 1864 sells them to P, and takes his bond for them payable when R should demand it. In August 1865 R took the amnesty oath prescribed by President Lincoln, with the conditions expressed in the proclamation of December 8th, 1863, and in the same year, as one owning $20,000 of property, he obtained a special pardon from President Johnson under his proclamation of May 29th, 1865, with its conditions, and took the oath prescribed in it. In suit upon this bond by R against P. HELD:
   1. **Same — Same — Same — Effect.** — The slaves not being within the federal lines, were not emancipated by President Lincoln's proclamation, even if that was a valid act.
   2. **Same—Same—Same—Same.**—The contract being valid when made, however conclusive the effect as an estoppel, the pardon and oath of R, P is not bound by it, and therefore cannot obtain any benefit from it.
   3. **Same — Same — Same — Same.** — The conditions attached to the pardon, was not intended to require an admission from R, that his slaves had become free in any particular way, or under any special law or proclamation.
   4. **Same—Same—Same—Same.**—President Lincoln's proclamation only affected slaves under the federal control; and as the slaves of R were not under that control, R's pardon and oath, cannot create any obligation on him to maintain or agree that these slaves were under federal control, and emancipated by that proclamation.

126 *This case was argued in Staunton at the last September term of the court, and was decided in Richmond at the present term. It was an action of covenant brought in March 1870, in the Circuit court of Albemarle county, by George Rives against the administrator with the will annexed of Wm. P. Farish, deceased, to recover the amount of a bond of $12,000, executed to the plaintiff on the 1st of January 1864, by George L. Peyton, as princi-

*Emancipation Proclamation.—As to the extent of this proclamation, see very able opinion of JUDGE STAPLES in Henderlite v. Thurman, 22 Gratt. 466.

pal, and William H. Peyton and Wm. P. Farish as his sureties.

On the 5th of December 1863 George Rives and George L. Peyton entered into an agreement under seal, by which Rives contracted to sell and deliver at his residence in Albemarle county, on the first of next January, to George L. Peyton, thirty-three negroes, named, and to warrant the title thereto, but not the soundness. And for these negroes Peyton agreed to pay, on delivery, the sum of $25,000 in bankable Confederate currency; and in addition, to give his note with Wm. P. Farish and Wm. H. Peyton as securities, for the further sum of $20,000, to be paid in twelve months after call, in equal annual payments thereafter; or at said Peyton's option, it may be on call all or a part paid. And Rives covenanted that he would not call on said Peyton for specie when it was at a premium, but to be satisfied with the bankable currency of the day, on the stipulation to choose his own time for the call. The said postponed payment to carry interest from the 1st of the next January, and to be annually paid at the Monticello bank in Charlottesville.

On the 1st of January 1864, the parties modified their contract; and it was then agreed that for the deferred payment of $20,000 of the purchase money for the negroes, George L. Peyton should, with his sureties, execute to Rives two bonds under seal, one payable on demand 127 *or twelve months thereafter, at the option of the obligors, and the other payable on demand or two years thereafter, at the like option. And in pursuance of this agreement the bonds were executed by the said George L. Peyton, as principal and Wm. H. Peyton and Wm. P. Farish as securities. The second of these bonds says: On demand or two years thereafter, at the option of the obligors, we promise to pay in the bankable currency of the day, (according to the agreement of the 5th of December,) to George Rives, his heirs or assigns, twelve thousand dollars, with interest from date to be annually paid on the 1st of January, at Monticello bank Charlottesville, the same being in part of the purchase money for thirty-three negroes, the title whereof is warranted; but no warranty is made of soundness. The said demand shall be made in writing by said George Rives, his assigns or legal representatives only.

On the 22d of August 1866 Rives made a demand in writing, on George L. and Wm. M. Peyton, for the payment of said bond of $12,000; and on the 28th of the same month he made a like demand in writing, upon Wm. P. Farish. And although Farish, as well as the Peytons, lived for more than two years after the demand was made upon them, none of them paid the money or any part of it.

The foregoing facts were fully set out in the declaration, which contained several counts. And the defendant demurred to it and to each count thereof. He also filed the plea of covenants performed, and twenty special pleas. The questions intended to be raised by all but three of these special pleas, were raised by the demurrer to the declaration; and as to the three which were not so raised, it was agreed by the parties that the declaration should be considered so amended as to raise them by the demurrer. The facts to which they refer 128 *are, that George Rives, in 1865, to get through the federal lines, to ascertain the fate of his son, just at the close of the war, took the amnesty oath prescribed by President Lincoln's proclamation of the 8th of December 1863; and that in the same year, as one who had been engaged in the rebellion, and having property to a greater value than $20,000, he applied for and obtained a special pardon from President Johnson, under his proclamation of May 29th, 1865, and took the oath prescribed in said proclamation. The condition annexed to this pardon is: "This pardon to begin and take effect from the day on which the said George Rives shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865; and to be void and of no effect if the said George Rives shall, hereafter, at any time acquire any property whatever in slaves, or make use of slave labour.

On the 29th of October 1870, the cause came on to be heard upon the demurrer to the declaration, when the court sustained the demurrer, and rendered a judgment for the defendant. Whereupon Rives applied to a judge of this court for a supersedeas; which was awarded.

Watson, for the appellant.

Baldwin & Cochran and William J. Robertson, for the appellee.

Staples, J. The principal points in this case are discussed and decided in Henderlite v. Thurman, reported in 22 Gratt., p. 446. In that case, as in this, the contract for the purchase of the slaves was made subsequent to the emancipation proclamation of January 1st, 1863. In that, as in this, it was insisted that the slaves were free by force of that proclamation: that the consideration had wholly failed, and the contract 129 was contrary to *public policy. It is, therefore, only necessary to refer to that case and the opinion there found, for the views of this court in reference to these questions. This case, however, presents another point not discussed or decided in Henderlite v. Thurman, which is now to be considered and settled.

It seems that the plaintiff, George Rives, on the 2d of August 1865, received from the President of the United States a special pardon for all offences by him committed, arising from his participation in the rebellion, so termed. By the terms of this pardon it was "to begin or take effect from the day on which the said George Rives should take the oath prescribed in the proclamation of the President dated May 29th, 1865; and to be void and of no effect if the

said George Rives shall hereafter, at any time, acquire any property in slaves, or make use of slave labor." The oath here alluded to was taken by the plaintiff, and was to the purport that he "would thenceforth faithfully support, protect and defend the constitution of the United States, and the union of the States thereunder; and that he would, in like manner, abide by and faithfully support all laws and proclamations which had been made during the existing rebellion, with reference to the emancipation of slaves."

The proposition of the defendant is, that the plaintiff, by accepting the pardon and taking this oath, agreed that he would recognize, and as far as he could, give effect to the emancipation of his slaves under the proclamation of the 1st of January 1863; and that he would maintain that they had become free on that day, and had all the while thereafter continued to be free persons, and not slaves. And it is insisted, that the present pretension of the plaintiff is wholly inconsistent with the obligation thus assumed; inasmuch as he now claims that the negroes sold by him to one of
130 the defendants, *were slaves after the 1st day of January 1863; and that a sale made by him subsequent to that day is valid, and should be enforced in his favor.

As no authorities directly bearing upon this question have been adduced on either side, it must be considered and discussed upon principle exclusively. In Henderlite v. Thurman this court held, that the emancipation proclamation of January 1st, 1863, if valid at all, was only so as a war measure; and as such it had no effect in regions beyond the control of the federal authorities; and that those slaves only were emancipated which came within the federal lines of occupation while that proclamation was in active exercise; that this was the construction given to that measure by Mr. Lincoln himself, by all the judges of the United States courts who had held the subject under consideration, and by a large majority of the State courts. If this point was correctly decided, if the negroes sold by the plaintiff, being in the county of Albemarle, were not embraced by the proclamation, beyond all controversy they were slaves at the time of the sale, recognized as such by the parties, by the constitution of the United States, and the laws and constitution of Virginia. Nothing had then occurred, no act had been done, to impair the plaintiff's right of property; and he was fully protected in his enjoyment and dominion by a competent military and civil power. The contract was, therefore, valid. The sale passed a clear legal title to the purchaser, and the plaintiff acquired a clear vested right to the purchase money.

A valid title having vested by the sale, no act the plaintiff might thereafter perform, no recognition by him of the validity of the proclamation, could affect that title, or interfere with the purchaser's claim against the government, if any he
131 had, for compensation. The *defendant's promise to pay is, therefore, in full force and effect, unless we are to assume that it has been extinguished by the mere fact that the plaintiff has taken upon himself certain duties and obligations to the federal government which do not concern the defendants, which entailed no loss and imposed no liabilities upon them.

If I rightly understand the argument of defendant's counsel, they do not maintain that the contract is discharged by the plaintiff's action. They seem to rely upon the principle of estoppel, as applicable to the case. Give, then, to the plaintiff's oath, and his acceptance of the pardon, all the effect of the most conclusive estoppel: can the defendants claim the benefit of it?—can they rely upon it? They are clearly not bound by it. They were no parties to the arrangement (if it may be so termed) between the government and the plaintiff. That arrangement was the result of a public policy inaugurated by the executive of the United States, to secure to the negro the freedom won for him by the federal arms. When the war closed the government of the United States was not looking to the previous status of the freedom in the southern States. It was a matter of no concern whether they were emancipated by force of a proclamation, or by the conquest of the south. It was a fixed fact that the slaves were free, free by the results of the war. The institution of slavery being thus at an end, the object of the government was to prevent ever thereafter, even the agitation of the question of its re-establishment. Its measures did not look to the past, but to the future. They were wholly prospective in their operation, intended to protect the negro in the enjoyment of his freedom. From these ends the whole power, all the machinery of the federal government, was brought into requisition. One of the
132 means adopted was to impose *terms upon those applying for executive clemency. The applicants were required to take an oath faithfully to abide by and support the laws and proclamations which had been made with reference to the emancipation of slaves; and it was further provided, that if the applicant should thereafter at any time acquire any property whatever in slaves, or make use of slave labor, the pardon was to be void and of no effect.

Construed by the light of surrounding circumstances, this provision or condition in the pardon clearly was not intended to exact from the applicant an admission that his slaves had become free in any particular way, or under any special law or proclamation; but that the sole object was to preclude any question in the future as to the right of these slaves to freedom; and to secure that right beyond the reach of cavil or controversy. In this sense, and this alone, it seems to me, the plaintiff, in common with others who applied for pardons, was required to support the laws and proclamation in reference to emancipation.

It is not to be presumed that the President of the United States intended, as a condi-

tion of his clemency, to exact from the citizen an admission which might perchance involve him in a perplexing controversy with his former slaves, concerning their right to compensation for services rendered after the proclamation was issued. Nor is it to be presumed it was his purpose to impose conditions which would constrain one party to surrender valuable rights, originating in contracts valid when made, and the enforcement of which can in no manner affect the rights and privileges of the freedman, or the well established policy of the government. If such was the purpose of the President—and such is the legal operation and effect of the oath taken by the plaintiff—then I think the courts would not hesitate to declare the 133 *condition annexed to the pardon a mere nullity. The President of the United States is authorized to grant conditional pardons. A performance of the condition renders the pardon absolute, and entitles the party to a full discharge from all the penalties and disabilities attached to the offence. On the other hand, a failure to perform the condition renders the pardon utterly void; and the offender is remitted to his former condition. But the President is not authorized to annex to his pardon a condition that is impossible, or contrary to law. In such case the pardon is absolute, and the condition void. If the proclamation was the exercise of a constitutional power by the President, and its effect was to confer freedom upon all the slaves in the designated States, it is not perceived how the oath of the plaintiff could give to it any additional obligation. It is binding upon him with or without this oath. If, on the contrary, it was illegal and unconstitutional, no oath the plaintiff might take, no promise he might make to the executive to support it, can preclude him from asserting his right of action growing out of a valid contract with another citizen. And it may be safely said, that the promise to support an unconstitutional act would be void, and the pardon absolute; or the promise not being observed, the condition not being performed, the pardon is void, and the grantee remains in the condition he was when the pardon was granted. And it would seem to be very clear, that in no case was the President authorized to annex to his pardon a condition requiring the offender to support an act which is an infringement of the constitution and a violation of the rights of property.

But waiving all this, let it be conceded that the plaintiff is absolutely precluded, by his acceptance of the pardon, from contesting the validity of the proclamation, or the emancipation of his slaves there- 134 under, I repeat what *has been before merely suggested, the defendants are in no condition to take advantage of the estoppel. When an estoppel is relied on to conclude a party, from claiming a clear, well ascertained legal right, he who claims the benefit of such estoppel, ought himself to be bound by it. If any proposition of law can be regarded as well settled, it is this. It is only necessary to cite a single authority. In Deery v. Cray, 5 Wall. U. S. R. 795, 803, the Supreme court of the United States say: "That no person can rely upon an estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. There is no mutuality, which is a requisite to all estoppels. This (say the court) is precisely the case before us. The plaintiff claimed under Brent and his deed. Defendants claim nothing under that deed, and deny all connection with the title it proposes to give. They are strangers to it, and have no right to set up its recitals as estoppels." It seems to me, therefore, that whatever may be the obligation of the plaintiff to the government, the defendants are in no condition to rely upon it as relieving them, or impairing plaintiff's right to enforce the contract.

There is one other view, perhaps more satisfactory than any yet mentioned. If, as already suggested, the proclamation is to be regarded as a war measure, conferring freedom only upon such slaves as came under federal control during the war, an oath to support that proclamation cannot, by any process of reasoning, be tortured into an obligation to maintain or agree that those slaves not under federal control were thereby emancipated; because such was not the legal operation and effect of the measure. Let it be conceded that the plaintiff is estopped to deny the constitutionality of the proclamation: surely he is not 135 therefore precluded from *an enquiry into the extent of its operation, and from showing, according to a fair interpretation, that his slaves were not within its influence and operation. Whether they were embraced by it, is a question for the courts. If they were not so embraced—if, indeed, being wholly within the Confederate lines, they were not emancipated, how is it possible to hold the plaintiff is compelled by his oath to acknowledge that they were in fact emancipated? This would be to deprive him of all claim to compensation for his property, because he has assumed an obligation to support a measure which in no way affected his title. The whole extent of the plaintiff's oath is, to support the proclamation, as interpreted by the courts. When he has done that he has fulfilled all the conditions of his pardon. And this court having held, in Henderlite v. Thurman, that the proclamation did not affect slaves situated as those belonging to the plaintiff, it must follow, according to this view, there is nothing in the pardon, or in the oath taken by the plaintiff, to preclude him from maintaining that he had a valid title at the time of sale, and that his slaves were not emancipated by operation of that measure.

I have thus given this case a somewhat extended consideration, not because in my judgment it deserved it, but from a feeling of respect to the opinion of the Circuit court, and the views of able counsel, who

seem to have entire confidence on the point; and because it is understood the case is to be taken hence to the Supreme Court of the United States.

For the reasons stated, the judgment must be reversed, and the cause remanded to the Circuit court, to be proceeded with in accordance with the principles herein announced.

136 *The other judges concurred in the opinion of Staples, J.

The judgment was as follows:

This cause, which is pending in this court, at its place of session at Staunton, having been fully heard, but not determined, at the said place of session: This day came here the parties, by their counsel: and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the judgment of the said Circuit court, in sustaining the defendant's demurrer to the plaintiff's declaration, and each and every count thereof, is erroneous: Therefore, it is considered, that the same be reversed and annulled; and that the defendant in error, out of the assets of his testator in his hands to be administered, pay to the plaintiff in error his costs by him expended in the prosecution of his writ of error and supersedeas aforesaid here.

And this court, proceeding to render such judgment as the said Circuit court ought to have rendered on said demurrer to the plaintiff's declaration, and each and every count thereof, is further of opinion, that said declaration, and each and every count thereof, is sufficient in law for the plaintiff to have and maintain his action against the defendant: And, therefore, it is further considered by the court here, that said demurrer to the declaration, and each and every count thereof, be overruled; and that this cause be remanded to the said Circuit court, for further proceedings to be had therein. And it is ordered, that this order be entered on the order book here, and be forthwith certified to the clerk of the

137 court where the cause is *pending, as aforesaid; who shall enter the same on his order book, and certify it to the clerk of the said Circuit court of Albemarle county.

Judgment reversed.

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138 *O'Bannon & al. v. Saunders.

November Term, 1873, Richmond.

1. **Executions—Presumption as to.***—When an execution is placed in the hands of a sheriff, the presumption of law is that he has levied it and made the money; and in the absence of evidence that he did not levy it, he and his sureties will be liable for the debt to the creditor.

2. **Same—Liability on.**—If the sheriff fails to levy the execution when he might do it, he and his sureties are liable for the debt.

3. **Same—Stay Law.**—Execution is issued in June 1860; and the sheriff does not return it until 1868, after suit is brought against him and his sureties, when he returns that he received the money in 1861 or 1862. A law to stay the levy of executions, and directing that where levied at the time, the sheriff should restore the property to the debtor, was passed in July 1861. The court will presume against the sheriff and his sureties, that the money was received on the first of January 1861.

4. **Pleading—Variance.**—The addition to a name of jr., is no part of the name; and when a judgment is against B jr., and in a suit against a sheriff for failing to make the money, the judgment is described as against B, this is no variance, and will not sustain the plea of *nul tiel record*.

5. **Same—Defences.**—If a defendant pleads several distinct matters of defence in one plea, the plaintiff may reply generally to it; the defendant being guilty of the first fault.

This was an action of debt in the Circuit court of Culpeper county, brought in February 1866, in the name of the Commonwealth, at the relation of Carter A. Saunders, against James O. Harris, late sheriff of said county, and Walter O'Bannon, Jacob S. Egborn and another as his sureties in his official bond, to recover the amount of an execution which issued

139 upon a judgment recovered *in the Circuit court of Culpeper county by the surviving partner of Thomas Hill & Co., for the benefit of Carter A. Saunders, against John S. Barbour, George G. Thompson and James Barbour. The breach of the condition assigned was, that the execution went into the hands of the sheriff on the 22d of June 1860, and that he had afterwards, on the —— day of —— 1860, received the money, and had failed to pay it to the plaintiff. The declaration was afterwards amended, and another breach assigned, viz: that there being sufficient estate in the hands of the defendants, out of which the execution might have been satisfied, the sheriff had failed to levy it, &c.

The defendants demurred generally to the declaration; but the court overruled the demurrer; and they then filed four pleas: 1st, conditions performed; 2d, non damnificatus; 3d, neil tiel record; and 4th, that the relator Saunders, on the 22d of June and ever since resided in a different county from that in which the sheriff resided, and that no demand of payment of the amount of the execution was made upon the sheriff by said Saunders, or his attorney at law, or any person having a written order from Saunders in the county of the sheriff's residence.

Issue was taken upon these pleas, and in June 1868 the cause came on to be tried, when the parties waived a jury, and submitted the whole matter of law and fact to the court. And thereupon the court rendered a judgment in favor of the plaintiff for $1,370 59, with interest thereon from the 1st of July 1862; that being the aggregate

*Executions.—On the subject of "Executions," see monographic *note* appended to Paine v. Tutwiler, 27 Gratt. 440.

of principal, interest and costs of the judgment and execution up to that date. From this judgment O'Bannon and Egborn obtained a supersedeas to this court. For the facts of the case, see the opinion of Moncure, P.

140 *James W. Green, for the appellants.

Field & Gray and Wm. J. Robertson, for the appellee.

Moncure, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of Culpeper county, rendered on the 10th day of June 1868, against a sheriff and his sureties, on his official bond, for his default in regard to a writ of fieri facias which came to his hands for execution. The original declaration was for the default of the sheriff in not paying to the relator, who was entitled to receive the same, the amount of the said writ alleged to have been received by the said sheriff from the defendants therein. The declaration was afterwards amended, assigning a further breach of the condition of the bond, in not making and paying the money in the said suit mentioned according to the mandate thereof. There were four pleas to the declaration: 1st, conditions performed; 2d, non damnificatus; 3d, nul tiel record; and 4th, that "Carter A. Saunders, for whose benefit the execution in the said declaration set forth was, and who is the person to whom the money was due under said execution is payable, resided on the 22d day of June 1860, (when the execution was delivered to the sheriff,) and has since continuously resided, and still resides, in a different county from that in which the said sheriff, James O. Harris, resided, and that no demand of payment of the amount of said execution was made of the said sheriff, by the said Saunders or his attorney at law, or any person having a written authority from the said Saunders, in the county of the residence of the said sheriff. To these pleas the plaintiff replied generally. The defendants moved the court to strike out the general replication to the 4th plea; 141 which motion the court *overruled. The parties then, by consent entered of record, waived the right to have a jury; and thereupon the whole matter of law and fact was heard and determined, and judgment given by the court; which judgment was for $65,000, the penalty of the bond, to be discharged by the payment of $1,370 59, being the aggregate of principal, interest and costs of said execution as of the 1st day of July 1862, with interest thereon from that day till payment, and the costs of the relator in the suit; and such other damages as might be thereafter assessed, &c.

The defendants excepted to opinions of the court given upon the trial, and also to the judgment of the court rendered upon the evidence; the whole of which is set out in a bill of exceptions. Two of the defendants, Walter O'Bannon and Jacob S. Egborn, sureties of the said sheriff, applied for and obtained a supersedeas to the said judgment; which is the case we have to dispose of.

The petition for the supersedeas assigns five errors in the judgment, which we will consider in the order in which they are assigned—and,

1st. Because there was no evidence that said writ of fieri facias was levied by the sheriff before the return day, (September rules 1860,) and it is well settled that if the money is paid to the sheriff after the return day, when there has been no levy before, (as was the fact in this case,) the payment is not to the sheriff, in his official character, and consequently does not bind his sureties. 1 Rob. Old Prac. 532; Chapman v. Harrison, 4 Rand. 336."

We think that the answer made to this assignment of error in the argument of the counsel for the defendant in error, and the authorities cited in said argument, are conclusive in favor of the said defendant. 142 The presumption, *in the absence of evidence to the contrary, is, that the sheriff did his duty, in levying the execution before the return day. "It is presumed, until the contrary is proved, that every man obeys the mandates of the law and performs all his official and social duties." 1 Greenl. Ev. p. 51, § 40. See also Williams v. The East India Company, 3 East's R. 192; The King v. Hawkins, 10 East's R. 211; Manning v. The Eastern Counties Railway Company, 12 Mees & Welsb. R. 237; and especially Hartwell v. Root, 19 John. R. 345; Jackson v. Shaffer, 11 Id. 513; and Russell v. Bebee, Hemp. R. 704; all of which authorities were cited in the argument of the counsel of the defendant in error. The evidence does not show that the sheriff did not levy the writ before the return day, as it was his duty to do. It does not at all follow that he did not make such levy because he did not receive the money until after the return day. If he made the levy before, he had authority to receive the money after the return day. See Wheaton v. Sexton's lessee, 4 Wheat's R. 503; and Ballard, &c., v. Thomas, &c., 19 Gratt. p. 14; also cited in the said argument. The only return made on the writ, to wit: "Money received in 1861 or 1862," does not show, nor tend to show, that it was not levied before the return day. The sheriff, who was examined as a witness in behalf of his sureties, did not say in his evidence that he did not make such a levy, nor was he asked by them the question "whether he did or not?" Clearly, therefore, according to the rule which has been settled by the case of Mitchell, &c., v. Barratta, &c., 17 Gratt. 445, we cannot say, upon the evidence in this case, that the writ was not levied before the return day thereof. Indeed, without that rule, and upon the authorities before cited, we would have to say the contrary.

If, however, the writ had not, in 143 fact, been actually *levied before the

return day, it certainly ought to have been; and because it ought to have been, and was not, if the debt was thereby lost, would have afforded a good ground for recovering the amount of it, under the amended declaration.

Our opinion, therefore, is against the plaintiff in error on the first assignment of error taken by him. And now let us consider the next—which is:

"2d: Because the money not having been received by the sheriff for about two years after the execution went into his hands, to wit: until the 1st of July 1862, as fixed by the court below, whether levied or not, he then had no authority to receive it. On the 26th day of July 1861, the General Assembly of Virginia, in session in the city of Wheeling, passed an act which went into operation on its passage, entitled 'An act staying the collection of certain debts;' whereby it was enacted, 'that in any case where a levy has been made prior to the passage of this act, the property so levied upon shall be returned to the owner; and the judgment upon which the levy was made shall be a lien upon all the property, both real and personal, of the debtor, and shall have priority over all other judgments as against the personal property of such debtor.' Sess. acts 1861, p. 24. This act operated as a legislative injunction, and put an end to the authority of the sheriff to sell where a levy had been made, and consequently to his right to receive payment in his official character, so as to bind his sureties."

The answer made to this assignment of error in the argument of counsel of the defendant in error is two fold: 1st—That according to the principles before stated and authorities before cited, we must say, upon the evidence, construing it most strongly against the plaintiff in error, that the money was received by the sheriff
144 on *the 1st day of January, 1861, which was before the passage of the act of the Wheeling legislature of the 26th day of July 1861 aforesaid; and that act, therefore, cannot apply to the case. And—2dly: "The acts of the Wheeling legislature had no binding obligation in that part of Virginia which adhered to the Confederate government. The government at Richmond, from 1861 to the spring of 1865, was the government of that portion of Virginia which adhered to it, de facto if not de jure; and the laws passed by the Wheeling legislature had no operation or effect in the county of Culpeper prior to the close of the war in the year 1865." Without expressing any opinion in regard to the latter view, it is sufficient to say, that we concur entirely in the former; and we are, therefore, of opinion against the plaintiff in error on his 2d assignment of error. The next is:

"3d: Because the evidence proved that the relator was not a resident of the county of Culpeper, and no demand was made in said county after the receipt of the money, either by the plaintiff, his attorney at law, or by any other person having a written order, of which the sheriff was informed. See Code of 1860, ch. 187, § 20, p. 775."

Field testified that he was the attorney who brought the suit in which the judgment was obtained, on which the execution aforesaid was issued, and that, after the return day of the execution, he frequently applied to the sheriff, who well knew that he was counsel in the case, for the money, but always without success. He does not think the money had been collected when he called on him, and he never made such a call after the 17th of April 1861, at which time witness left the county to enter the army. This testimony is of itself a sufficient answer to the 3d assignment of error. Field resided in the same county with the
145 sheriff, and was well known *to him to be the plaintiff's attorney in the execution; and the sheriff well knew that he could, at any time, pay the money to the said attorney, who had frequently applied to him for it. To be sure the sheriff himself testified that he did offer to pay the money to Field, as attorney of the plaintiff in the execution, who declined to receive it. But in this conflict of testimony the established rule, before referred to, requires us to credit that which tends to sustain the judgment of the court below. There is other testimony in the case which affords another sufficient answer to the 3d assignment of error. We mean the testimony of Edward B. Hill, the nominal plaintiff in the execution, who testified that about the 1st of September 1862 he received a letter from the relator, authorizing and requesting him to collect for him of the sheriff the proceeds of the execution aforesaid; that accordingly he called on Harris, the sheriff, for the money, who acknowledged that he had received it, but declined to pay it; saying that he could afford to hold it, as he could make more than six per cent. with it, having already made more than $3,000 by speculating in tobacco. Witness informed the sheriff that he was authorized by the relator to call on him for the money, but did not tell him that his authority to do so was in writing. The sheriff made no objection to paying him the money for the want of written authority, nor on any other ground than that already stated; nor did he make any offer to pay it, if a written order should be produced; or make any allusion to a written order. Witness had searched for the letter referred to, but was unable to find it; and supposed it had been destroyed, along with many other of his papers, during the war.

Our opinion is against the plaintiff in error on his 3d assignment of errors. The next is:

"4th—The judgment of the court
146 should have been *for the defendants, on the plea of nul tiel record; because no judgment or writ of fieri facias, such as is set out in the declaration against John S. Barbour, George G. Thompson and James Barbour, was produced; but one against John S. Barbour, jr., George G. Thompson and James Barbour, was."

This assignment of error is based upon the narrow ground, that the omission in the declaration of the two letters "jr.," added to the name of John S. Barbour in the judgment and execution, is a fatal variance between the allegata and probata. We do not think so. "Jr." is no part of the name, but a mere descriptio personæ, and may be rejected as surplusage. It would have done no harm if it had been inserted in the declaration. Utile per inutile non vitiatur. But it was unnecessary to insert it there; as it would have been unnecessary to have inserted any other addition by which John S. Barbour might have been described in the judgment and execution. As for instance, "attorney at law," or "president of a railroad company," or "resident of the county of Culpeper," &c. &c. "Junior is no part of a person's name," 7 Bacon's Abri. p. 8; Bouviser's Am. ed. of Gwyllim's Eng. ed. 1846, and cases cited, viz: Commonwealth v. Perkins, 1 Pick. R. 388; Cobb v. Lucas, 15 Id. 7; Kincaid v. Howe, 10 Mass. R. 203; 7 Johns. R. 549; 2 Caines R. 164; 17 Pick. R. 200; 3 Metc. R. 330. There seems to be some conflict of authority upon the question whether the omission of the designation "jr." annexed to a man's name to a bond or note, would be a material variance in describing such bond or note in a declaration or other pleading; but the preponderance of authority, and reason also, seem to be in favor of its being no variance. See Headley v. Shaw, 39 Illi. R. 354, decided in 1866, in which Mr. Justice Breese, delivering the opinion of the court, said:

147 "The weight of authority *seems to be that this is no variance. 'Jr.' added to a person's name is no part of the name." See also Fleet v. Youngs, 11 Wend. R. 522; The People v. Cook, 14 Barb. R. 259, 299, 300; Prentiss v. Blake &c., 34 Verm. R. 460; Commonwealth v. Parmenter &c., 101 Mass. R. 211.

Our opinion, therefore, is against the plaintiff, on his 4th assignment of errors. The next and last is:

"5th—The judgment of the court was erroneous, in refusing to strike out the plaintiff's general replication to the defendant's 4th plea."

It is a sufficient answer to this assignment of error to say, that no exception was taken in the court below to the action of the court in refusing to strike out the general replication to the 4th plea; and it is too late to take it, for the first time, in this court. But the answer, made by the counsel of the defendant in error, is also a good one. While "the defendant, in any action, may plead as many several matters, whether of law or fact, as he shall think necessary," (Code, ch. 171, § 23,) yet he must plead them in several pleas, and not all, or more than one, in one plea, unless the several matters so pleaded in one plea, be constituent parts of one and the same defence. Duplicity, to that extent, must still be avoided by a defendant in an action; and while the plaintiff in an action cannot make several replies to one plea, yet he can reply severally to each plea. If the defendant include several distinct matters of defence in one plea, he has no right to complain of the plaintiff for replying generally to such plea. If the plaintiff in such case can be said to be guilty of a fault in pleading, it is induced by his adversary, who is guilty of the first fault. Whether, therefore, the 4th plea in this case be double or single, it is no error in the plaintiff to reply to

148 it generally; and *certainly no error of which the defendants in the court below can complain.

Our opinion is, therefore, against the plaintiff in error on his 5th and last assignment of errors.

We think there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

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149 *City of Richmond v. Poe, Trustee.

November Term, 1873, Richmond.

Dedication—Evidence of.*—In a controversy between the city of Richmond and P, the owner of a lot on F street, as to the northern line of said street, P and those under whom he claims having been in possession by actual enclosure, for more than sixty years, and there being no proof of actual dedication by R, the original owner of the land, such dedication cannot be shown by proof of the existence of stones on the corners of the cross streets on the line claimed by the city; it not appearing by whom they were placed there, or that R recognized them as marking the line; nor by maps of the ground laid off by R, copied by order of the city, from an old map in the county court clerk's office, since lost; it not appearing that R had any knowledge of said old map; nor by the records of the proceedings of the Council of the city, reciting an acknowledgment by a previous owner of the lot, that his enclosure encroached upon the street, and giving him permission to continue it for the present.

In June 1871 John P. Poe, trustee for Mrs. Bradley T. Johnson, applied by bill to the judge of the Chancery court of the city of Richmond, for an injunction, to enjoin the city of Richmond from proceeding to widen Franklin street by extending its northern line so as to include a part of the lot held by him as trustee as aforesaid, lying between Jefferson and Madison streets, at the corner of the latter and Franklin street. The ground on which he rested his

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***Dedication—Evidence of.**—See on this point, Skeen v. Lynch, 1 Rob. 186; Harris v. Com., 20 Gratt. 833; Taylor v. Com., 29 Gratt. 780; Colbert v. Shepherd, 89 Va. 401, 16 S. E. Rep. 246; Buntin v. Danville, 93 Va. 200, 24 S. E. Rep. 830; Taylor v. Philippi, 35 W. Va. 554, 14 S. E. Rep. 130; Teass v. St. Albans, 38 W. Va. 1, 17 S. E. Rep. 400; Pierpoint v. Harrisville, 9 W. Va. 219; Wheeling v. Campbell, 12 W. Va. 63, citing the principal case; Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. Rep. 818, 10 Am. St. Rep. 860; City of Richmond v. Stokes, 31 Gratt. 713; Talbott v. R. & D. R. R. Co., 31 Gratt. 685; Norfolk v. Nottingham, 96 Va. 34, 30 S. E. Rep. 444.

claim to enjoin the city, was, that he and those under whom he claimed had been in possession up to the present line of Franklin street, certainly since 1809. That the enclosure of this lot had been where it is now ever since that time, and the deed
150 *from Alexander Stuart to Wm. Price, which bears date 11th day of April 1809, and was executed at that time, though not recorded until June 1815, under which the plaintiff claims, conveyed the lot as one-half acre, "as the same is now enclosed," "it being the same lot on which the said Price now resides."

Notice of the application having been given to the city authorities, an answer was filed for the city. The ground taken by the city was, that Franklin street had been laid out long before the deed of Stuart was executed, and that it was of the uniform width of sixty-five feet four inches, from ninth street opposite the capitol square, to what was the western limits of the city at the date of Stuart's deed; and that such is now its unobstructed width for that distance, except along the three squares from Foushee to Madison streets, as is shown by the oldest maps and surveys of the city, made by its authority and under its direction.

It was further stated, that as appeared by certain proceedings before the council of the city, in the latter part of the year 1845, Charles Palmer and others, who were then the owners of these lots, sent in a petition to the city council, respecting the north line of Franklin street from Foushee street west, in which they admitted they encroached on Franklin street, and that a part of said street was embraced within their enclosures; and praying the council not to require them to take down their enclosures, and withdraw them to the proper line of Franklin street. And the council upon their petition, granted the owners of the lots permission to retain their enclosures undisturbed for the present; and this was accompanied with the resolution, that nothing therein contained "shall be construed into a surrender by the city council of any portion of Franklin street as laid out and defined by the certain corner stones
151 aforesaid, making *the said street in all its parts sixty-five and one-third feet wide."

The controversy in this case relates to Franklin street and a lot lying within what is known as Rutherford's addition to the city. All the land west of first and south of Broad streets, extending south beyond Canal street and west beyond the city limits, was owned by Thomas Rutherford, who laid it off in streets and squares; the squares containing each four half-acre lots. The streets running east and west were extensions of the streets of the city, as Grace, Franklin, Main, &c. The cross streets running south and north, were, beginning from First and running west, named Foushee, Adams, Jefferson and Madison. About 1795 Mr. Rutherford built a house on the lot at the north-east corner of Franklin and Adams street; and he lived in this house until his death in 1851 or 1852.

It was proved by two witnesses, that the plaintiff's enclosure on Franklin street was on the same line that it was sixty years before. It was there when they first knew the lot, and the knowledge of one of them went back to 1810, and the other nearly as long; and a third witness not so old as the others, but who had been in the city and had known the lot ever since he was old enough to notice such things, expressed the opinion that no change had been made in the location of the enclosure on Franklin street since he had known the lot.

The city introduced a plat of Rutherford's addition to the city, made in 1835 by Micajah Bates, the surveyor of the city, copied, as stated on its face, from a map then in the clerk's office of Henrico county court, but now lost, which laid down Franklin street as of the same width of sixty-five feet four inches, from Ninth to Madison streets; but there was no proof, except the necessity of such a map, for his purposes, to
152 connect Mr. Rutherford *with it. There was proof also of stones on Adams and Madison streets, on the line of what the city claimed to be the north line of Franklin. These stones had been in their present position a long time; but it did not appear who placed them there.

The proceedings of the council in 1845, referred to in the answer of the city, were before the court; but the petition of the property owners was not to be found. These proceedings recited the reception of a petition from the property owners, and referred it to a committee. This committee reported, recommending the adoption of certain resolutions, by which the true boundary of Franklin street, as called for by the stones before mentioned, and making it sixty-five and one-third feet wide, was declared; that the petitioners were declared to have admitted their encroachment on Franklin street; and giving them leave to retain their enclosures as they were for the time; but with the proviso stated in the answer. And these resolutions were adopted by the council.

There was no doubt that the north line of Franklin street, if continued straight from ninth to Madison street, would throw into the street a few feet of ground from Foushee to Madison streets.

The cause having been set for hearing, came on to be heard on the 31st of October 1871, when the chancellor—Fitzhugh—delivered his opinion as follows:

This is an application for an injunction to restrain the authorities of the city of Richmond from taking a portion of the lot of the plaintiff, at the corner of Franklin and Madison streets, for public use, as a part of Franklin street, except after proper legal condemnation of the same.

The city has answered the bill, and claims the right to have Franklin street of
153 the uniform width of 65 feet *4 inches; and that it was so laid out and established long prior to the deed under which

the plaintiff claims. That the records showing its establishment have been destroyed, but the oldest map of the city now extant, traces the street to the western limits of the city as of that uniform width. That three stones which are old land marks, show the same thing, and that so much of the plaintiff's lot as is necessary to make Franklin street of the uniform width aforesaid, and which is now embraced within his enclosure and fence, constitutes a part of that street, and to that extent is an encroachment on the street of the city. And that it will appear from certain proceedings before the council of the city in November, 1845, that the owners of lots on the north side of Franklin street in that part of the city, and among others Charles Palmer, who then owned the lot in controversy, sent in a petition to the city council, respecting the north line of Franklin street from Foushee street west, in which they admitted that they encroached on the street, and that part of it was embraced within their enclosures; but praying the council not to require them then to take down their enclosures and withdraw them to the proper line of Franklin street. That the council granted the prayer of the petition and permitted the enclosures to stand as they then were, "for the present;" but with the distinct declaration, that nothing in that permission should "be construed into a surrender by the city council of any portion of Franklin street, as laid out and defined by the corner stones" before referred to, making the said street in all its parts 65⅓ feet wide.

That the said petition has been lost, but its substance and purport can be easily gathered from the proceedings of the council. And the city insists that the present owners of these lots are estopped from denying that 65 feet 4 inches is the true width of Franklin street.

154 *It seems that Thomas Rutherford, in 1794, purchased of Buchanan the parcel of ground now known as Rutherford's addition to Richmond, and afterwards laid it out into lots with squares and streets. It is not known when this was done; but perhaps it was soon after Rutherford built his own house, in which he resided until his death, in the year 1795; and it is probable the lots were laid out about that time. Afterwards Mr. Rutherford conveyed the lot in question to Alexander Stuart, by a deed, the date of which is unknown; and Stuart and wife, by deed dated in 1809, recorded in 1815, conveyed it to William Price for life, with remainder in fee to Sarah Price, his wife. She devised it to Charles Palmer for life, with remainder in fee to William P. Palmer.

Charles Palmer died in 1867, and it then passed to William P. Palmer, who conveyed it in 1869 to Bradley T. Johnson, and he to the plaintiff.

It appears that Franklin street has never been wider at the point opposite this lot than it now is. The enclosure binding on the present line of the street, have been where they now are for more than sixty years; and during that whole period of time the strip of land fronting on Franklin street, now claimed by the city as a part of the street, has been uninterruptedly in the actual occupation and possession of its several owners. It has been enclosed, and the deed from Stuart and wife to Price and wife in 1809, calls for "one half acre lot of ground as the same is now enclosed." And Mr. Drew testifies that the fence stands now where it did sixty years ago. And it is clear, from the testimony, that Franklin street, from Foushee to Madison streets, remained at its present width from at least 1805, and most probably from about 1795, when Mr. Rutherford built his house at the corner of Adams and Franklin streets, until his death, which occurred in 1851 or
155 1852; that is, *for a period of from 50 to 55 years. And during all that time he must have known, not only that Stuart and other parties to whom he had sold lots, had encroached upon the street, if the claim of the city be just, but that he himself was in the occupancy of ground to which the public had a right as a street, and which he had appropriated for that purpose.

I think there can be no question that Franklin street, in its present width at the points above indicated, was dedicated as a street by the owner of the land; for he had opened it and sold lots to third parties abutting upon it; and there have been so many acts of control by the city, and it had been used as a street by the public so long, that the use sufficiently evinced its acceptance by the public. The intention and acts of dedication concurring with the acceptance on the part of the public, made the dedication complete. Washburne on Eas. top p. 188-9, Marg. pp. 139, 140.

But the claim of the city to the strip of ground on the north side of Franklin street, presents a different question.. It is one having reference to the extent of the dedication. Did Thomas Rutherford ever dedicate more land to a public use than is shown by the present boundaries of Franklin street, between the two points in which it is narrower than 65 feet 4 inches? In other words, did he ever dedicate the strip of ground in controversy to a public use?

To constitute a dedication of land to a public use, there must first be an intention to do it on the part of the owner; and this must be unequivocally and satisfactorily proved. The intention may be manifested by writing, by declaration, or by acts. Washburne on Eas., Marg. p. 133, top p. 180. If not in writing, the acts and declarations of the land owner, indicating the intent to dedicate his land to the public
156 use, must be unmistakable *in their purpose, and decisive in their character, to have that effect. Harris' Case, 20 Gratt. 833.

The city, to maintain that there was a dedication of this strip of ground, relies upon some stones which had been set up as landmarks, upon certain maps, all of which

show that Franklin street was of the uniform width of 65 feet 4 inches, and upon admissions claimed to have been made by the owners of this and other lots, where the encroachments are alleged to exist, recognizing the right of the city to a street 65 feet 4 inches wide; and further, that it is shown by a survey of the lot in question, that the plaintiff has half an acre, which is all his deed calls for, after taking off the strip of land in dispute.

1. As to the land marks: Mr. Pleasants speaks of some old stones on the south side of Franklin street at Monroe and Henry streets, and an old stone now standing on the north side of Franklin street and the west side of Madison, (adjacent to the lot in controversy,) 65 feet 4 inches from the south line of Franklin street at that point. It is not known when they were originally placed where they are, nor by whom; but Mr. Pleasants supposes by Thomas Rutherford, as some of his deeds call for stones at the corner of his squares. Mr. Pleasants has only known them since 1845, and he says that at the corner of Madison and Franklin streets was an old one then. But who placed them where they are, whether Rutherford or the city, or whether by the joint action of the two, is now matter of conjecture; there is no proof on the subject. If by Rutherford, or by him and the city, before any conveyance by him to a third party, it was an equivocal act on his part. For though taken by itself it would amount to strong evidence of an intention to dedicate the 65 feet 4 inches as a street; yet when he held on to this strip of land
157 throughout the *whole of his addition from Foushee to Madison street, embracing a part in front of his own house, and afterwards permitted those to whom he sold to do the same thing without objection or complaint for so long a series of years, it would seem to negative the idea of a dedication of that strip of ground as a part of the street. For the simple planting of a land mark, assuming that he did it himself, without a surrender of the land, would not amount to a dedication. On the other hand, if it was planted by Rutherford, after his sale of the lot in question to Stuart, and the latter had enclosed it and held it under Rutherford's deed, it would have been too late for Rutherford to dedicate it as a street; for he could not appropriate Stuart's land to that purpose; and there is no evidence that Stuart or any subsequent owner had any thing to do with placing the stone where it is. But the absence of proof when it was placed where it is, and by whom it was so placed, and especially the absence of proof that Rutherford had any thing to do with it, and the positive proof that it has never formed any part of the street, and that it has been enclosed and held as it now is for upwards of 50 years during Mr. Rutherford's lifetime, without complaint on his part, create a very strong presumption against a dedication by him, and certainly is wanting in that unequivocal, unmistakable and decisive character of proof which it has been seen the law requires to establish a dedication.

2. As to the maps. It seems from the testimony of Mr. Pleasants, that a copy of a map of Rutherford's addition was in the city engineer's office, purporting to have been made by Micajah Bates, city surveyor, in November 1842, from a copy on file in the clerk's office of Henrico county court. Mr. Pleasants never saw the original. It is not to be found in the regular book of records of plats. There is no evidence
158 of any sort that *it was ever ordered to be recorded. Pleasants thinks it must have been filed loose and has been lost. There is no evidence, either, when or by whom it was filed, or that Rutherford had any thing to do with it. Bates certifies his copy to be "a copy of a plat of Rutherford's addition to the city of Richmond, taken from a copy filed in the office of the clerk of Henrico county court."

If the paper filed with Mr. Pleasants' deposition be a true copy of the original, the presumption is that the paper from which Bates made his copy was itself made long after Rutherford's addition had been laid out; for, among other things of subsequent date, it has reference to Gwathmey's lot, and the deed to him is dated in July 1817. Mr. Pleasants, however, suggests that Bates' copy may have been made for a specific purpose. See his certificate at the bottom of the map. And it may be that these subsequent matters found on Bates' copy were not in the original, and they may have been inserted on Bates' copy after it was made. But this is all conjecture now; for Mr. Pleasants says he never saw the original, and it is lost and cannot be produced. It is claimed for the city, in argument, that Bates' map is a copy of an ancient document too old to be proved by living memory, but found in its proper place of deposit; and that it shows Franklin street to be 65 feet 4 inches wide, and is entitled to great weight as one of the evidences of the intention of Rutherford to dedicate to public use a street of that width. But in order to have effect as evidence at all, it must be cotemporaneous with the transaction to which it relates, must be genuine, and must come from the proper custody. See 1 Greenl. Ev., § 142. Now, in view of the remarks just made, there is room for grave doubt as to whether the map in the clerk's office was cotemporaneous with the laying out of Rutherford's plan.

And also whether it came from the
159 proper place of deposit. *If it had been recorded, the clerk's office would have been the proper place of deposit for the record, but it was not; and therefore the proper custodian of the loose paper, if it was an authentic and genuine original map, would have been Mr. Rutherford. But there is no evidence that he ever saw it. He lived until 1851-'52, a date so recent, that there are doubtless many living witnesses of transactions with him in regard to property in his addition, who could testify to his use of this map or plan, or to his knowl-

edge of its existence, if such had been the fact. And these doubts are strengthened by the fact to which Mr. Pleasants testifies, that in the deeds made by Mr. Rutherford for property in his addition, the calls are generally for the streets, occasionally for stones at the corners of the squares, but never in any instance for a map or plan.

From the testimony, I have no doubt that Bates' copy and that he found in the clerk's office, were generally accurate maps of Rutherford's addition, with the exception of the strip of ground in controversy. But there is great doubt whether the paper in the clerk's office was made from a survey of the ground, after it had been staked off and partially improved, or whether it was the original plan or paper from which the ground itself was subsequently laid out as it now is; too much doubt, to authorize a court to dispossess a man of his property of which he and those under whom he claims have been in actual adverse possession for over 60 years. On this subject see Missouri v. Kentucky, 11 Wall. U. S. R. 395, 402-3, 410.

It seems there have been three maps of the city made in which Rutherford's addition is embraced; one by Young in 1809, or about that time; another by Bates in 1835, and a third by Pleasants in 1845; and 160 in all of *them Franklin street, through Rutherford's addition, is of the uniform width of 65 feet 4 inches.

But these maps are not entitled to much weight as evidences of Rutherford's intention to dedicate a street of that width, when they stand confronted by the uninterrupted adverse possession of those under whom the plaintiff claims, and of Mr. Rutherford himself, from a period anterior to the date of the oldest map, and when the city itself acquiesced quietly in their possession, so far as the record shows, without objection or claim until 1845; that is, for over 35 years. In Poole v. Huskinson, 11 Mees. & W. R. 827, cited in Harris' Case, it is said a single act of interruption by the owner is of much more weight upon the question of intention than many acts of enjoyment on the part of the public; the use without the intention to dedicate it as a public way, not being a dedication. If a single act of interruption will produce such an effect, the continued possession by the owner of the land, and the absence of all use or enjoyment by the public, should be absolutely conclusive on the subject. It is upon this ground of want of intention to dedicate it to the public, that no man ordinarily loses his right to enclose a strip of land lying between his buildings and the highway, though suffered to remain open for ever so long a period of years. Wash. on Eas., top p. 184, Marg. 135.

But in this case the ground was enclosed, and there was adverse possession for over 35 years, acquiesced in by the city; and this would have destroyed the right of the city, if it ever existed. Idem, p. 642, Marg. p. 553, citing Yeakle v. Nace, 2 Whart. R. 123.

For these reasons I am of opinion that neither the land marks, nor the maps, nor all combined, furnish ground up to the year 1845, upon which the court can dispossess the plaintiff of his ground, which it will in effect do if the injunction be refused.

161 *3. The consideration of the question whether any acts or admissions have been done or made which during the year 1845 or since give to the city a title to the strip of land in question as a street, brings me to the consideration of the third point.

Mr. Pleasants says that he used the stone at the corner of Madison and Franklin streets as giving the line for the curbstone on Franklin street in 1845; and while he was engaged in giving the curb line on the north side of that street, between Adams and Madison streets, in 1845, the property-holders between these points discovered that there would be a very narrow footway, if any, between their enclosures and the curb; and upon their application the council directed the curb to be placed where it now is.

This seems to have been the cause which induced the property-holders between these points to present a memorial to the city council on the subject.

The memorial is lost, and the only evidence of its contents is a recital contained in an order of council of Nov. 10, 1845 referring it to the commissioners of streets to examine and report. That recital represents it as a memorial "from Charles Palmer and others, owners of lots on Franklin street west of Foushee street, requesting that the existing width of the said street may be established as its legal width, and the enclosures and trees on the north side thereof permitted to remain undisturbed in the improvement of said street."

On the 13th November 1845, the commissioners of streets made their report, and recommended the adoption of the following preamble and resolution:

The committee to whom was referred from the city council, the memorial of Charles Palmer and others respecting the north line of Franklin street, from Foushee street west, having duly considered the same, 162 unanimously *adopted the following preamble and resolution, which they direct to be reported to the council, and recommend to its adoption:

Whereas, the owners of lots on the north side of Franklin street, from Foushee street westward, acknowledge the encroachment on the street by fences and trees, as indicated by the corner stones there fixed, as the true line and bounds of the streets and lots; and whereas, the removal of the same at this time would materially interfere with the convenience and comfort of the owners, without present adequate advantage to the city at large, and also to preserve the uniformity of the line of enclosures; therefore:

Resolved, That in laying down the line of curb stones on the north line of Franklin street, the same shall be continued from the present curb as fixed on the northeast of Franklin and Foushee streets, a straight

line to a point fourteen feet six inches, south of the corner-stone on the north-west intersection of Franklin and Adams streets; and thence a straight line to a point twenty feet six inches south of the corner-stone planted at the north-east corner of Franklin and Madison streets; but nothing contained in this resolution shall be construed into a surrender by the city council, of any portion of Franklin street, as laid out and defined by the corner-stones aforesaid, making the said street in all its parts 65⅓ feet wide:

And on the 17th of November, 1845, the preamble and resolutions were adopted by the council.

To enable the city to acquire a title to the use of the strip of land in question, as a part of the street, it is incumbent upon it to show that the right was acquired either by condemnation on the part of the city, or grant or dedication on the part of the owners and acceptance by the city, or by contract between the owners and the city.

163 *In the view I have taken of this case it has been seen, that from the evidence now in the record, no right to it had been acquired by the city up to 1845; and the question remains to be determined whether, upon the facts just stated, the city had acquired such a right during or since that year, in either of the modes just announced.

It is not pretended that the land was ever condemned, and there has been no express grant or contract in writing between the parties, unless the memorial and the preamble and resolution adopted by the city council can be construed to be such a contract, or the admission of a previous contract or dedication.

It will be observed from the recital made by the city council, of the memorial, that there was no acknowledgment in it of any pre-existing right in the city to this ground, nor to any willingness on their part to grant or dedicate it to the city; on the contrary, they evinced a desire to retain the undisturbed possession of their property as it was then enclosed; for their prayer was, that the then existing width of the street might be established as its legal width, and the enclosures and trees permitted to remain undisturbed in the improvement of the street.

They did not wish to have the curb-stone so placed as to leave them no sidewalk or footway or one too narrow, or that the city should exercise its undoubted right to condemn so much of their ground as would be sufficient for a footway. Mr. Pleasants says Mr. Samuel Taylor, who owned a part of the ground, told him he would make no claim to that part within his enclosure which the city claimed, when the city required him to move his enclosure back. But this admission is not binding on the other property-holders, nor upon him-

164 self, if made *without full knowledge of the facts affecting his rights in the premises.

The sole ground upon which the city places its right, so far as it is claimed under the proceedings of the council in 1845, is upon the report of the street commissioners stating that the owners of lots on the north side of Franklin street westward from Foushee street, acknowledged the encroachment on the street by fences and trees, as is indicated by the corner-stones there fixed as the true lines and bounds of the streets and lots. And that the granting of the prayer of the memorial should not be construed into a surrender of any portion of the street as laid out and defined by the corner-stones making the street 65⅓ feet wide in all its parts.

This is the only evidence of such an acknowledgment. Is this sufficient to fix a title in the city?

It is argued on behalf of the city, that the books which contain the official proceedings of corporations and matters respecting their property, if the public at large is concerned with it, are admissible as evidence of municipal acts; and the counsel of the city cites 1 Greanl. Ev. sects. 484–493.

This is true as to municipal acts of a public nature relating only to persons under its government; but it is not applicable to strangers, nor I suppose, to corporate acts affecting private rights. See Wilcock on Municipal Cor., Marg. p. 343. Corporation books containing an account of the privileges or public transactions of the body are evidence in a suit between the several members. But they are not evidence in favor of a corporation to support a claim of right against a stranger; as where a right to certain tolls is claimed by a corporation, entries in the corporation books respecting payments made by individuals in former times are not admissible on the

165 *part of the corporation, against a party who contests the right to tolls; for such entries relating to the private interests of the corporation and being of a private nature cannot be evidence for the party to whom the books belong. 1 Phil. Ev. 422.

Municipal corporations in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly. Bailey v. Mayor of New York, 3 Hill's R. 54. Now in this case the acknowledgment reported to have been made by the owners of the lots was their private act, and the report of the acknowledgment and recording of the same on the corporation books did not divest it of that character, or stamp it as a municipal act of such a public character as to make it evidence in favor of the corporation.

The corporation was dealing with persons in relation to land in their possession. If it had no title and wished to acquire one by private contract it was just as necessary for the corporation to have some writing as it was for an individual. And on the other hand, if it set up a claim which they acknowledged, it was not more in the power of the corporation to make the acknowledgment evidence by recording it on their official journal of proceedings than a private individual could. For neither has it in their

power, as to such matters, to manufacture evidence in their own behalf; which would be the case if such a record by a corporation could be used for that purpose. And although the high character of the gentlemen composing that commission at that time precludes the idea of any unfair dealing in the present case, yet that does not affect the legal principle. And in my opinion it is as incumbent on the corporation to prove such an acknowledgment independently of their own books, as it is on a private individual.

166 *Again, the property-holders are said to have acknowledged that they encroached on the street. Concede ex gratia, that they did make such an acknowledgment. According to the view I have taken of this case there never was an encroachment, and the acknowledgment being made in ignorance of their rights would not have given rise to an estoppel. See Smith's Leading C. top 753, 757, edition of 1866. Where there was a transaction between two co-terminous neighbors who differed about their boundaries, and there was no promise to convey, nor any contract between them, but merely an acknowledgment by one of them of the right of the other to the land, he will not be bound by such acknowledgment if afterwards he finds himself mistaken. 2 Lomax Dig. Marg. p. 68; Stuart v. Luddington, 1 Rand. 403. As to the quantity conveyed, I think the conveyance to Stuart and the subsequent conveyances were in gross for the quantity within the enclosures and not a conveyance by the acre.

Upon the best consideration of the whole case, I am of opinion that the injunction should be awarded.

The landmarks, the maps, and the proceedings before the council combined, leave so much to conjecture, and the possession of the plaintiff, and those under whom he claims, has been so long, that I do not think a court would be justified in refusing the injunction. And that so much is left to conjecture, is owing, perhaps, to a want of proper diligence on the part of the city authorities in bygone years in protecting its rights, if it ever had any, to this ground. And now, although it may be the misfortune rather than the fault of the present generation, that the long lapse of years has deprived it of full evidence in regard to these transactions, during which a former generation might have established whatever rights the city had, and did not, it is

167 a misfortune *to which the plaintiff in no way contributed, and the consequences should not be visited on his head.

As to the question of jurisdiction, see Washburne 668, Marg. p. 575-6; 2 Story Eq., sect. 929; Kender v. Jones, 17 Ves. R. 110.

As to security in bond, see Lomax v. Picott, 2 Rand. 266, and sect. 10 Code, ch. 179, p. 737.

In pursuance of this opinion the court made a decree that the city be perpetually enjoined and restrained from taking, or otherwise interfering with, the property of the complainant, in the bill mentioned, for the purpose of widening Franklin street, unless, and until, the defendant, the city, shall acquire the legal right to do so in the manner prescribed by law. From this decree the City of Richmond applied to this court for an appeal; which was allowed.

Page, for the appellant.

Ropalt, for the appellee.

Moncure P. delivered the opinion of the court.

This is an appeal from a decree of the Chancery Court of the city of Richmond rendered on the 31st day of October 1871, perpetually enjoining the said city from taking, or otherwise interfering with, the property of the complainant in the bill mentioned, for the purpose of widening Franklin street; unless, and until, the defendant shall acquire the legal right to do so in the mode prescribed by law.

The said property consists of a narrow strip of land lying on the north side of Franklin street, between Jefferson and Madison streets, inside of the complainant's enclosure; and which has been within the enclosure of the complainant, and of those under whom he claims, continually for

168 more than sixty years last *past; of which the city has never had the possession or enjoyment, for any purpose, for a single instant; but which it claims to be entitled to as a part of Franklin street, under an alleged dedication thereof, made more than seventy years ago, by Thomas Rutherford, in his addition to the city of Richmond. The learned chancellor who decided the cause in the court below, delivered at the time a very able opinion, which is referred to in the decree appealed from, and thereby made a part of the record in the cause. That opinion covers the whole case, and strongly presents the principles on which it rests; and as we entirely concur in it, we deem it sufficient to express such concurrence, without adding anything to what is there said, or saying substantially the same thing in different words.

Therefore, for the reasons assigned by the chancellor as aforesaid, we are of opinion that there is no error in the said decree and that it ought to be affirmed.

Decree affirmed.

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169 *Wise Bro., &c., Agents, v. Rogers, 2d Aud.

Maury & Co. v. Rogers, 2d Aud.

November Term, 1873, Richmond.

1. **Repeal of Coupon Bond Statute—Constitutionality of.***—The act of March 7, 1872, which repeals the act of March 30th, 1871, so far as it authorizes the issue of coupon bonds with coupons attached, receivable for taxes and other dues of the State, is constitutional so far as it applies to bonds not presented to the 2d auditor before the passage of the repealing act.

***Repeal of Coupon Bond Statute.**—See on this point,

The case is stated in the opinion of the court.

Rob. Howard and G. Wise, for the petitioners.

The Attorney General, for the Commonwealth.

Christian, J. delivered the opinion of the court.

These cases involving precisely the same question were heard together. They are before the Court on applications made by the parties respectively, for writs of mandamus to compel the second auditor to fund certain bonds and interest thereon accrued of the State of Virginia, according to the provisions of the act of the General Assembly approved March 30th, 1871, in coupon bonds payable to bearer with coupons receivable at and after maturity for all taxes, debts, dues and demands due the State, as to two-thirds of the principal and interest, &c.

In each case this Court awarded a rule upon the second Auditor to show cause why said writs of mandamus should not issue.

To this rule the second Auditor answered, "that there is no law authorizing re-
170 spondent to fund any of the said *bonds in bonds with coupons receivable for taxes; the act of 1871 having been repealed before the presentation to respondent of the bonds mentioned in said petitions. He is willing and has been ready and willing to fund said bonds and coupons into bonds with coupons annexed, but without the receivability clause annexed thereto; which class of bonds the said parties can get by calling at his office and filing the original bonds and coupons as is provided by the act of March 30th, 1871."

The cases are submitted upon the rules and answer of the Auditor; which is the same in both cases.

The records show that the petitioners, Wise Bros., presented their bonds to the 2nd Auditor on the 22nd March 1873, and the petitioners Maury & Co., on the 24th March, 1873.

On the 7th March 1872 the Legislature passed the following act:

1. Be it enacted by the General Assembly of Virginia, that hereafter it shall not be lawful for the officers charged with the collection of taxes, or other demands of the State, due now or that shall hereafter become due, to receive in payment thereof, anything else than gold or silver coin, United States treasury notes or notes of the National banks of the United States.

2. All acts and parts of acts inconsistent with this act are hereby repealed.

3. This act shall be in force from and after its passage.

This act is a direct and unconditional repeal of so much of the second section of the act approved March 30th, 1871, entitled "an act to provide for the funding and payment of the public debt" as declares that "the coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues and demands, due the State, which shall be so expressed on their face."

171 *The act must therefore now be read as if these words were stricken out. And while it is true, as decided by this Court in Antoni v. Wright, Sheriff, 22d 833 Gratt., that those who had come forward and funded their bonds according to the provisions of the act of March 30th, 1871, could not be affected by the act of March 7th, 1872, and that as to them the act was unconstitutional and void, because it impaired the obligation of the contract which the State had entered into with all its citizens, who had accepted the provisions of the former act before the passage of the latter; it is equally clear, that the act of March 7th, 1872, is valid and binding upon all those who did not avail themselves of the provisions of the funding bill, before the passage of that act. The Legislature had the unquestioned right to amend, modify or repeal the act of March 30th, 1871; and those who like the petitioners, delayed the presentation of their bonds until after the passage of the act March 7th, 1872, must be held bound by the provisions of that act.

The court is therefore of opinion that the second auditor was right in the opinion, that "he had no authority under existing laws, to fund the stock referred to in the manner proposed: to wit, into coupon bonds with coupons attached receivable for taxes &c;" and that the rules awarded against him having been fully answered, must be dismissed.

Rules dismissed.

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172 *Meredith v. Rogers, 2d Aud.

Terrell v. Same.

Yates v. Same.

Aglionby v. Same.

November Term, 1873. Richmond.

1. **Bonds of 1862.**—The obligations created in the name of the State of Virginia, by the General Assembly which sat in Richmond, at its session of 1861-62, are embraced by article 10, § 10, of the constitution of Virginia; which forbids that any provision shall be made for their payment.

2. **Same—Provision for Payment—Constitutionality of.**—In 1862 the General Assembly passed an act which authorized the issue of $200,000 of State bonds to the James River and Kanawha Company. These bonds were received by the company, and sold during the war to third persons. They are not embraced in the act of March 30th, 1871, which authorizes the investing of two-thirds of the amount of bonds of

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Paulsen v. Rogers, 32 Gratt. 654. See also, Clarke v. Tyler, 30 Gratt. 134, and *note*, and Williamson v. Massey, 33 Gratt. 237, and *note*. See, citing the principal case, Antoni v. Greenhow, 2 Sup. Ct. Rep. 92, 107 U. S. 769; Poindexter v. Greenhow, 5 Sup. Ct. Rep. 907, 114 U. S. 270; Royall v. State of Va., 6 Sup. Ct. Rep. 513, 116 U. S. 572; McGahey v. State of Va., 10 Sup. Ct. Rep. 972, 135 U. S. 662; McCullough v. Com., 19 Sup. Ct. Rep. 135, 172 U. S. 102.

the State, in coupon bonds with coupons attached, receivable for taxes and other dues to the State.

These are applications to this court by Meredith, Terrell, Yates and Aglionby for a mandamus to Asa Rogers, the second auditor of the State of Virginia, to compel him to fund certain certificates of State stock held by them respectively. Upon the filing of the petitions, an order was made in each case, requiring the second auditor to show cause why a mandamus should not be awarded the petitioner, to command him to fund, in the petitioner's name, the said certificates of stock, and the interest due thereon, according to the provisions of the act of March 30th, 1871.

Rogers made his response to the rule.
173 *The facts are stated by Judge Anderson, in his opinion.

Meredith and Cocke, for the petitioners.

The Attorney General, for the Commonwealth.

Anderson J. delivered the opinion of the court.

These causes all rest upon the same ground, and involve the same question. Each of them is a petition for a mandamus, to compel the second auditor to fund, in the name of the petitioner, certain certificates of State stock, according to the act of 30th of March 1871. That act authorizes the funding of two-thirds the amount of "any of the bonds, stocks, or interest certificates, heretofore issued by this State, which are recognized by its constitution and laws as legal, except the 5 per centum dollar bonds, and what are known as sterling bonds," &c. The second auditor in his answer to the several petitions of the plaintiffs, avers that the said bonds or certificates of indebtedness, claimed by the plaintiffs respectively, have not been recognized by the constitution as legal, and are therefore not authorized by the act aforesaid to be funded. The provision in the constitution (Art. 10 § 10,) is, "No appropriation shall ever be made for the payment of any debt or obligation created in the name of the State of Virginia, by the pretended and usurped State authorities assembled in Richmond during the war." It appears from a certificate of the second auditor, that the stock was issued to the James River and Kanawha Company, under the second section of an act of the legislature of Virginia, passed March 18th, 1862; and we think that a mistake in the date of the act in its recital in the certificates of stock, is a clerical error, which may be corrected by the records of the office from which they issued. It is further shown
174 that *the certificates of stock claimed by the plaintiffs, Francis Yates, Charles Aglionby, and Julia Terrell, were transferred by said James River and Kanawha Company to R. H. Maury & Co., October 30th, 1862; by them to J. H. Strider, November 1st, 1862, and by him to the said parties respectively, January 2d, 1863; and that the certificate of stock claimed by Mrs. Mary L. Meredith, was transferred by the said James River and Kanawha Company to Wm. M. Sutton & Co., January 7th, 1864, and by them to Mrs. Mary L. Meredith, January 21st, 1864. It thus appears that the several certificates of indebtedness, claimed by the plaintiffs respectively, are parts and parcels of liabilities assumed by the legislature during the war, and were created by an act of the legislature of 1862.

It might be questioned whether the legislature which passed the act aforesaid, comes within the terms of description used in the constitution, "pretended and usurped State authorities assembled in Richmond during the war." Though this court might be ever so clearly of opinion, that the legislature of 1862 does not answer the description of a pretended and usurped authority, yet they cannot doubt, that within the contemplation of the framers of the constitution, it falls within that description; and that said clause of the constitution, was designed to invalidate every obligation on the part of the State for the payment of money created by act of the legislature during the war.

Then the question would arise, whether such provision of the State constitution is consistent with Article 1, sec. x, clause 1, of the constitution of the United States. But that question does not arise in these causes. The only question upon which they turn, is, whether the claims sought to be funded by these proceedings, are embraced by the act of March 30th, 1871; and if
175 they *are not recognized by the constitution and laws, (as we have seen they are not,) whether their repudiation by the constitution is valid or not, no provision is made by the act of March 30th, 1871, nor authority given to the auditor, for funding them. Therefore the 2d auditor, in declining to fund them, acted strictly within the line of his duty; and the mandamus must be refused in each case.

Mandamus denied.

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176 *Crawford & als. v. Turk, Sheriff.

January Term, 1874, Richmond.

1. **Action against Sheriff for Default of Deputy.**—In an action by an execution creditor against a high sheriff, for the failure of his deputy to pay over money made on the execution, the deputy is present at the trial and examined as a witness, but there is a verdict and judgment for the plaintiff. In a subsequent action by the high sheriff against the deputy and his sureties, on their bond with condition to indemnify the high sheriff from all loss and damages from the conduct of the deputy in said office, the judgment against the high sheriff, in the absence of fraud and collusion, is conclusive evidence of the default of the deputy against not only the deputy, but also his sureties.
2. **Same—Judgment—When Conclusive against Deputy.***—Though the declaration in the action by the

***Judgment against Sheriff—When Conclusive against Deputy.**—See Poling v. Maddox, 41 W. Va. 779, 24 S. E.

high sheriff does not allege that the deputy was requested to defend the suit against the high sheriff or had an opportunity of doing so, or had notice thereof, his presence at the trial and being active in the defence may be proved by oral testimony.

In May 1872, Rudolph Turk, late sheriff of Augusta county, instituted an action of debt in the Circuit court of said county, against J. Crawford, J. Givens Fulton and John Seawright, upon a bond executed by them to him, with the condition—that whereas the above bound J. Crawford hath been appointed and admitted as one of the deputies in the office of sheriff of Augusta county, for the term beginning on the 1st day of January, 1859: Now if the said J. Crawford, shall in all things, well and truly and faithfully discharge the duties of the said office of deputy sheriff (during his continuance therein), and shall, in all respects indemnify and save harmless the said Rudolph Turk, and all other per-
177 sons, from all *loss and damages in any wise arising from the conduct of the said J. Crawford in said office, then the above obligation to be void; otherwise it shall remain in full force.

The breach of the condition assigned was, that Crawford had collected the amount of an execution, and had failed to pay it over, and that the plaintiff in the execution had sued Turk and his sureties for this failure to pay by Crawford, and had recovered a judgment against them for the penalty of his bond to be discharged by the payment of $571.30, with interest from the 6th of April 1861, and costs.

The defendants pleaded "conditions performed;" and at the June term the parties waived a jury, and submitted the whole matter of law and fact to the decision of the court.

On the trial of the cause the plaintiff, to sustain his action, offered in evidence the record of the suit by the commonwealth for Kyle, the plaintiff in the execution against himself and his sureties, in which judgment had been recovered against them. To this record as evidence of the fact that a judgment had been rendered against Turk as late high sheriff of Augusta county for the alleged default of Crawford, as one of his deputies, the defendants did not object; but they objected to it as evidence conclusive upon Crawford and the other defendants in this action, and as estopping them from enquiring into the facts determined by it; because the declaration does not aver that Crawford was requested to defend the suit, the record of which is in question, or had an opportunity of doing so, or even had notice of its existence, or that from any cause the proceedings in said cause were in fact conclusive upon him. But the court being of opinion, that it was competent for the plaintiff, Turk, to show by parol testimony, that Crawford so participated in the management and trial of said
178 *suit against Turk and his sureties, or had such notice of its existence, as to make the judgment binding and conclusive upon him, admitted the record. And then the plaintiff introduced a witness, who testified that Crawford was present in court when the said suit was tried; was examined as a witness therein, and seemed to be the person manifesting the most interest in its progress and results.

To the introduction of said record and of the parol testimony for the purpose of showing by the record and parol evidence combined, that the record was conclusive upon Crawford and his co-defendants in this suit, the defendants excepted.

In the progress of the trial the defendants offered to prove by another of the deputies of the plaintiff, that the execution was not levied on the property of the defendant in the execution, as stated in the plaintiff's declaration. But the court being of opinion, that the record mentioned in the first bill of exceptions when taken in connection with the parol testimony introduced by the plaintiff, was conclusive upon the defendant Crawford, and that he was therefore estopped from denying the levy of said execution, refused to allow the defendants to introduce testimony on this point. And the defendants again excepted.

The court ascertained the plaintiff's damages at $833.64, with interest on $571.30, part thereof, from the 6th of April 1861 till paid; and there was a judgment accordingly. And thereupon the defendants applied to this court for a supersedeas; which was allowed.

Elder and T. J. Michie, for the appellants.

H. W. Sheffey, and Bumgardner, and Baldwin and Cochran, for the appellee.

179 *Moncure, P. This is an action of debt, brought by a sheriff against his deputy and the sureties of the deputy, on the official bond of the deputy, to recover the amount of a judgment rendered against the sheriff for the default of the deputy, in not duly accounting for money made by the latter under execution. The only question presented by the record is, whether the judgment rendered against the sheriff in such a case, the deputy having attended the trial and made full defence to the action, is binding and conclusive upon him and his sureties, in the action of the sheriff against them?

That it is binding and conclusive upon the deputy himself is certainly true, according to the best settled principles of the law. That it is at least prima facie evidence against his sureties is also true. But whether it is conclusive evidence against them, is a question which we now have to solve.

Why is it not also conclusive against them? The sheriff is presumed to know

Rep. 999, and Carr v. Mead's Ex'x, 77 Va. 160, citing the principal case. See also, McDaniel v. Brown's Ex'or, 8 Leigh 218; Weaver v. Skinker, 4 Gratt. 160; Scott v. Tankersley, 10 Leigh 581; Allebaugh v. Coakley, 75 Va. 628. See as to conclusiveness of judgment in general, Lancaster v. Wilson, 27 Gratt. 624, and *note*.

nothing, and generally, in fact, does know nothing, of the acts and defaults of his deputy, in the execution of the office of such deputy, and the sureties of the deputy are equally ignorant of such acts and defaults. The only person who is presumed to know anything about them is the deputy himself, who, of course, knows all about them. He is primarily liable for them, and is bound to indemnify against all loss and damage arising from them, not only his own sureties, but the sheriff also. When, therefore, an action is brought against the sheriff to recover damages arising from any of these acts and defaults, the sheriff has a right, and it is an act of prudent precaution on his part, to throw the burden and responsibility of defending the action upon the deputy, whose action it, in effect, is. It is due both to the deputy and his sureties that this should be done. There would be no 180 reason and no propriety *in throwing this burden on the sureties, who have not the necessary information to enable them to bear it. They have no more information on the subject than the sheriff has, if so much. They have no right to require the sheriff to do more than to notify the deputy to defend the action, and having done that, the sheriff may leave the defence of the action to the deputy; and may look to the deputy and his sureties for full and complete indemnity against any judgment which may be recovered in the action, and against the costs of defending it. We have seen that this is certainly the case in regard to the deputy. Why is it not also the case in regard to his sureties? They have voluntarily placed themselves in his shoes. They have become sponsors for him; have expressly undertaken that he will faithfully perform the duties of his office, and will well and truly indemnify the sheriff against all loss and damage arising from the acts and defaults of the deputy. When, therefore, his default is established, in a judgment against the sheriff rendered in an action defended by the deputy, why should not the judgment be conclusive against the sureties of the deputy, as it certainly is against the deputy himself? According to the true intent and meaning of the bond, it binds the sureties as well as the deputy, to pay such a judgment in exoneration of the sheriff. Without doing so, the deputy will not in all respects indemnify and save harmless the sheriff from all loss and damages in any wise arising from the conduct of the deputy in his said office, for which he and his sureties expressly bound themselves, jointly and severally, to the sheriff. Suppose the condition of the bond had been that the deputy and his sureties would pay all judgments recovered against the sheriff for the deputy's default during his continuance in office; and suppose that a judgment had been recovered in an 181 action against *the sheriff for such a default, which action was defended by the deputy, would not the sureties, as well as the deputy, have been conclusively bound by such a judgment? Would it not have been included in the very terms of the condition? Could it be said that there was no privity of contract between them and the sheriff in such a case? Upon the same principles, and for the same reason, I think the sureties are conclusively bound by the judgment in this case. If there had been any fraud or collusion between the sheriff and his deputy in the defence of the action against the sheriff, the case would have been different, and the sureties would not have been bound by the judgment. But it is not pretended that there was any such fraud or collusion, and in fact there was none. The defence appears to have been bona fide, and the judgment was recovered against the sheriff in invitum, both as to him and the deputy.

But the cases of Munford &c., v. Overseers of the Poor of Nottoway, 2 Rand. 313; and Jacobs v. Hill &c., 2 Leigh, 393, are relied on by the learned counsel for the plaintiffs in error, to show that the judgment was only prima facie and not conclusive evidence against the sureties. I will now enquire whether they or either of them can have any such effect.

And first, as to the case of Munford &c. v. Overseers of the Poor of Nottoway:

In that case it was held that a judgment against a principal in a bond is not conclusive evidence against his sureties. It was an action of debt brought in the name of the Governor of Virginia, for the benefit of the overseers of the poor of Nottoway county, against Munford and others, on a bond given by said Munford for the faithful discharge of his duties as sheriff, with the other defendants as his sureties. The only question in the case was, whether a judgment which had been recovered 182 *by the overseers against the sheriff as collector of the poor rates of the county, was conclusive evidence that the sheriff had been appointed to collect them, and precluded and estopped the sureties from giving any evidence going to contradict that fact. It was admitted that the judgment was conclusive of that fact against the sheriff, or rather would have been conclusive of it in a separate action brought against him; but whether it was conclusive in an action against the sureties, or even in an action brought against the sheriff and his sureties jointly, was the question. "The question how far sureties," says Judge Green in delivering his opinion in the case, "are bound by a judgment or other evidence against their principal, which estops or concludes him, has never, as far as I am informed, been settled in this court, except in the case of Baker v. Preston and others, Gilm. 235, decided in a special court. In that case it was decided that the treasury books kept by Preston were conclusive evidence against him, and estopped him from giving any evidence to contradict them, and that his sureties were, in like manner, estopped and concluded. The court argued that if a judgment against the principal would conclude his sureties, so ought the evidence on which such judgment is rendered to

conclude them." But Judge Green proceeded to show that the cases relied on by the special court did not sustain it; and after reviewing the authorities on the subject, he concludes: "I think, therefore, that the question is still open, whether a judgment against the principal is conclusive evidence against the sureties or not." He then proceeds to give his views upon the question thus: "The general rule is that verdicts and judgments bind conclusively parties and privies; because privies in blood, in estate, and in law, claim under the person against whom the judgment is rendered; and they claiming his rights, are,
183 *of course, bound as he is. But as to all others, they are not conclusively binding; because it is unjust to bind a party by any proceeding in which he had no opportunity of making a defence, of offering evidence, of cross examining witnesses, or of appealing, if he was dissatisfied with the judgment; and this is called by the court in Bourke v. Granberry, 'a golden rule,' Gilm. 16, 25. Sureties and joint contractors do not claim to any purpose under their principal, or under each other." "There are cases," the Judge then proceeds to say, "in which those who are not parties to the suit, and do not claim under either of the parties, may be bound by the judgment, as in the cases of contracts of indemnity, and in the nature of contracts of indemnity, and in those cases in which a person, although not in form a party to the suit, is bound to assist in the prosecution or defence, and either does so in fact, or, having notice of the pendency of the suit, fails to do so. But these cases do not come within the principle or reason of the general rule aforesaid; and the case of principal and surety, so far as it relates to the effect upon the sureties, of a judgment against the principal, does not come within the reason of this latter class of cases, but within the general rule."

Now the case we have under consideration falls under the latter class, and not under the general rule referred to by Judge Green; and what he says tends, therefore, to sustain the view that the judgment in this case was conclusive against the sureties as well as against the deputy. Their bond is a bond of indemnity within the meaning of the class of cases referred to, and the deputy was a person, in the meaning of those cases, who, although not in form a party to the action against the sheriff, was bound to assist in defence of the same and did so in fact.

184 *Secondly, as to the case of Jacobs v. Hill &c.:

In that case a motion was made against a sheriff for default of his deputy, upon which the sheriff with the assent of the deputy, but without the knowledge of his sureties, confesses judgment: Held, the record of this judgment is admissible evidence against the deputy's sureties, upon a motion by the sheriff against the deputy and his sureties. There the proceeding was upon the official bond of a deputy sheriff which was to some extent an indemnifying bond, and somewhat though not precisely like the bond in this case. It was not necessary to decide, and was not decided in that case, that the judgment against the sheriff was not conclusive evidence against the sureties of the deputy, but it was sufficient to decide, as it was decided, that the said judgment was prima facie evidence against them. The remark of Judge Carr in delivering the opinion of the court, that "this, we think was ample evidence of the fact, and charged his sureties, unless disproved by them," was extra-judicial as to the concluding words, "unless disproved by them," and seems in that respect to have been made without adverting to the distinction noticed by Judge Green, as before mentioned. 2 Rand. 318. Judge Carr treated the case before him as a case falling under the general rule which governs the case of principal and surety, instead of a case falling under the exceptions, which include cases of contracts of indemnity and the like. Whether it properly fell under the one or the other, the result of the case would be precisely the same.

In that case the judgment against the sheriff was by confession, though with the assent of the deputy, and it was therefore contended by the sureties of the deputy, that it did not bind them; there being, as they said, no other evidence of the deputy's default. But the court said the record showed that the motion against the
185 *sheriff was for judgment for the amount of the clerk's tickets for fees put into the hands of his deputy, and that upon this motion the deputy assented in open court to the confession of judgment by the sheriff; in other words confessed that he had received the clerk's tickets and had not accounted for them; this, the court thought, "was ample evidence of the fact, and charged his sureties, unless disproved by them." Had the judgment been rendered against the sheriff, not by confession, but in invitum, and against the utmost resistance of the deputy, the court might have thought the judgment conclusive, not only against the deputy but also against his sureties. In the case now under consideration the judgment against the sheriff was in invitum, and against the utmost resistance of the deputy, who was present on the trial, was examined as a witness for the defendant, and seemed to be the person manifesting the most interest in the progress and result of the action.

Besides the two cases relied on by the counsel for the plaintiffs in error, my attention has been called to the case of Cox and als. v. Thomas' adm'x, 9 Gratt. 323, as also tending to show that the judgment against the sheriff is only prima facie, and not conclusive, evidence against the sureties of the deputy in this case. But it is enough to say, that it does not appear that the deputy was present on the trial of the motion against the sheriff in that case, or had any notice of such trial or motion, and yet the court considered the judgment recovered

against the sheriff, showing that it was for the default of the deputy, as prima facie evidence of such default, or the trial of a motion by the sheriff against the deputy and his sureties, to recover the amount of such judgment. Had the deputy been notified of the motion against the sheriff, and attended and made the best defence he could upon the trial, the judgment rendered
186 *against the sheriff might have been considered conclusive evidence against the deputy and his sureties. It may be said of this case also, as was said of Jacobs v. Hill &c., that the effect was precisely the same whether the evidence was regarded as prima facie or conclusive in the particular case; and therefore it was immaterial to discriminate between the two for the purpose of deciding the case in hand.

Since writing the foregoing opinion my attention has been called by my brother Staples, to a great many cases in the reports of some of our sister States, and especially New York, which seem to have an important bearing upon this case, and some of which he supposed might be in conflict with the views expressed in the said opinion. I have examined all those cases, I believe, and only one or two of them, if any, seem to be in conflict with those views. While most of them lay down or affirm the general principle that a judgment is conclusive only against parties or privies, they admit that there are exceptions to the general rule; and the question in each case is, whether it falls within the general rule or one of the exceptions to it. There are two propositions which none of these cases seem to deny. And they are, 1st, that where one party is bound to indemnify another against a liability, the latter may notify the former to defend a suit brought to enforce such liability, and the judgment recovered in such suit will be conclusive evidence in a suit by the latter against the former to enforce such indemnity. And, 2ndly, when by the terms of the contract of indemnity, express or implied, the indemnifying party and his sureties can be considered as contracting for the payment of any judgment which may be recovered against the party indemnified, on account of an act or default to which the contract of indemnity applies, then the indemnifying party and his
187 *sureties are bound by privity of contract for the payment of such judgment, which is therefore conclusive, not only against the principal indemnifier but his sureties also; at least if notice of the pendency of the suit in which such judgment was obtained was given to the principal, although no such notice was given to the sureties. These two propositions, so well established by reason and authority, amply sustain the views I have expressed, and emphatically so in a case like this, in which the contract of indemnity is a bond by a deputy sheriff and his sureties, not only that he "shall, in all things, well and truly and faithfully discharge the duties of his said office of deputy sheriff during his continuance therein;" but also that he "shall, in all respects, indemnify and save harmless the sheriff and all other persons, from any loss and damage in any wise arising from the conduct of the said deputy in the said office." In the case of Thomas v. Hubbell &c., 15 New York R. 405, which is the principal if not the only case of those referred to, apparently in conflict with the views before expressed, the condition of the bond was, only that the principal obligor would "do his duty as deputy sheriff;" and not, further, as in this case, that he would "in all respects indemnify and save harmless the sheriff and all other persons from all loss and damage in any wise arising from the conduct of the deputy in the said office." The court in that case held, that the terms and condition of the bond did not bring it within the class of cases in which an indemnitor is concluded by the result of the suit against the person whom he has undertaken to indemnify, upon the ground that such is the fair interpretation of the contract. We have reason to believe that the court would have been of a different opinion if the condition of the bond in that case had been the same as in this. In Westervelt v. Smith, 2 Duer's R. 449, the condi-
188 tion of the *bond was substantially the same as in this. And in regard to that case, the court, in Thomas v. Hubbell &c., say that it "was reviewed in the court and put upon the ground that it fell within the class of cases before alluded to, in which one has stipulated to be bound by the event of a suit between strangers." The case of Thomas v. Hubbell &c., therefore, can not in fact be said to be in conflict with the views I have expressed. But if it could be, and there were other such cases, yet not being of binding authority with us, I would consider it proper for this court to lay down and follow the rule indicated by those views, which rule I consider much more reasonable and just than the contrary. That rule is, that where the condition of the bond of a deputy and his sureties to the sheriff is such as it is in this case, a judgment rendered against the sheriff for the default of a deputy, in a suit which was defended by the deputy, or which he was duly notified to defend, and had an opportunity of defending, is conclusive evidence, in the absence of fraud or collusion, not only against the deputy, but against his sureties also. That such is the true rule in this State, I think the Code of 1860, chapter 49, sections 41 and 42, page 287, giving a summary remedy to the sheriff and his sureties against the deputy and his sureties, and the decisions of this court in regard to those provisions of law, especially the cases of McDaniel & als. v. Brown's executor, 8 Leigh 118, and Scott's adm'r v. Tankersley's ex'or, 10 Id. 581, strongly tend to show.

The fact is that the relation which has always subsisted in this State, from the earliest times, between the sheriff and his deputy, naturally gave rise to such a rule, and made it proper and necessary. Formerly, we know, that the sheriff, rarely if ever, performed any of the duties of the

office; which was the only reward conferred upon the justices for their public serv-
189 ices. *And they were permitted to farm the office to a deputy, who performed all the duties, and gave to the sheriff bond, with sureties, conditioned for his full indemnity against all the acts and defaults of the deputy. Under such circumstances, it was meet and fit that when a suit was brought against the sheriff, for any act or default of the deputy, it should only be necessary for the former to notify the latter, of the pendency of the suit in order to make the judgment rendered in such suit conclusive evidence, not only against the deputy, but his sureties also, in a proceeding against them for the indemnity of the sheriff against such act or default. The relations between the sheriff and his deputy, and the terms of the official bond of the latter and his sureties, made it his duty to defend such a suit, which he only in fact could do, and made the judgment rendered in it conclusive, both against him and them, in the absence of fraud and collusion, though he only had notice of the pendency of the suit. To have required the sheriff, in order to make the judgment thus conclusive, to give such notice, not only to the deputy but to all his sureties, would have been unreasonable in the last degree. The penalty of the bond is large, and we know very well that the sureties are often numerous and scattered. To give notice to them all, including the representatives of such as are dead, would be extremely inconvenient, to say the least of it; and what good purpose would it answer? The sureties know nothing of the facts and could only notify the deputy to make defence. But that, according to the requisition of the rule is supposed to have been already done for them by the sheriff.

I am, therefore, for affirming the judgment of the Circuit court.

Christian, Anderson and Staples, Js., concurred in the opinion of Moncure, P.
190 *Bouldin, J. I have felt some difficulty, under the decisions and intimations of opinion of this court and other authorities, in reaching the conclusion that a judgment against a high sheriff for the deputy's default can be regarded as higher than prima facie evidence merely against the sureties of the deputy. But the conclusion reached by the court is in my opinion just, reasonable, and conclusive, and I yield my doubts to the concurring opinions of the other judges.

Judgment affirmed.

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191 *Smyth v. Sutton & als.

January Term, 1874, Richmond.

1. **Contracts.**—In December 1863 R. by an agent, bought of S of King and Queen, his crop of corn, to be delivered at a certain landing on York river on the 1st of February 1864, and to be paid for on delivery, at the price of $40 per bushel. R engaged a vessel to go for the corn, and sent bags in which to put it. The vessel arrived in time and the corn was delivered on board; but R or his agent not appearing to pay the money, S sent the corn on his own account to W & Co., of Richmond. The agent of R started down to the place of delivery having a blank check of R to pay for the corn, and intended and expected to get there in time, but he failed to do so. HELD:
   1. **Same—Termination.**—The corn being to be paid for on delivery, and R, or his agent, not being present to pay for it, S may terminate the contract; and this especially as a very brief delay at the place might have subjected it to capture by United States vessels in the river.
   2. **Same—Same.**—If the agent had arrived at the place in time, he not having the money, but only a blank check of R, S might have refused to accept payment by the check.
2. **Same—Sale—Injunction.**—After the corn arrives in Richmond, R obtains an injunction to prevent W & Co. and S from selling it, claiming that he had bought it. S answers the bill, and by consent under a decree of the court, the corn is sold, and the proceeds deposited in bank, where they remain till the end of the war, when the bank fails, and they are lost. HELD:
   1. **Same—Same—Same.**—The proceeds of the sale of the corn having been lost by the improper interference by R with the sale of it by W & Co. he is liable to S for the price for which it was sold.
   2. **Same—Same—Same.**—R having brought S into a court of equity, and the case having been submitted to the court upon full proofs on the
192 *issue thus made, and S having established an equitable demand against the plaintiff, there was no reason why the court should stop with the dissolution of the injunction. On the contrary it was competent and proper for the court to dispose of the whole case, and to adjust completely the respective rights and obligations of the parties as established by the proofs before it.
3. **Same—Same—Same—Scaling.***—The court having scaled the amount for which the corn sold, at twenty-three for one, the appellate court will presume, in the absence of any objection in the court below, that the court had before it a broker's scale which was universally adopted by the courts, as proof of the value of Confederate money.

In December 1863, Robert J. Smyth, by an agent, purchased of John R. Sutton of King and Queen county, his crop of corn, to be delivered at a certain landing on York river, on the 1st of February 1864, and to be paid for on delivery, at the price of $40 per bushel. Smyth, conducted a milling business in Richmond. He engaged a vessel to go for the corn, and sent bags in which to put it. The vessel arrived in time, and the corn was delivered on board; but Smyth or his agent not appearing to pay for the corn, Sutton sent it on his own account to Logan Waller & Co., of Richmond. It appeared that the agent of Smyth, who made the contract and sent the vessel, started down to the place of delivery having a blank

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*Scaling Confederate Contracts.—See Moss v. Moorman's Adm'r, 24 Gratt. 97, and *note*, and Effinger v. Kenney, 24 Gratt. 116, and *note*; Moon v. Richardson, 24 Gratt. 219; Jarrett's Adm'rs v. Nickell, 9 W. Va. 353.

check from his principal, to pay for the corn, and intended and expected to get to the place of delivery in time; but he failed to do so. After the corn arrived in Richmond, Smyth obtained an injunction restraining Sutton and Logan Waller & Co., from selling the same, claiming that he had purchased it. Sutton answered the bill; and as the corn was in danger of being spoiled, by consent of plaintiff and defendant an order was made directing Waller & Co., to sell the corn and deposit it in the Bank of Virginia. This was done and the money remained in the Bank until
193 the end of the *war, when the Bank became insolvent, and the money worthless.

The cause came on to be heard on the 22d of March, 1870, when the court dissolved the injunction, and made a decree against the plaintiff in favor of Sutton for $369.50, with interest from March 1st 1864. And Smyth thereupon obtained an appeal from the decree.

Neeson and Evans, for the appellant.

E. Y. Cannon, for the appellees.

Christian, J. delivered the opinion of the court.

The court is of opinion that there is no error in the decree of the circuit court of the city of Richmond.

It is conclusively shown that the appellant did not comply with his contract. That contract bound him to pay for the corn purchased of the appellee, upon its delivery on board the vessel which was to convey it to the city of Richmond. Neither the appellee nor his agent was present when the vessel received her cargo. An agent of the appellant arrived after the vessel had sailed, and says he sought the appellee, for the purpose of paying for the corn, but failed to meet him. But even then, according to his own statement, he did not have the money, but had a blank check which he expected to fill up and deliver to the appellee. The appellee was not bound to receive a check; and if he had seen the agent, he had a right to refuse the check and sell the corn as his own.

Under the contract, there was no obligation upon the appellee to detain the vessel a moment after the corn was delivered. When that was done, and the vessel was ready to sail, the appellant not being present to pay, according to his contract, the appellee was at once released, and had the unquestioned right to sell or consign
194 *the cargo to whomsoever he might please. This was his legal right under any circumstances; but the appellee in this case was fully justified in the course he took, by the extraordinary circumstances which then surrounded him. At that time (February 1863) an hour's detention might have occasioned the loss of both vessel and cargo. The blockading vessels of the United States were almost daily in the waters of the York. It was with difficulty that any communication by water could be had with that section, and the few vessels trading in that river were running constant risks of capture. This was well known to the parties; and the knowledge of this fact required the appellant to act with the greatest promptness in the execution of his contract. His failure to do so released the appellee from all obligation under the contract.

It is further shown in the record before us, that the cargo was consigned by the appellee to Logan Waller & Co., then commission merchants in this city. But before the cargo reached its destination, an injunction was obtained by the appellant, enjoining and restraining the appellee and Logan Waller & Co. from selling it; and in this injunction suit an order was made to sell the corn, which was accordingly done and the proceeds of sale were deposited in the Bank of Virginia, where it remained until it perished with the fall of the Confederate government and the consequent destruction of the Confederate currency.

The loss thus occasioned was manifestly caused, first, by the failure of the appellant to comply with his contract, and the assertion afterwards, of an unjust demand, the consequence of which was the loss to the appellee of the whole proceeds of the sale of the corn. The burden of this loss has been properly fixed by the court below upon the party who caused it.

195 *The court is further of opinion that so far from being a ground of error (as assigned in the petition of appeal) it was entirely proper for the court below to adjust the rights of the parties as established by the record, instead of simply dissolving the injunction and dismissing the bill. The plaintiff, having invoked the extraordinary jurisdiction of the court by way of injunction, and the defendant having answered the bill, and the case having been submitted upon full proofs on the issue thus made, and the defendant having established an equitable demand against the plaintiff, there was no reason why the court should stop with the dissolution of the injunction. Nor is there any rule of equity practice which required the court to turn the defendant out, to a suit on the injunction bond in a court of law. On the contrary, the court having jurisdiction of the subject matter and the parties, it was competent and proper for the court to dispose of the whole case, and to adjust completely the respective rights and obligations of the parties as established by the proofs before it.

There is only one other ground of error assigned necessary to be noticed, and that is, that there was no proof in the cause showing the depreciation of Confederate currency, and that the case ought to be sent back for an enquiry by a commissioner to ascertain the value of the Confederate currency which the appellee lost. The amount of Confederate money deposited in bank was $8,500. The sum decreed against the appellant is $369.50, showing the scale adopted by the court to be $23 to one. It is

not suggested that this is not the true scale, or that the decree is for too large a sum; but simply that there is no proof in the record as to what was the scale of depreciation at the time of the sale. This court will not reverse the decree on this ground,
196 but will rather presume *that a broker's scale, which was universally adopted by the courts as proof of the value of Confederate money, was before the court when the decree was rendered. Such presumption may well be made in the absence of any suggestion, from any quarter, that the decree is for too large a sum.

We are of opinion that the decree of the Circuit court of the city of Richmond should be affirmed.

Decree affirmed.

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197 *Poore v. Magruder.

January Term, 1874, Richmond.

1. **Instructions.***—Where an instruction is given to the jury, as to which the evidence furnishes no ground, for the hypothesis upon which it is based, whether the instruction be correct or erroneous it furnishes no ground for reversing the judgment.
2. **Proof of Agency.**—Neither the declarations of a man nor his acts, can be given in evidence to prove that he is the agent of another.

This was an action of debt in the Hustings court of the city of Lynchburg, and afterwards transferred to the Circuit court of the city, brought by James Magruder, assignee of S. O. Moon who was assignee of John T. Little against Charles J. Raine, Wm. A. Poore and three others, upon a bond for $8000 executed by the defendants to John T. Little, by him assigned to S. O. Moon and by Moon to the plaintiff.

The defendants pleaded "payment," and also "usury;" upon which pleas issues were joined.

Upon the trial, after the evidence was introduced, the defendants asked the court to give certain instructions to the jury, which are not set out in the record; but the court refused to give them, and instructed the jury as follows:

If the jury shall believe from the evidence that S. O. Moon purchased the bond in the declaration mentioned, without knowing that the same was made for sale, they should find for the plaintiff; though they should believe from the evidence, that he paid for it a less sum than the amount of said bond.

198 *But if the jury believe from the evidence, that the said Moon had made D. T. C. Peters his agent to purchase said bond at a discount, and that Peters had so purchased it, he, the said Moon knowing that the said bond was simply a bond made for sale, they ought to find for the defendants: But that knowledge that the bond was so made for sale, on the part of Peters, would not defeat the plaintiff's action, unless he, the plaintiff, had also such knowledge. To the giving these instructions the defendants excepted.

On the trial the deposition of John T. Little, taken by the defendants, was read. He said that he was acting as the friend of Charles J. Raine, and that the bond was executed to him simply to negotiate a loan for the use of said Raine. That he never saw or communicated with Moon on the subject. That D. C. T. Peters told witness he (Peters) was acting for Moon. Witness applied to Peters to obtain Moon's address, as it was his intention to go to see him, in order to negotiate the bond. Peters assured him it would be a useless trip. That he Peters could negotiate it by mail; and that Moon would not negotiate directly with any of the parties on the bond, as the rate of interest was above the legal rates, and he desired to make the transaction with a third party: and witness turned the papers over to Peters to make the negotiation. Raine received the money, and witness understood the rate of interest to be about one and one quarter per cent. per month. Witness was not to be responsible on his assignment.

Peters was examined as a witness by the plaintiff. He stated that a few days before the date of the assignment of the bond by Little to Moon, Little placed the bond in the hands of the witness, who was a broker, of the firm of Peters, Spence & Co. That he had tried to sell it to two or three persons without success, when he learned
199 *that Moon had arrived at Lynchburg, and knowing that he was a moneyed man, he called upon him at the hotel where he stopped and proposed to sell the bond to him, recommending the obligors as being entirely solvent. That Moon told him he would take the bond at a discount of four per cent. from its face value, provided all the obligors would state in writing that they had no offset to it. That witness took the bond and prepared the writing upon the back of it, which is signed by the obligors, gave it to Little, and told him to procure the signatures of said obligors to that writing; which Little did, and brought it to the witness, who delivered it to Moon with Little's assignment. Moon paid the money to Peters, Spence & Co. who paid it, as he believes, to Little. That witness had nothing to do with Raine in the transaction, and the negotiation was conducted by him with Moon at the instance of Little; who paid him a commission for it. That he never represented himself to Little as the agent of Moon, but told Little what he required to be done before he would purchase the bond. That Moon never paid him any thing for what he did. That witness did not know what was the consideration of the bond; nor did he know it was made for sale.

The endorsement referred to by the witness, was addressed to Moon, and was as follows: We understand that you are about to trade for this bond: it is given for value received, and we have no offsets against it. This 24th November 1859. And it was signed by all the obligors.

There was a verdict and judgment for the plaintiff; and the defendant Poore applied

*Instructions.—On this subject, see monographic *note* appended to Womack v. Circle, 29 Gratt. 192.

to this court for a supersedeas; which was awarded.

Yancey, Bocock and J. M. Daniel, for the appellant.

Kirkpatrick and Blackford, for the appellee.

200 *Anderson, J., delivered the opinion of the court.

This is an action of debt brought by the defendant in error against the plaintiff in error and others, upon their joint bond, executed to John T. Little, who assigned the same to S. O. Moon, who assigned to the defendant in error, for value received. The bond is for $800, payable twelve months after date, with interest from date. The defendants pleaded payment, and a plea of usury. There was judgment for the plaintiff; and the cause is brought here by a writ of error to that judgment.

On the trial the defendants moved the court to give certain instructions to the jury, not recited in the record, which the court refused to give; but gave certain other instructions, to which the defendants excepted; and they are set out in the bill of exceptions; and all the evidence in the cause is certified.

The ground for reversal assigned in the petition, is error in those instructions. The principle controverted in them is, substantially: That if the said bond was purchased by Moon at a discount, and that he made D. T. C. Peters his agent to purchase it, and that said bond was made simply for sale, which was known to Peters, that knowledge of Peters, the agent should not defeat the plaintiff's action, unless he, Moon, (styled plaintiff,) also had knowledge of it. This is believed to be a fair interpretation of the instruction; and whether it be erroneous or not, it is not considered material in the case made by this record. The evidence furnishes no ground for the hypothesis, upon which the conclusion of law was declared. There is no evidence in the cause to support the hypothesis that Peters was the agent of Moon for the purchase of the bond. The statement of Little, that Peters told him that he was the agent of Moon, is not evidence to prove the agency. It would be monstrous to hold, that one man was bound by the acts or declarations

201 *of another, until his agency is established. Neither the declarations of a man, nor his acts, can be given in evidence, to prove that he is the agent of another. 1 Phil. Ev. 5th Amer. Ed., Marg. p. 515, Note 144, and cases cited. Peters would be a competent witness to prove his agency; but it could not be proved by his unsworn declaration. He was a witness, and he swore that he was not the agent of Moon. And the facts to which he testifies, and which are not in conflict with any other testimony in the cause, are utterly irreconcilable with the idea that he was an agent of Moon, in the purchase of the bond. He was undoubtedly the agent of Little, to make sale of it; and received from him a commission for selling it. The hypothetical fact, of which the instruction is predicated, not being proved in the cause, nor any evidence adduced tending to prove it, but the contrary being clearly shown, the court is of opinion that the instruction is the declaration of a mere abstract principle of law; and whether right or wrong, is immaterial, and could not have prejudiced the plaintiff in error; and is not, therefore, ground for reversal. Powell on Appellate Proceedings, chap. iv, §§ 42, 43. Upon the whole case, the court is of opinion that the judgment is right, and that the same be affirmed.

Judgment affirmed.

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202 *Nash v. Fugate & als.

[18 Am. Rep. 640.]

January Term, 1874, Richmond.

1. **Bond—Estoppel.***—A bond which is a complete and perfect instrument on its face at the time of its delivery to the obligee, was executed by persons as sureties, upon the condition that it should not be delivered until executed by other persons, and it was placed in the hands of the principal obligor, and without being so executed it was delivered by the obligor to the obligee, who was not informed of the condition. The bond is the valid bond of the sureties, and they can not set up the condition against the obligee.

2. **Same—Obligor Added.**†—A joint and several bond is executed by several persons, and delivered to the obligee; and afterwards, with the consent of the obligee, but without the knowledge of the obligors, another person executes it. As to those who first signed it, it is joint as between themselves, and several as to the person last executing it.

This was an action of covenant in the Circuit court of Russell county, brought by Aaron H. Nash against A. W. Smith and nine other persons. The action was founded on an obligation of which the following is a copy:

For value received, we, or either of us, bind ourselves, our heirs, &c., to pay to Aaron H. Nash, thirty-five hundred dollars, to be paid in three equal annual payments; the first payment on the 1st of January 1870, the second on the 1st day January 1871, the third to be paid on the 1st day of January 1872, with interest from date.

203 *Witness our hands and seals this the 8th day of December 1868.

A. W. Smith.	[Seal.]
Jos. C. Fugate.	[Seal.]
J. C. Fugate.	[Seal.]
J. W. Smith.	[Seal.]
S. M. Muncy.	[Seal.]
Robert Johnson.	[Seal.]
Geo. Banner.	[Seal.]
Charles G. Gose.	[Seal.]
George C. Gose.	[Seal.]
Isaac Vermillion.	[Seal.]

*Bond—Estoppel.—See Miller v. Fletcher, 27 Gratt. 403, and *note*, also, Lyttle v. Cozad, 21 W. Va. 199 and Long v. Campbell, 37 W. Va. 665, 17 S. E. Rep. 197, citing the principal case.

†Same—Obligor Added.—See Tremper v. Hemphill, 8 Leigh 623; Harrison v. Lane, 5 Leigh 414. But see Baber v. Cook, 11 Leigh 606; Steptoe v. Read, 19 Gratt. 9; Beazley's Adm'r v. Sims' Adm'r, 81 Va. 647; Bush v. Campbell, 26 Gratt. 403, and *note*; Moffett v. Bickle, 21 Gratt. 280.

A. W. Smith put in the plea of payment. The other defendants filed pleas of non est factum, to which the plaintiff objected; but the court overruled the objection. Of these there were five; but the third was afterwards withdrawn. The first, fourth and fifth are general pleas of non est factum. The second sets out that their co-defendant, A. W. Smith, on the day of 18 , brought the paper on which the supposed writing obligatory is written, to them, with the body of said writing obligatory then fully written by him thereon, and a great many, to wit: about twenty scrolls made one directly under the other in a line on the right hand side of said paper, beginning just under the writing on the right hand side of said paper, and to which his said Smith's name was subscribed opposite the first scroll as an obligor, and then and there stated to these defendants that he was going to get twenty good solvent men to sign it with him as co-obligors, as his sureties, and amongst these twenty persons that he was going to get to sign it, he would get one Stephen Banner and Joseph Gilmer to sign it as a part and parcel of the said twenty obligors, and requested these defendants to sign it as a part of the said twenty persons; and then and 204 *there promised them that if they would sign it and deliver it to him, he would not use it or deliver it to the said plaintiff unless and until he procured the said number of persons to sign and seal it, and unless and until he procured the said Stephen Banner and Joseph Gilmer as a part of said number, to sign it as co-obligors with him and these defendants. And they aver that only on that condition and none other, they did sign their names respectively to the said paper opposite the said scrolls where their respective names appear, and delivered the same to the said A. W. Smith, as an escrow, on the express agreement and understanding, that unless and until he procured with these defendants the said Stephen Banner and the said Joseph Gilmer and enough other good solvent persons to execute it and become bound as co-obligors in it with him, the said Smith and these defendants, he should not use it as their deed, nor deliver it as their deed to the plaintiff. And they further say that the said A. W. Smith wholly failed to get and procure the said Stephen Banner and Joseph Gilmer and the other solvent persons necessary to make the promised number to execute and become bound as co-obligors with himself and these defendants. Yet without their authority and consent and against the express agreement when they delivered it to him, delivered the same to the said plaintiff, &c. Wherefore they say the said supposed writing obligatory is not their deed.

Upon the trial of the cause the defendants asked the court to give five instructions to the jury, which were objected to by the plaintiff; but the court overruled the objections, and gave them: and the plaintiff excepted.

They are as follows:

1st. The court instructs the jury, that although the possession of the bond by 205 the plaintiff is prima facie *evidence that the bond had been properly delivered to him by the defendants, yet that presumption may be met and overturned by evidence: and if the jury believe from the evidence in the cause, that that presumption is met and overturned, they must find for the defendants, or such of them as they may believe have not delivered said bond or authorized the delivery.

2d. If the jury shall believe from the evidence, that the bond sued on was signed and sealed by the defendants and handed to A. W. Smith to be delivered to the plaintiff on any expressed condition, and not to be delivered to the plaintiff until said condition was performed, then unless the jury shall believe that said condition was performed before said delivery, it is not their bond, and they shall find for the defendants.

3d. If the jury shall believe from the evidence, that the bond sued on was signed and sealed by any part of the defendants and handed to A. W. Smith to be delivered to the plaintiff on any expressed conditions, and not to be delivered by said Smith to the plaintiff until said conditions were performed, then unless the jury shall believe that said conditions were performed before said delivery, it is not the bond of those imposing said conditions, and they must find for said defendants.

4th. If the jury shall believe from the evidence, that any part of the defendants signed and sealed the bond sued on, and delivered it to A. W. Smith, not to be delivered to the plaintiff until certain specified conditions were performed, and that the other of said defendants signed and sealed said bond and delivered it not knowing of the conditions imposed by the other defendants, and believing that they were making themselves jointly liable with the other obligors, and that those conditions were not performed, that then it was not the 206 bond of *any of the defendants, and that the jury must find fhr the defendants.

5th. If the jury shall believe from the evidence, that A. W. Smith delivered the bond sued on to the plaintiff and received the consideration for it, and that it was a finished transaction between them; and that the said plaintiff to whom the bond had been previously delivered, handed the said bond to J. F. McElhenny to be stamped and handed to A. W. Aston for safekeeping, and then that afterwards, by the consent of the plaintiff, without the knowledge of all the defendants, the said bond was signed, sealed and delivered by Isaac Vermillion, then it is not the bond of any of the defendants who did not know of said transaction and consent to it, and the jury shall find for such defendants.

The jury found a verdict for the plaintiff against A. W. Smith, and in favour of the other defendants. And thereupon Nash applied to the court to set aside the verdict

and grant him a new trial. But the court overruled the motion, and rendered judgment upon the verdict; and the plaintiff excepted; and applied to a judge of this court for a writ of error and supersedeas; which was allowed.

All the sureties on the bond were examined as witnesses. All but two of them state that they signed it upon the promise of A. W. Smith to get other sureties to the bond; some of them say there were to be fifteen and others twenty: some say that Stephen Banner and Thomas Gibson were to be two of them. One says he counted the scrolls to the bond and there were twenty of them. Charles G. Gose says there were ten or twelve scrolls below his name; and George C. Gose says there were from eight to twelve below Charles G. Gose's name when he signed it. McElhenny states that Nash assigned his claims upon the estate of
207 S. F. Hendricks to A. W. *Smith, who gave him the bond. That after the assignment of this claim the bond not being stamped, it was brought to him by Nash, and left with him to be signed by Vermillion. That Smith and Vermillion came to his office, when Smith asked Vermillion to sign it, which he did the next morning; and witness instructed him to hand the note to Samuel W. Aston to be put in Aston's safe for safekeeping for Nash. That the appearance of the note now was not such as it was when it was handed to him by Nash, and the signature of Vermillion that witness saw him make did not look to witness as the same one now on the note. That at the time the bond was handed to him it was a half sheet of paper and there were several scrolls below those already signed. Vermillion says he signed the bond in McElhenny's office. That there were then some three or four scrolls below his name; he thought there were fifteen scrolls upon the paper in all. He states that he put the paper in his desk in his office, and when he came back some one had removed or scattered his papers. He then took the bond to his house and put it away. That he afterwards took out the note to give it to Nash when he should meet with him, and discovered that witness' name was torn off it. He could not undertake to say how it was done. That he then signed it again; and the bond is now as it was when he handed it to Nash, except that witness thinks it was not then stamped. Witness handed it to Nash in the clerk's office, and Nash asked him if his name was on the paper; and said it was expected witness should sign it. Witness replied yes, and it is expected for others to sign it too. He then handed Nash the note. Did not say to Nash who or what others it was who were to sign it.

John W. Johnston and John A. Campbell, for the appellant.

208 *Burns, for the appellees.

Staples, J. It must be assumed for all the purposes of this decision, that the bond in controversy was a complete and perfect instrument on its face, at the time of its delivery to the obligee. The defendants pleas and the instructions given by the court are obviously based upon this hypothesis. It must also be assumed, that at the time the bond was executed by the defendants, other than the principal obligor, it was agreed that it should not be delivered to the obligee, until executed by other persons besides the defendants, and further, that without being so executed, it was delivered by the principal obligor to the obligee, who was not informed of the condition annexed to the delivery of the instrument.

The question is presented, whether the bond under this state of facts is binding upon the parties actually executing it as sureties.

It is very clear that a deed or bond may be committed to a stranger to be delivered by him to the obligee upon the performance of a condition or the happening of an event; and if delivered before the condition is performed or the event happens, the bond will not take effect, although the obligee may not be apprized of the terms imposed, and although there is nothing on the face of the instrument to excite his suspicions or put him upon enquiry. In such case it is simply a question of power in the agent in making the delivery, and not a question of good faith in the obligee in accepting it.

The point to be considered then is, whether there is any substantial distinction between a delivery to a stranger and a delivery to the principal obligor by one who signs the instrument as surety. That such a distinction does exist, and that it is founded upon the soundest principles, I think is easily established.

209 *When the bond is placed in the hands of a third person, who is a stranger to the consideration and to the instrument, to be delivered to the obligee only upon the performance of some condition, such person is a mere custodian of the instrument until the condition is performed, having no interest, or semblance of an interest, in the subject matter of the contract. The obligee, finding the paper in the hands of such a person, is bound to know how he obtained possession of it, and by what authority he undertakes to dispose of it. It is a case of naked special agency, governed by the principles applicable to that class of agencies. All persons dealing with such an agent are bound, at their peril, to enquire into the extent of his power and to understand its legal effect, and if the agent exceeds the limits of his authority the act, so far as it affects the principal, is void. When the bond is in the possession of a stranger, there is nothing in the character of the agent, or in the custody of the instrument, calculated to mislead the obligee in unduly accepting it. On the contrary, the mere fact that a stranger, having no apparent interest in the bond, has possession of it, is of itself sufficient to excite suspicion, and to put the obligee upon enquiry as to his authority to dispose of it. When, therefore, the obligors deliver the

bond to a stranger as an escrow, it cannot be said they have done an act or made a declaration calculated to mislead third persons. The most that can be said is, they have appointed an agent, who, in making an undue delivery, has exceeded his powers; but there is nothing in the manner of the appointment or the circumstances of the agency which prevents the principal from repudiating the act.

On the other hand, very different considerations, it seems to me, should govern where the surety signs a bond complete in its terms, all its forms and provisions, 210 and entrusts *it to the principal obligor for a proper delivery to the obligee. It is true the principal obligor has no greater power than the stranger to whose custody the bond is committed; but in such a case the question is not what is the power conferred, but what is the power the obligee has the right to suppose is conferred. The principal obligor has certainly an apparent authority to deliver the instrument in its then existing form and condition; that is such an authority as may be fairly inferred from his connection with and possession of the paper. The reasonable presumption is, that he is to dispose of the bond according to the natural course of proceeding in such cases; that is, by a delivery to the obligee. It is true the agency is a special one; but the agent being clothed with the evidence of agency for the general purpose of delivery, no secret limitations or restrictions ought to control the exercise of the power, so far as parties are concerned dealing with the agent, upon the faith of the apparent power.

The instrument being complete in form, (precisely such as would have been adopted if the parties signing it alone were to be bound,) being found in the possession of the very person who would have held it if the purpose had been to make an unconditional delivery, under such circumstances an obligee accepting it has the right to infer that the transaction is precisely what it purports to be, and that the real power is in fact co-extensive with the apparent power.

In the language of an eminent author: "If the principal has justified the belief of persons dealing with his agent, that the agent had from him sufficient authority to do as agent the precise thing, it is no answer on his part to say that the agent had no authority, or one which did not reach so far, and that it was a mistake on the part of the third party. It may have been 211 his mistake, *but the question is, whether the principal led this third party into the mistake." 1 Pars. on Cont. 39. If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided, to sell, it must be intended that the commodity was sent there for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale, or if one send goods to an auction room can it be supposed that he sent them thither merely for safe custody? 2 Kent's Com. 621.

And so when the surety signs an obligation for the payment of money, and leaves it in the hands of him for whose benefit it was executed, is it to be presumed it was left there merely for safe custody? May it not be fairly inferred it was intended rather for delivery to the obligee? Is the latter to go further and take it for granted, that there are secret limitations upon this power of delivery never communicated to him? When the surety signs his name to a bond and confides it to the principal obligor, he thereby makes a solemn declaration that he has become a party to the instrument, and he so makes and shapes this declaration that it is almost absolutely certain to reach the party who is most likely to be misled by it. It would seem to be a gross violation of justice and good faith to permit the surety, under such circumstances, to repudiate these solemn declarations by setting up conditions and limitations known only to himself and his co-obligors.

In Pickard v. Sears, 6 Ad. and El. 469, Lord Denman said, "The rule of law is clear, that when one by his words or conduct wilfully, causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is concluded 212 from averring against the latter *a different state of things existing at the time."

And in Lickbarrow v. Mason, 2 T. R. 63, 70, the same doctrine was expressed in a form very familiar to the profession; and that is, whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. The great principle of the law of estoppel is, that when an act is done or a statement made by a party which can not be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere evidence.

In the May number of the Law Register 1864, Judge Redfield uses the following language: "Where the surety entrusts the bond to the principal obligor, in perfect form, with his own name attached as surety, and nothing upon the face of the paper to indicate that others are expected to sign the instrument in order to give it full validity against all the parties, he makes such principal his agent to deliver the same to the obligee, because such is the natural and ordinary course of conducting such transactions; and if the principal under such circumstances gives any assurances to the surety in regard to procuring other co-sureties or performing any other condition before he delivers the bond, and which he fails to perform, the surety giving confidence to such assurances must stand the hazard of their performance, and he cannot implicate the obligee in any responsibility

in the matter, unless he is guilty of fraud or rashness in accepting the security."

These just and sensible observations are sustained by a number of well considered cases in the American courts. Smith v. Moberly, 10 B. Mon. R. 266; Millet v. Parker, 2 Metc. Ken. R. 608; Deardorff et
213 als. v. Foresmun, *24 Ind. R. 481; State v. Pepper, 31 Ind. R. 76; Passumpsic Bank v. Goss, 31 Verm. R. 318; State v. Peck, 53 Maine R. 284. I refer especially to the case of Deardorff et als. v. Forestmun, 24 Ind. R. 481; and State v. Peck, as containing an exhaustive review of all the authorities bearing upon the question.

It must be admitted there are contrary decisions in the courts of other States, among them The People v. Bostwick, 32 New York R. 445; State Bank v. Evans, 3 Green N. J. R. 155. Upon a careful examination it will be found, that in a large majority of the cases relied on to sustain the opposing view, it appeared that the obligee either had notice of the condition attached to the execution and delivery of the bond by the surety, or there was something in the transaction, or on the face of the instrument, to put him upon enquiry, or the obligee had not sustained any damage or loss, nor done any act to his own prejudice upon the faith of the instrument. Pawling v. United States, 4 Cranch R. 218; Wills v. Dill, 1 Martin R. 592; Bibb v. Reed, 3 Alab. R. 38; King v. Smith, 2 Leigh 157.

In Virginia this question has never been the subject of adjudication by any court of the last resort. In Ward et als. v. Churn, 18 Gratt. 801, this court held that an instrument which on its face indicates that it is not complete, and that other persons are intended to sign it, is not binding upon those who do sign it, although the condition may not have been known to the obligee when it was delivered to him. But the court declined to express any opinion upon the effect of an instrument which is apparently complete, and which in no manner indicates that it is to be signed by others. In the course of his opinion Judge Joynes adverted to this question and to the conflict of authority upon it; but he said its decision was not necessary to the case before
214 the court. *In Preston v. Hull, 23 Gratt. 600, the instrument was imperfect and incomplete on its face when exhibited to Hall, in the fact that the name of an obligee had not been inserted. And this court held that the blank could not be filled by an agent appointed by parol, and then delivered, in the absence of the principal, as a deed. It is clear that the doctrine of estoppel could have no application to the case.

Amid this conflict of authorities in other States, and in the absence of any express adjudication by this court, we are at liberty to adopt that rule which seems best to accord with sound policy and well established general principles of law.

In this State it is believed to have been the general practice and usage for parties executing bonds as sureties to leave them in the possession of the principal obligor for delivery to the obligee. Until very recently no serious question has ever been raised as to their liability, whatever may have been the conditions imposed, unless indeed there was something apparent on the face of the instrument calculated to excite suspicion or enquiry.

It is impossible to foresee the mischiefs of establishing a different rule. An obligee having in his possession an instrument signed by responsible parties, to all appearances perfectly complete and valid, may at any distance of time be confronted and defeated by a secret parol agreement between the principal obligor and some one of the sureties, of the existence of which he had not even a suspicion. How is it possible to provide against these pretended agreements? How are they to be met and disproved? In the nature of things the obligee can offer no evidence besides the bond, as a knowledge of the condition is generally confined to the principal obligor and the sureties.

215 *It is a fundamental principle of the common law, that parol testimony is not admissible to vary or contradict a written agreement. In this case it is proposed to receive such testimony in its most objectionable form, by proof of a parol contract between the parties on one side, never communicated to the party on the other most interested in knowing it.

It has been said that the obligee may protect himself by requiring the personal acknowledgment of each one of the obligors. Apart from the inconveniences resulting from such a rule, it is by no means certain that an acknowledgment of that kind will furnish the necessary security. After a great lapse of time it would be as difficult to prove the acknowledgment as the original execution, unless indeed some independent proof of such acknowledgment shall always be presented along with the bond.

On the other hand nothing can be easier than for the surety to incorporate in the writing or endorse upon the paper, the condition upon which his signature is attached or he may commit it to the custody of a third person in no manner connected with the transaction. This would furnish ample protection to the surety and constitute sufficient notice to the obligee. In the absence of some plain and obvious precaution of this sort, I think the parties whose names are attached to the instrument should be estopped to deny as against the obligee, that it is their deed.

Since the foregoing opinion was written, the 16th Vol. of Wallace's reports has been published, containing the case of Dairs v. United States, page 1.

That case is identical with this, the surety having signed the bond on condition that it should not be delivered unless it was executed by other persons, who did not execute it; but the obligee had no notice
216 of the *condition, and there was nothing to put him upon enquiry as to the

manner of its execution. The Supreme court of the United States held that the bond was nevertheless binding upon the sureties. Justice Davis speaking for the court, said: In the execution of the bond the sureties declared to all persons interested to know, that they were parties to the covenant and bound by it; and in the belief that this was so, they were accepted and the license granted. They cannot, therefore, contravene the statement thus made and relied on without a fraud on their part, and injury to another; and where these things concur the estoppel is imposed by law. As they confided in Dair it is more consonant with reason that they should suffer for his misconduct than the government, who was not placed in a position of trust with regard to him.

It will be perceived, that the Supreme court rests its decision upon the doctrine of estoppel exclusively. And upon the same ground we are content to place the decision of this case. It only remains to consider the question raised by the defendants fifth instruction. This instruction asserts the proposition, that if the bond was executed by all the defendants except Isaac Vermillion, and in that condition was delivered to and accepted by the obligee, but afterwards with the consent of the obligee and without the consent of the obligors, was executed by Vermillion, then it is not the bond of any of said obligors who did not know of said transaction and consent to it.

It will be observed that the obligation is joint and several. In this respect it is different from the bond in Baker v. Cook, 11 Leigh 606, which was simply a joint obligation. In that case it was held that when a bond is executed by three persons and perfected by delivery, the sealing and delivery by another afterwards will not
217 *avoid the bond as to the others. In such case the obligation as to the three first signing is joint as between themselves, and several as it relates to the obligor last signing. And so in this case, if the fact be as assumed in the instruction, as between the parties first signing, the bond is joint and several, and as to Vermillion, it is simply his several obligation. Whether the plaintiff will be entitled to a joint judgment against the obligors first executing the bond, and a several judgment against the last, or whether in this action he is barred of any remedy against Vermillion, and will be compelled to resort to a new suit against him, are questions in no manner before us, and which we are therefore not called upon to decide. Moffett v. Bickle, 21 Gratt. 280. We have only to deal with the instruction as it is, which, for the reasons suggested, was clearly erroneous, and should not have been given.

This disposes of all the questions arising upon the pleas and the instructions. In the progress of the trial evidence was adduced tending to show, that at the time the bond was signed by a part of the obligors, it was agreed that the signatures of twenty sureties should be obtained, and that there were then twenty seals or scrolls upon the paper, extending to the bottom of the page; whereas the bond as now exhibited by the plaintiff, contains ten only. What would have been the effect of such evidence offered under appropriate pleadings, it is unnecessary now to say. The instructions given by the Circuit Judge are not based upon any hypothesis of an incomplete instrument, or an instrument which upon its face indicates that it is to be signed by others; but they cover the broader ground that the bond, though perfect in form and execution, was not valid and binding until the conditions were complied with, although these conditions were never communicated to
218 the obligee, and *nothing appeared on the face of the instrument to put him upon enquiry. The second, third and fourth instructions clearly assert, and were no doubt intended to assert this proposition; and in that aspect they have been argued by counsel and considered by this court. The first instruction is perhaps not objectionable, though of a somewhat vague and general character. Plea No. 2 affirms the same erroneous doctrine asserted in the instructions. Had it averred that the obligee was apprized of the condition, at the time the bond was delivered to him, or that there were scrolls or seals upon the paper to which no signatures were attached at the time of such delivery, the plea would have presented an entirely different question for the consideration of the court and jury.

Pleas Nos. 1, 4, and 5 are general pleas of non est factum, to which there is no valid objection.

But for the error in admitting plea No. 2, and giving the instructions before mentioned, the judgment of the Circuit court must be reversed, and the case remanded for further proceedings in conformity with the views herein expressed.

The other Judges concurred in the opinion of Staples, J.

Judgment reversed.

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219 ***Moon v. Richardson.**

January Term, 1874, Richmond.

Bond Debt—Time of Scaling.*—R executes to M his bond for $3,000 bearing date the 11th of July 1862, and payable on demand. In a deed of trust given at the same time by R, to secure the debt, it is provided that if R will pay punctually the interest on the debt semi-annually, the debt shall not be collected for five years. S pays the interest until July 1864: HELD: The bond being payable on demand, the provision in the deed for time does not change its character in that respect, and it must be scaled as of its date.

In July 1867 Temple D. Richardson obtained an injunction to stay a sale of a tract of land in the county of Appomattox, under a deed executed by himself to trustees, to

*Bond Debt—Time of Scaling.—See Smyth v. Sutton, 24 Gratt. 191, and *note*, and see Jarrett's Adm'rs v. Nickell, 9 W. Va. 358, citing the principal case.

secure a debt due to Samuel O. Moon. The deed bears date the 11th day of July 1862, and recites that Richardson is indebted to Moon in the sum of $3,000 due by bond bearing even date therewith, and is upon trust that if Richardson shall pay to Moon the legal interest upon said debt of three thousand dollars every six months, with promptness and regularity; then and on that express condition, it is agreed that Richardson shall have five years' credit upon the bond given for said debt; that is to say, the said bond, which is payable on demand shall not be collected for five years if the interest is paid every six months. But if Richardson should fail to pay said interest on the 11th of January and July of each year, then the trustees were, on the request of Moon, to sell, &c.

The bond is not in the record, but in both the bill and answer it is stated to have been payable on demand, and that it was given for the loan by Moon to Richardson of
220 *$3,000 of Confederate States Treasury notes. Richardson paid the interest on the bond up to and inclusive of the 11th of January 1864. And the only question considered in this court or the court below, was the date at which said debt was to be scaled. The Circuit court, by its decree of the 25th of September 1870, held that the scale was to be applied as of the 11th of July 1864, up to which time the court considered the interest had been paid or tendered. From this decree Moon applied to this court for an appeal; which was allowed.

J. W. Daniel, for the appellant.

Kirkpatrick and Blackford, for the appellee.

Bouldin, J., delivered the opinion of the court.

The true character of the contract in this case is conceded on both sides. The bond given for the debt was executed between the 1st day of January 1862 and the 10th of April 1865; was given for a loan of Confederate States Treasury notes, corresponding in amount with the nominal amount of the bond; and was to be discharged by the payment of the same currency. It is clear, therefore, and is not denied, that it is what is commonly called a Confederate contract; that it comes plainly within the operation of the act for the adjustment of such liabilities, and must be scaled. The only question before us is, at what period shall the scale be applied?

The appellant contends that the scale should be applied as of the date of the bond, the same being payable on demand: whilst the appellee contends that it was properly applied by the court below as of the period when, by the terms of the deed of trust given to secure the debt, the appellant had a right to enforce the collection thereof, by sale of the property conveyed.

We think there can be no doubt
221 about the law of the *case. It has been plainly settled by recent and repeated decisions of this court, and is no longer open for discussion, that a bond payable "on demand" is payable presently without demand; that the right of the obligor so to pay it, and the duty of the obligee to receive the payment, is not at all impaired by restrictions on the obligee's right to immediate payment imposed for the benefit of the obligor, either on the face of the bond or by contract de hors thereto: that in all such cases it is at the option of the obligor either to avail himself of the restrictions or to pay the debt at any time after date, as if there were no restriction; and that such bond, if given for a loan of, and solvable in Confederate States treasury notes, must be scaled as of its date. This is now the settled law of this court. Stover, assignee, v. Hamilton & al., 21 Gratt. 273; Omohundro's ex'or v. Omohundro, 21 Gratt. 626; Bowman v. McChesney, 22 Gratt. 609.

We have seen and heard nothing in this case to withdraw it from the influence of these decisions. The bond, it is true, which was given for the money loaned, is not copied in the record; but it is plainly described in the pleadings on both sides, and also in the deed of trust; and there is no difficulty as to its terms. It is for three thousand dollars, payable "on demand," and bears date the "11th of July 1862," on which day it was executed. There is nothing on the face of the bond to impair, in the slightest degree, the right of the obligee to enforce immediate payment thereof; nor is there any thing on its face to prevent the obligor from discharging the same at his pleasure. It is, as written, merely a single bill, payable "on demand;" and due as to both parties instantly. But it is contended, for the appellee, that the legal effect of the bond is changed by the cotemporaneous execution of a deed of trust by the parties to secure the same, in which there
222 is a stipulation in the *following words: "That if the said Temple D. Richardson shall well and truly pay, or cause to be paid, unto the said Moon, the legal interest that may accrue upon the said debt of three thousand dollars, hereinbefore described, every six months, commencing six months from the date hereof, with promptness and regularity, then, and on that express condition, it is agreed that the said Temple D. Richardson shall have five years' credit upon this said bond given for said debt, beginning at the date hereof; that is to say, the said bond, which is payable on demand, shall not be collected for five years, if the interest is paid punctually every six months."

It is very evident from the terms of the clause we have quoted, that it was the purpose of the parties to keep distinctly in view the fact that the debt was payable "on demand," but that the debtor might secure indulgence by the punctual performance of an express condition. It was at his option either to pay the debt at any time "which is payable on demand" as stated in the deed itself, or by performance of the condition to secure indulgence. He did not, and was

not required to surrender this right; and this brings the case directly within the principle of the cases of Stover, assignee' v. Hamilton and Baughman v. McChesney. It is a privilege secured to Richardson and a restriction upon Moon; and Richardson still had the unqualified right to waive that privilege and discharge the debt at any time. As to him, notwithstanding the privilege to himself and the restriction on Moon, the debt is regarded in law as payable presently. The date then, and the period of payment, the maturity of the bond being in this case the same, there is no necessity for considering the question so elaborately discussed by the judges and at the bar in the case of Dearing, administrator, v. Rucker, 18 Gratt. 426. We are all of opinion that the bond in this
223 *case was, so far as the rights of the appellee Richardson are concerned, payable at its date; and that the scale should have been applied as of that period. The decree of the Circuit court is therefore erroneous, and must be reversed with costs to the appellant; and this court would now proceed to enter such decree as should have been entered by the Circuit court were the proofs in the cause sufficient for the purpose. There is, however, no proof in the cause of the value of Confederate States treasury notes, either on the 11th day of July 1862, the date of the bond, or on the 11th day of July 1864, when it was scaled by the Circuit court. It is true that we may take notice, as matter of history, that Confederate States treasury notes were depreciated on the 11th day of July 1862, and continued to depreciate; that the depreciation between that date and the 11th day of July 1864 was very great, and that the scaling, as of the latter period, was very prejudicial to the appellant; but what was the true debt on the 11th day of July 1862, when the scale should have been applied, we cannot from anything in the record now say. That must be ascertained by the Circuit court, either by reference to a commissioner or by proofs taken before the court; and the cause must be remanded for that purpose. The decree of the Circuit court must be reversed and annulled, with costs to the appellant, and the cause remanded to that court to be further proceeded in according to the principles above declared.

The decree was as follows:

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the obligation of the appellee Richardson, in the proceedings
224 *mentioned, was, as to him, payable presently, in Confederate States treasury notes, and under the repeated decisions of this court, should have been scaled as of the date thereof, viz: the 11th day of July 1862, and not on the 11th of July 1864. It is therefore decreed and ordered that the decree of the Circuit court of the 25th day of September 1870 be reversed and annulled, and that the appellee Richardson do pay to the appellant his costs by him expended in the prosecution of his appeal to this court; and the cause is remanded to the Circuit court, to ascertain, by proof before the court or otherwise, the true value of the Confederate States treasury notes, secured by the obligation of the appellee, on the 11th day of July 1862, the date thereof, and for final decree.

Decree reversed.

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225 ***Staples & als. v. Staples & als.**

January Term, 1874, Richmond.

*Absent, STAPLES, J.

Wills—Sale—Confederate Money.†—S. died in July 1861, and by his will, which was made in February 1861, he directs "that all of my estate be sold as soon as the times seem to justify a sale without a sacrifice, and the proceeds without regard to any advancement heretofore made, be equally divided amongst my children," naming them, and the children of two who were dead to take *per stirpes*. There were nine children living, of whom six lived in Virginia, and the other three and the grandchildren lived in Missouri. D, one of his sons, was his executor. In July 1862 D sold the estate, except $4,000 of Amherst bonds, the sale being for Confederate money, and on the terms of cash for one-third, and on a credit of one and two years for the balance, the purchasers giving their negotiable notes. These were paid at maturity, and conveyances made by the executor to the purchasers. One place was purchased at the sale by T, and soon afterwards T sold to the executor, who afterwards sold and conveyed to C. The sales were fairly made and brought fair prices, according to the value of Confederate money at that time. The executor settled his accounts regularly, and promptly paid the debts, paid to the six legatees living in Virginia, their shares of the estate; and on the 24th of August 1864, on his petition, the Circuit court of Amherst county made an order that he be authorized to deposit in the Citizens Savings Bank of Lynchburg, the sum of $9,000, in the names of the legatees living in Missouri; which was done on the 7th day of December 1864. On a bill by the legatees in Missouri, to set aside the sales and hold the executor and the Virginia legatees to account, HELD:

226 *1. **Same—Same.**—The discretion as to the time of sale, is given by the testator to the executor, and he having acted in good faith, the sale was valid, whether his judgment that a sale could then be made without a sacrifice was reasonable or not.

2. **Same—Same—Purchasers.**—Even if the executor acted in bad faith, yet if the purchasers at the sale had no knowledge of the fact, but acted in good faith in making and completing their purchases, they acquired a good title to the land purchased by them respectively.

3. **Same—Same—Confederate Money.**—That the sale was made for Confederate money at that time,

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*JUDGE STAPLES was related to some of the parties.

†**Wills—Sale—Confederate Money.**—See Moss v. Moorman's Adm'r, 24 Gratt. 97, and *note*, and see Moon v. Richardson, 24 Gratt. 219, and *note*.

and under the circumstances, can not affect the *bona fides* of the executor or the validity of the sales.

4. **Same—Same—Same.**—The fair mode of considering the prices paid for the property is, to estimate the value of the price in Confederate money as at the time of the sale.

5. **Same—Same—Purchase by Executor.**—An executor or other trustee can lawfully purchase for his own benefit, property, though it may have been purchased by his vendor of himself as such executor or trustee; provided that the transaction be real and *bona fide*.

6. **Same—Same—Same.**—If the sale by the executor to T was a sham sale, it was fraudulent, and if not absolutely void it cannot enure to the benefit of the executor, but only to that of the legatees.

7. **Same—Same.**—The executor did not commit a breach of trust in receiving Confederate money in payment of the deferred instalments of the purchase money of the real estate, at the maturity of those instalments.

8. **Same—Same—Bona Fide Purchasers.**—The purchasers at the sale having in good faith paid the amount of the purchase money duelby them, and the executor having in good faith received it, and executed conveyances to them, they became entitled, in law and equity, to the property purchased by them respectively, and their title thereto can not, therefore, be impeached.

9. **Same—Same—Payment to Legatees.**—The payments made by the executor to the resident legatees, on account of their interest in the proceeds of the sale of the estate, were rightful and proper payments; and cannot be recalled at the suit of the non-resident legatees.

227 *10. **Same—Same—Non-Resident Legatees.**—The executor committed no breach of trust by retaining in his hands, as he did, the portions which belonged to the non-resident legatees, and in depositing the same in the savings bank under the order of the court, as he did; and incurred no liability in regard to the same, except for the depreciation of the mohey so deposited between the time it ought to have been deposited and the time it was actually deposited.

11. **Same—Same—Same.**—The loss arising from the depreciation of the portions retained by the executor and deposited in the savings bank for the non-resident parties as aforesaid, ought to fall on them alone, and not on all the legatees equally, including those residing in the State.

12. **Same—Same.**—The proceeds of the sale of the Amherst bonds should be divided among all the legatees equally.

On the 19th of February 1861 David Staples, late of the county of Amherst, made his will, and he died in July of that year. In September following the will was admitted to probate in the County court of Amherst, and David T. Staples qualified as executor.

By his will the testator gave to his widow during her life a negro woman, and $200 a year; and to his daughter Emily his piano and $100 a year until his estate was divided, or a division of some portion of it should occur. He then says: "I will that all of my estate be sold as soon as the times seem to justify a sale without sacrifice, and the proceeds, without regard to any advancement heretofore made, to be equally divided amongst my children, William A., Nelson C., Polly Ann, James M., Betsy Ann, Emily Ann, Frances Ann, Julia Ann and the children of Cynthia Plunket dec'd, and the children of Ro. S. Staples dec'd; the children of the said Cynthia Ann Plunkett and the children of Robert S. Staples to take per stirpes."

By the will Nelson C. Staples, who lived in Missouri, was appointed trustee
228 for Robert S. Staples' children *who also lived in that State; and David T. Staples the son of the testator, was appointed executor of the will, with directions that he should be permitted to qualify without giving security.

In October 1861 an inventory and appraisement was returned to the court; and among the property mentioned in that paper, were a store house and lot in Lynchburg, appraised at $7,000; a place in Amherst called Mount Airy, with eighty acres attached, appraised at $5,000; and another in the same county called City-view, with four acres, appraised at $2,500; four Amherst bonds of $1,000 each, appraised at $3,000, and five slaves appraised at $2,100.

In July 1862 the executor sold the estate, except the Amherst bonds, which he seems to have retained for the purpose of paying the annuity to the widow; and he settled his accounts regularly before the court of probate; and on the 24th of August 1864, upon his petition, the Circuit court of Amherst county made an order, that he be authorized to deposit in the Citizens Savings Bank of Lynchburg the sum of $9,000, in the names of the five legatees living in Missouri; which was done on the 7th of December 1864. He paid the six legatees living in Virginia the full amount reported by the commissioner to be due to them.

In July 1866 Nelson C. Staples, and the other legatees living in Missouri, four of whom were infants who sued by Nelson C. Staples as their next friend, brought their suit in equity in the Circuit court of Lynchburg, against David T. Staples, in his own right, and as executor of David Staples deceased, the widow and children of David Staples living in Virginia and the husbands of those who were married, and Charles K. Rucker, Ambrose B. Rucker, and Andrew J. Camp & Co.; and in their bill, having set out the facts, they charge the sale
229 *of the store house and lot to Ambrose B. Rucker, at $11,000, and that called City-view to Charles H. Rucker, at $3,725, were void for inadequacy of price, and because the sale was without authority. And they insist that the sale of Mount Airy was void, not only on these grounds, but also because it was purchased by the executor at the sale made by himself. They insist that the Virginia legatees shall account for what they have received, and that the plaintiffs shall not be charged with the moneys deposited in the Lynchburg Savings Bank; or if chargeable at all, only with the value of said deposit. And they pray that the sales of the real estate be set aside, that

the parties who received the proceeds of the sales of the estate of David Staples deceased, may be required to account for the values received by them respectively, and said estate be divided among the legatees equally, as directed by the testator's will; that the executor be required to settle his accounts de novo in this suit; and for general relief.

Ambrose B. Rucker, who purchased the store house and lot in Lynchburg, Samuel J. Turner, one of the sons-in-law of David Staples deceased, to whom Mount Airy was knocked off at the sale, A. J. Camp & Co., who afterwards purchased Mount Airy from David T. Staples, and the said David T. Staples answered the bill.

It abundantly appeared from the evidence, that the sales were fairly conducted, that there were many persons present, and in the opinion of the witnesses, the property sold for fair prices. But the sales were for Confederate money, and were on the terms of one-third cash, and the balance on a credit of one and two years. The Ruckers paid the cash payment, and gave their negotiable notes with an endorser for the deferred payments, which were paid when they fell due; and the executor conveyed to each the property he had purchased.

230 *The facts in relation to the Mount Airy tract are stated by Judge Moncure in his opinion.

By a decree made on the 28th of June 1867, the bill was dismissed with costs as to the Ruckers, and the executor was directed to settle his accounts before a commissioner of the court; and under a subsequent decree, the Amherst county bonds were sold.

The commissioner returned his report, in which he charged the executor with interest on the sum of $9,000 directed to be deposited in the Lynchburg Savings Bank, from the date of the order of the court authorizing the deposit in said Savings Bank, until it was made; and ascertained the amount of each of the eleven shares in Confederate money on the 16th of December 1864, to be $1,912.24 of principal and $134.90 of interest. To this report the plaintiffs excepted; and especially protested against being charged with the $9,000 deposited in the Lynchburg Savings Bank.

The cause came on to be finally heard on the 20th of June 1870, when the court held that A. J. Camp & Co. were bona fide purchasers of the Mount Airy place, without notice of any fraudulent combination between David T. Staples and S. J. Turner, if there was such combination, of which there was no proof in the cause; and such being the fact the said A. J. Camp & Co. were entitled to the said Mount Airy estate against the plaintiffs, and decreed that the plaintiffs pay them their costs, &c.

The court further held that the executor was justified in selling the property of his testator at the time it was sold; and having sold it in perfect good faith, and with the assent of the legatees in Virginia, he was not to be charged with its value in consequence of its having perished by the results of the late war; but he should be credited with the amount deposited in the

231 Lynchburg *Savings Bank. And scaling the amount reported by the commissioner above the amount deposited, he gave the plaintiffs a decree against the executor for this amount; and also distributed the proceeds of the Amherst bonds among all the legatees. From this decree the plaintiffs applied to this court for an appeal; which was allowed.

Mosby, Jones & Bouldin and Jno. B. Robertson, for the appellants.

Kean, Kirkpatrick & Blackford, for the appellees.

Moncure, P. delivered the opinion of the court.

The court is of opinion, that the appellee, David T. Staples, executor of David Staples, had authority under the will of his testator, to sell the real estate of said testator, as he did on the ninth day of July 1862. The testator, by his said will, which bears date on the 19th day of February 1861, expressly directed all his estate to be sold "as soon as the times seem to justify a sale without sacrifice," and the proceeds, without regard to any advancements theretofore made, to be equally divided amongst his children, naming them, and who were eleven in number, the children of two of them who were dead to take per stirpes; and he appointed his son, the said David T. Staples, executor of his will, and directed that no security should be required of the said executor as such. The testator died on the 1st day of July 1861. His will was recorded, and his executor qualified on the 16th day of September 1861. His estate, real and personal, was inventoried and appraised on the 5th day of October 1861, and his real estate was sold, as aforesaid, on the 9th day of July 1862. At the date of his will, and at the time of his death, six of his children resided in Virginia, and it seems in

232 the neighborhood in which *he died; and the remaining five, including the children of the two who were dead, resided in Missouri, where they continued to reside until after the late civil war. The only question in regard to the authority of the executor to make the said sale arises from the words of the will, which directed the sale to be made "as soon as the times seem to justify a sale without sacrifice." It is argued that these words create a condition precedent which must take place to authorize a sale; and that the said sale was made before the times seemed to justify a sale without sacrifice. But, who was to be the judge of that matter? To whom did the testator refer the question as to when a sale might be made without sacrifice? Certainly to his executor, and to him only; who was one of his sons, and in whom, undoubtedly, he had great confidence, as is evidenced by the fact not only that he selected him as his executor, but also that he directed no security to be required in the executorial bond.

He did not direct, nor seem to contemplate, that any resort should be had to a court of equity, to determine the question as to the propriety of sale; but left the matter exclusively to the discretion of his executor, who had himself a deep interest in the subject, and who was surrounded by brothers and sisters who were alike interested, and whom he would, naturally, advise with on the subject. The very nature and object of the trust required a sale in a short time, and as soon as one could be effected without a sacrifice. There could be no division among his numerous heirs without a sale, and they were equally entitled to the subject immediately. The fact that nearly half of them resided in a distant State increased the necessity for a speedy sale, supposing the time to be suitable, as the property could not continue to be held in kind to advantage under such circumstances. Of course
233 he did not wish the property to *be sacrificed by a premature sale, when, by waiting for a short time, such sacrifice might be avoided. But he wished the sale to be made as soon as it could be without sacrifice; for he so expressly said; that is, as soon as it could be so sold, in the opinion of his executor. These words, "as soon as the times seem to justify a sale without sacrifice," seem to have been used, as much for the purpose of accelerating the sale as soon as it could be made without sacrifice, as for the purpose of showing that he did not require it to be made until, in the opinion of his executor, it could be done without sacrifice. Probably, when the will was made, land in the testator's neighborhood was not very salable, but was likely soon to become more so.

Then, the only remaining question in this branch of the case, is: Did the executor act in good faith, in making the sale at the time at which it was made? Did the times then seem to him to justify a sale? Did it seem to him that a sale could then be made without sacrifice?

If he acted in good faith in making the sale, it was valid, whether his judgment that a sale could then be made without sacrifice was reasonable or not, under all the circumstances. And even if he acted in bad faith yet if the purchasers at the sale had no knowledge of the fact, but acted in good faith in making and completing their purchases, they acquired a good title to the land purchased by them respectively. But the court is of opinion that he acted in good faith in making the sale, and that his judgment that a sale could then be made without sacrifice, was reasonable, under all the circumstances. There is no evidence in the record, and there was no attempt by any body to show that the executor acted in bad faith in making the sale. Though real estate may not have been very salable
234 in the neighborhood *when the will was made, it became more so afterwards; and about the time the sale was made, prudent men were making sales of their own land, with a view to their interest. That the sale was made for Confederate money, can make no difference: A sale could be made for no other money at that time, nor at any time afterwards during the war. It was then very doubtful when the war would terminate, and there was no good reason to believe that it would terminate in any short time. The executor had deferred the sale until about a year after the testator's death, and there seemed to be no good reason for deferring it any longer. Most, if not all of the heirs residing in Virginia desired a sale, and none of them opposed it. That nearly half in number of the heirs resided in Missouri, whose wishes on the subject were not known, makes no difference. Though they could not, in the then state of the country, receive their portions of the proceeds of sale, yet it was well hoped that they might be able to do so in a short time. The heirs living in Virginia could receive their portions at any time, and those of the non-resident heirs it was no doubt believed, and reasonably believed, by the executor, could be held and secured for them until they could receive their portions. That sales of real estate might properly be, and were frequently made during the war, for Confederate money, under decrees of courts of chancery and by fiduciaries, where non-residents and persons under disability were concerned, has been established by repeated decisions of this court. Dixon & als. v. McCue's adm'x & als., 21 Gratt. 373; Walker's ex'or v. Page & als. Id. 636; Poague v. Greenlee's adm'r & als., 22 Id. 724. Though Confederate money had depreciated, and was perhaps still depreciating, at the time of the sale, yet most persons then hoped and believed that it would soon become better, and ulti-
235 mately be worth its *par value. At least it was generally, if not universally believed, that Confederate bonds, in which Confederate money could at any time be readily invested, were a perfectly safe investment. Scarcely any body in the Confederate States then doubted the success of the Confederate cause, and perhaps every body believed that in that event those States would be able to pay, and would pay, the entire amount of their debts, great as they would certainly be.

The court is further of opinion, that the said sale was not void or voidable on the ground of inadequacy of price: and that the price at which the property was sold at said sale, cannot be considered as inadequate, under the circumstances which then existed. There is no evidence in the record tending to show that any of the property sold did not produce its full value in Confederate money, on the terms on which it was sold. On the contrary, the evidence in the record affirmatively shows, that all of the said property produced its full value, in such money and on said terms. The sale was duly advertised, and was well attended by bidders, and every effort in the power of the executor seems to have been used by him to promote the sale. Several of the other heirs were present, and none of them objected to the sale, but all seemed to be

satisfied therewith. The price at which the property was sold in Confederate money converted into gold at its then market value, at the place where the sale was made, would have exceeded the appraisement price of the property; but we all know that at that time gold was a very scarce commodity and commanded very high price, and that Confederate money was often worth its par amount, or nearly so, in the payment of ante-war debts, or in the purchase of land or other property. In considering the question of inadequacy of price, the value of the 236 Confederate money for *which the land was sold ought to be estimated as at the time of the sale, and not as at the time at which it became payable according to the terms of sale. No body anticipated, at the time of the sale, that there would be any thing like so great a depreciation of Confederate money as afterwards occurred. On the contrary, most persons, perhaps, believed that its value would continue to be about the same, and many no doubt believed that it would appreciate after a while. The fair mode of considering the subject is, to estimate the value of the price in Confederate money as at the time of the sale. Tested by that rule, there was certainly no inadequacy of price.

The court is further of opinion, that the executor was not a purchaser of Mount Airy at his own sale; but that he purchased it afterwards of S. J. Turner, who had purchased it at the executor's sale; and that it was competent for the executor, acting in good faith, to become such purchaser from S. J. Turner.

It is certainly well settled, as a general rule, that a trustee for the sale of property cannot purchase it for his own benefit at his own sale, either directly by his own act, or indirectly by the interposition and agency of another; and that an executor is a trustee within the meaning of the rule. But it is certainly true, that an executor or other trustee can lawfully purchase, for his own benefit, property, though it may have been previously purchased by his vendor of himself as such executor or other trustee; provided, of course, that the transaction be real and bona fide. If the sale by the trustee be a sham sale, of course it is fraudulent, and if not absolutely void, it can not enure to the benefit of the trustee, but only to that of the cestui que trust. Now the question in this case is, was S. J. Turner, to whom Mount Airy was cried out at the executor's sale, a purchaser of that property for his own benefit and on his 237 *own account, or did he purchase it as the secret agent and for the benefit of the executor?

Certainly S. J. Turner was the highest bidder for the property, and it was cried out to him at the executor's sale. He was in form and to all appearance the purchaser at that sale. If, though in form acting for himself he was really acting for the benefit and as the agent of the executor, their object being to accomplish indirectly and secretly, what they knew they could not accomplish directly and openly, they were both guilty of a great fraud; but in order to establish such a fraud, the evidence ought at least to be very strong.

There is no such evidence if there be any evidence tending to prove such a fraud in this case. On the contrary, all the evidence in the case is consistent with the truth and integrity of the transaction. The account given of it by said Turner in his answer is as follows: "Respondent represents that Mount Airy was at the sale knocked out to him, and not to the said D. T. Staples. Respondent bought said place because he was anxious to secure it as a home to his mother-in-law, the widow of David Staples, and his sister-in-law, then living with her mother. At the time of the sale he believed that he could prevail upon David T. Staples to take the purchase off his hands, though said D. T. Staples was very much averse to doing so, and had urged upon respondent and the other legatees not to sell Mount Airy, but allow it to remain for the present unsold, and be used as a home for their aged mother and their maiden sister. This arrangement was not assented to by the parties; they positively refusing so to do, and insisting that the property should be all sold together. Thereupon respondent determined to buy the property aforesaid; and having done so, prevailed on said D. T. Staples to take his shoes, which he did. Said D. T. Staples, as executor, first 238 conveyed *said property to respondent, and respondent then conveyed it to him, and he afterwards conveyed it to A. J. Camp. Respondent is sure that in respect to this purchase of Mount Airy, the said D. T. Staples acted from the purest motives, and with no view to his personal advantage. The old lady was very infirm, and her husband had made very inadequate provision for her. Respondent, under the circumstances, regarded it as the duty of her children to secure to her a home, and on his part he made this purchase with a view to that end only."

D. T. Staples, in his answer says: "As to the sale of Mount Airy, charged in the bill to have been made by respondent to himself, he desires to refer to the answer of his co-defendant, Turner, which relates the truth of the case. Respondent never wished to purchase said property. He never would have consented to Turner's proposition but for the earnest entreaties of the family, who were anxious that respondent should take the house, which was the old homestead, and allow their aged and very infirm mother to occupy it with himself and his unmarried sister. This step was rendered necessary for the comfort of the old lady, the provision for her maintenance having become wholly inadequate early in the war. The price at which said property sold was its full value at the time. A large company of land buyers was present at the sale, and every effort was made to procure the fullest price."

The evidence on this branch of the subject consisted of the testimony of one witness,

W. A. Staples, examined in behalf of the plaintiffs, and three witnesses, Bryan Akers, E. B. Mays and C. H. Rucker, examined in behalf of the Camps, the sub-purchasers of Mount Airy from D. T. Staples.

On the one side, W. A. Staples tes-
239 tified as follows: *"I was at the sale. Turner and Staples had some conversation about Mount Airy. Turner advised Staples to purchase it; that it would suit him. The latter replied he had no right to buy, being executor, &c.; intimated or expressed that it would suit him, &c."

On the other side, Bryan Akers, who was the auctioneer that conducted the sale, testified as follows: "There was a large crowd present when the sale was made, and the prices obtained were considered good prices at that time, and I think were perfectly satisfactory to the legatees present. Mr. Turner, the son-in-law of David Staples, became the purchaser of the place called Mount Airy, and the price paid for it was then considered a good one. D. T. Staples, W. A. Staples, and one, if not both the Turners, (legatees of D. Staples,) were at the sale." E. B. Mays (who had married a sister of S. J. Turner) testified that he was present at the sale. There was a large crowd present. At the time, the prices obtained were regarded as good. S. J. Turner became the purchaser of Mount Airy, and after the sale offered to sell it to the witness, but sold it to D. T. Staples to secure a home for his (the witness's) wife's mother, as said Turner told the witness. C. H. Rucker testified as follows: "I was at the sale. I regarded the prices obtained as very good. I was a bidder for Mount Airy, and it sold for more than I was willing to pay for it. I ran it up, I think, above $7,000. I regarded it a good sale. I was pretty well acquainted with that property and had been over it a good deal. D. T. Staples, Jno. L. Turner and Samuel J. Turner, (legatees of David Staples,) were present at the sale. I do not remember whether W. A. Staples was present. (In fact he was.) I have never heard from any of the legatees that they objected to the sale. I was a purchaser of one piece of the property at the sale."

240 *Thus it appears from the evidence, that S. J. Turner was, bona fide, the purchaser of Mount Airy, on his own account, at the executor's sale; that after the sale he claimed it as his own property and exercised acts of ownership over it, first, by offering to sell it to Mays, who married his sister; and then by selling it to D. T. Staples, who bought it as a home for his mother and sister; that this arrangement was agreeable to all the legatees who were present at the sale; and that the property produced the best possible price that could be obtained for it, without being in the least degree influenced by the fact that S. J. Turner was the purchaser at the sale, or the fact that D. T. Staples became a sub-purchaser from him; which latter fact had not then transpired, and of course could not then be known to the bidders at the sale. It does not appear from the evidence that there was any agreement or understanding between D. T. Staples and S. J. Turner, when the latter became the purchaser of the property, that he would resell it to the former; and it is very clear that no such resale could have been enforced, if Turner had chosen to continue to own and hold the property. The subsequent purchase by D. T. Staples appears to have been voluntary on his part, induced by the laudable desire of himself and the other legatees who were present, to preserve the family residence as a home for their aged mother and maiden sister. Under these cirumstances, there was nothing in the law to prevent these parties from making this humane arrangement, and it was competent for D. T. Staples to purchase the property, as he did, from S. J. Turner.

It was argued by the learned counsel for the appellants, that by making the purchase, D. T. Staples placed himself in a wrong position, in which his interest conflicted with his duty; that it then and thus
241 became his interest *to accept Confederate money in discharge of the deferred instalments of the price of the property, however greatly the value of such money might depreciate in the mean time; while it might be his duty to refuse to receive it, on account of such depreciation. The books afford no authority for saying that such a circumstance will disable a trustee from purchasing property which had once constituted a part of the trust subject, and had been sold by him as such. S. J. Turner having become the bona fide purchaser of the property on his own account, could sell it to whomsoever he pleased, subject, of course, to the payment of the purchase money due by him, and D. T. Staples had the same right to make the purchase of S. J. Turner that any other person had. It could no more make it to the interest of the executor to do wrong in the execution of his trust than a like purchase of property, at the same time and on the same terms, of any other person would have done; and nobody will say that it would have been incompetent for him to have made such a purchase. That an act may make it the interest of a trustee to do wrong, does not, of itself, necessarily make the act unlawful. It may serve to put us on the alert, and cause us to scrutinize closely the conduct of the trustee; but the question, after all, is, whether the trustee has in fact done wrong or not. In this case, when the purchase was made by D. T. Staples of S. J. Turner, which was probably about the time of, though after the executor's sale, it did not and could not appear that the purchase would make it the interest of the executor to do wrong, or influence his conduct as executor in any way. Nobody then knew that there would be any material depreciation of Confederate money when the deferred payments would mature, but most people hoped, and perhaps believed, that such would not be the case. Had they
242 not so *hoped and believed they would not, about that time, have made sales

of property for Confederate money, payable at future periods, without providing against the effect of such depreciation.

The court is further of opinion that D. T. Staples having lawfully become the purchaser of Mount Airy of S. J. Turner, had a right to resell it to the Camps, whose title, therefore, cannot be impeached: and this renders it unnecessary to consider the ground so much pressed by their learned counsel, in argument, that even if the purchase was made by S. J. Turner, at the executor's sale, for the benefit of the executor himself, yet the Camps were bona fide subsequent purchasers without notice, and entitled, as such, to the property, against the claims of the appellants.

The court is further of opinion that D. T. Staples is chargeable with nothing on account of the resale by him of Mount Airy to the Camps. He would have been chargeable with nothing on account of such resale, even if he had made a profit by it; his conduct in the transaction having been fair and bona fide. But it appears that, so far from making a profit, he sustained a loss by it; for though the resale was for a larger amount, nominally, of Confederate money than he paid for it, yet, reducing the amounts both paid and received to good money or gold, at the times of such payments and receipts respectively, it appears by the commissioner's report that the amount paid exceeded the amount received by $695.83.

The court is further of opinion that the executor, D. T. Staples, did not commit a breach of trust in receiving Confederate money in payment of the deferred instalments of the purchase money of the real estate at the maturity of those instalments; and the purchasers at the sale, having in good faith paid the nominal amount
243 of *the purchase money due by them; and the executor having in good faith received such payment in full discharge of said purchase money, and executed the proper conveyances, the said purchasers became entitled, in law and equity, to the property purchased by them respectively; and their title thereto cannot, therefore, be impeached.

The contracts of sale by the executor in this case being made on the 9th day of July 1862, though made for so many dollars merely, were, no doubt, according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or were entered into with reference to such notes as a standard of value; and if the purchase money had not been fully paid during the war, the case would have come within the operation of the adjustment acts, and been settled accordingly. But, one-third of the purchase money was paid in hand, and for the other two-thirds negotiable notes were given, (certainly by A. B. Rucker, and no doubt by the other purchasers also,) payable one and two years after date, according to the terms of sale; which notes appear to have been punctually paid at maturity; of course in Confederate States treasury notes. The money had greatly depreciated between the date and the maturity of the negotiable notes, no doubt greatly beyond the expectation of the parties at the time of the sale. But, still the parties considered that the said notes were solvable in Confederate money at par, at the time of their maturity; and such payment was accordingly made by the purchasers, and received by the executor, in discharge of the said notes; and the property was thereupon duly conveyed to the purchasers thereof respectively. These acts of the purchasers and of the executor were done, and this settlement between them was made in perfectly good faith; and they ought not now to be undone or disturbed; whatever might
244 *have been the rights of the parties after the war and under the adjustment acts, if the transaction had not been fully settled, as aforesaid, during the war. This settlement was made in accordance, it is believed, with the general understanding of the country in regard to the construction and operation of such contracts; and similar settlements have no doubt been made, by fiduciaries and others, in a great many cases, which it would be productive of a great deal of evil, confusion and loss to unravel and set aside. It is far better to let such settlements, made during the war, remain as they were made by the parties, than to attempt now to do justice by setting them aside, and making new settlements for the parties. Courts have enough to do, in regard to these transactions, in settling such of them as remained unsettled at the end of the war. The preamble of the adjustment act of March 3, 1866, affords some idea of the difficulty attending the adjustment of these unsettled matters. After reciting that a depreciated currency, known as Confederate States treasury notes, constituted the only or principal currency, in the greater part of this State, during the late war, and that the result of said war involved the total destruction of said currency, the preamble proceeds to recite, that "whereas there are many contracts which were made, or obligations which were incurred, before the termination of said war, predicated on said depreciated currency, still remaining wholly or partially unadjusted; in respect to which great uncertainty exists, perplexing alike to debtor or creditor, as to the present measure of their liabilities and rights respectively; and it thus appearing useful that some uniform and equitable rule should be established for the adjustment of such mutual demands and liabilities: Therefore," &c.: That it was the policy of this act not to disturb settlements of these transactions actually made between
245 *the parties is shown by the proviso of the 2d section, "that in all cases where actual payment has been made of any sum of such Confederate States treasury notes, either in full or in part of the amount payable under such contract, the party by or for whom the same was paid, shall have full credit for the nominal amount so paid,

and such payment shall not be reduced." The 4th section of the act in regard to a tender, serves to show the view of the legislature as to the effect, not only of actual payment of a Confederate debt, but even of a tender of the amount, on or after the maturity of the debt, and within the period prescribed by the act. We think, therefore, without enquiring what would be the most reasonable construction of such a contract, if the question were a new one, that wherever the parties have, during the war, bona fide settled the matter themselves, as in this case, by paying on the one side, and receiving on the other, the amount of a Confederate debt at its maturity, in Confederate States treasury notes, the transaction ought, forever, to stand and remain as thus settled.

The court is further of opinion that the payments made by the executor to the resident legatees, on account of their interest in the proceeds of the sale of the estate, were rightful and proper payments; that the executor committed no breach of trust by retaining in his hands, as he did, the portions which belonged to the non-resident legatees, and in depositing the same in bank, under the order of the court, as he did; and incurred no liability in regard to the same, except for the depreciation of the money so deposited, between. the time it ought to have been deposited under such order, and the time it was actually so deposited; with the amount of which depreciation he has been charged by the decree of the court below; and that the loss
246 arising from the depreciation *of the portions retained by the executor and deposited in bank for the non-resident parties as aforesaid, ought to fall on them alone, and not on all the legatees equally, including those residing in the State; and that the proceeds of the sale of the Amherst bonds were rightly decreed by the court below to belong to all the legatees equally, and not the non-resident parties exclusively.

It appears that the executor promptly and fully paid to the resident parties their portions of the estate, and there is no complaint on their part against him in that respect, although no account between him and them was stated by the commissioner. Those parties residing here, and being entitled to, and ready to receive, their portions, it was the duty of the executor to pay them. But the other parties residing out of the State, and cut off by the war from all communication with the executor, it was out of his power to pay their portions, and he was compelled by necessity to retain them until the end of the war. He retained them safely in his own hands until he made the deposit in bank under the order of court, as aforesaid. It does not appear that he was in any default in not having obtained the order for the deposit at an earlier period. The order was made very soon after the second deferred instalment was paid. He could not know how long it would be before the non-resident parties could receive their portions. He seems to have acted in good faith in retaining the money in his own hands as long as he did. He says he was no speculator, and it is not pretended that he derived any profit from the money, or used any part of it for his own benefit, although he is charged in his accounts with interest upon it while it remained in his hands. The estate of his testator was indebted to a large amount, which exhausted the greater part of
247 the cash payment *for the real estate.

The executor himself was a creditor of the estate, by bond and note, to the amount of upwards of $3,000, which was, no doubt, a specie debt, and is charged to the estate in the executorial account, as of the 14th of August 1862; being then paid in Confederate money. The executor having properly paid the portions of the resident parties, and set apart, and first retained and then deposited in bank, the portions of the non-resident parties, it follows that the loss arising from the depreciation or destruction by the effects of the war, of the money constituting those latter portions, must fall exclusively on the owners thereof, to wit, the non-resident parties; and all the rest of the estate having been divided equally among all the parties entitled thereto, it follows, as a matter of course, that they are all equally entitled to the only estate remaining for distribution, to wit; the proceeds of the sale of the Amherst bonds.

The resident legatees had a right to receive their portions, and did accordingly receive them, leaving the portions of the non-resident legatees in the hands of the executor. That the latter legatees could not receive their portions, by reason of their non-residence and of the war which then existed, was their misfortune, and is not attributable in the least degree to any fault of the resident legatees; who are, therefore not bound, upon any principle of law or equity, to bear any part of the loss arising from the depreciation of the money retained and set apart by the executor as the portions of the non-resident legatees. The money so retained and set apart was deposited in bank by the executor, in the names of the owners thereof, the non-resident legatees respectively, according to the order of the court, and so remained on deposit until Confederate money perished by the result of the war. Of course, the loss must
248 fall exclusively *on the said owners of the money so deposited. It is said the non-resident legatees never consented to receive those portions, which, therefore, were not theirs. Such consent was not necessary to make them theirs. The resident legatees had of right received their portions, leaving the residue of the funds in the hands of the executor; and the case then stood as if that residue had constituted the whole estate and the non-resident legatees were the only distributees thereof.

The executor throughout the course of his management and administration of his testator's estate, acted within the scope of his powers and, so far as the record shows, in perfectly good faith. It does not appear

that he acted in any respect as a prudent man would not have acted, and did not often act during those extraordinary times, in regard to his own property; and these are considerations which have always had very great, if not controlling, effect in controversies in regard to the responsibility of fiduciaries in such cases. He acted with the advice and at the instance of all the resident parties, except, perhaps, one of them, who, however, did not object, was present at the sale, and received his portion of the money. And what is still more important to show the good faith with which the executor acted, he consulted able counsel and acted in pursuance of the advice and instructions of such counsel. The court perhaps, can not judicially know the moral character and professional standing of any particular counsel; but the executor says that he retained as his counsel the late Chiswell Dabney, Esq., who had been the trusted friend and legal adviser of the testator, and that he strictly pursued the advice of said counsel in regard to all his transactions as executor. That counsel is spoken of in the record as having been distinguished for his carefulness, ability and uprightness, and there is nothing in the record 249 *tending to show the contrary. The record shows traces of the advice of good counsel in the management of the estate; the executorial accounts having been regularly settled every year, and returned, confirmed and recorded. It would, at least, be a very hard case if, under all these circumstances, the executor should be held personally responsible for the loss which has occurred. Certainly that loss is very great; and it has fallen, more or less, on all the parties concerned; though especially on the non-resident parties, by reason of the accident of their non-residence. But this loss has been the result, not of misconduct, but of misfortune, against which human foresight could not guard. Many of our wisest and best men lost their whole estates, after using every means which their wisdom suggested to avoid such a loss. Fiduciaries are fallible like other men, and can not be expected or required to take better care of the estates of others entrusted to their hands, than men of ordinary prudence take of their own estates. It is not strange therefore, that infants, and insane persons, and married women, and non-residents who owned property within the Confederate States during the war, sustained losses as other people did, and were involved in the same calamity which overwhelmed almost all who were in a like predicament.

Upon the whole, we think there is no error in the decrees appealed from, and that they ought to be affirmed.

Anderson, J., concurred in the opinion on all the points discussed, but one. He thought the money deposited in the Lynchburg Savings Bank should have been at the risk of all the legatees.

Decree affirmed.

250 *Buck & als. v. Wroten & Wife.

January Term, 1874, Richmond.

1. **Equitable Separate Estate.***—The testator says: All the rest and residue of my estate, of whatsoever nature, kind or description, not hereinbefore disposed of, including all my slaves, &c., on the death or marriage of my wife, I give to my daughter E. G. and her children, including her child by her first husband, R, to and for her and their sole and separate use and benefit, and not to be subject to or liable in any way whatsoever for the debts of her husband H. G. At the time of the will the oldest child of E. G. was twenty years old: the two daughters and two sons by her last marriage were infants ten years and under. The property left to the grand-child is not left to her exclusive use and benefit, so as to defeat the marital rights of her husband.
2. **Same.**—Courts of equity will not deprive the husband of his rights at law, unless the words relied upon to create a separate estate, of themselves, leave no doubt of the intention to exclude him.

John L. Shultice, of Fredericksburg, died in August 1849, having made a will in October 1846, which was duly admitted to probate. After giving a house and lot in Fredericksburg to his grand-daughter Sarah W. Rollow, and giving all the rest of his estate to his wife for her life or widowhood, and devising certain real estate to his son Wm. Shultice, to be taken at the death of his wife; by the 6th clause of his will he says:

All the rest and residue of my estate, of whatsoever nature, kind or description, not herein before disposed of, including all my slaves and the future increase of the females thereof, on the death or marriage of 251 my said *wife, I give and devise to my daughter Eliza Ann Genther and her children, including her child by her first husband William Rollow, dec'd, to and for her and their sole and separate use and benefit, and not to be subject to or liable in any way whatsoever for the debts of her husband Henry D. Genther.

Sarah W. Rollow, the child of Mrs. Genther, referred to in the will, married George W. Wroten about 1850; and after the marriage, viz: in May 1861, Wroten conveyed to Wm. A. Little, in trust, to secure debts, a farm called Gunnery Hall, which had been allotted to Mrs. Wroten, after the death of

*Equitable Separate Estate.—See Coatney v. Hopkins, 14 W. Va. 362, and Rixey's Adm'r v. Deitrick, 85 Va. 42, 6 S. E. Rep. 615. See also, Scott v. Gibbon, 5 Munf. 90; Smith v. Smith's Adm'rs, 6 Munf. 581; West v. West, 3 Rand. 373; Lewis v. Adams, 6 Leigh 320; Nixon v. Rose, 12 Gratt. 425; Penn v. Whitehead, 17 Gratt. 503; Mauzy v. Mauzy, 79 Va. 537; Haymond v. Jones, 33 Gratt. 321; Mitchell v. Moore, 16 Gratt. 280; White v. White, 16 Gratt. 264; Taylor v. Yarbrough, 13 Gratt. 183; Cleland v. Watson, 10 Gratt. 159; Sayers v. Wall, 26 Gratt. 373, and *note*; Harshberger's Adm'r v. Alger, 31 Gratt. 52; Leake v. Benson, 29 Gratt. 156, and *note*; Garland v. Pamplin, 32 Gratt. 314; Dugger v. Dugger, 84 Va. 144, 4 S. E. Rep. 171; Ropp v. Minor, 33 Gratt. 97, and *note*; Miller v. Miller's Adm'r, 92 Va. 515, 23 S. E. Rep. 891.

Mrs. Shultice, as a part of the estate she received under the will of John L. Shultice.

It seems that Buck and others, creditors of Wroten, filed their bill in the Circuit court of Spottsylvania, against Little and Wroten, to have the said deed of trust enforced. In May 1871 the bill was amended making Mrs. Wroten a defendant; and she and her husband filed an answer, referring to the will of John L. Shultice, and insisting that under that will she took a separate estate which could not be conveyed by her husband so as to deprive her of her rights.

It appears that at the date of John L. Shultice's will, Mrs. Wroten, then Rollow, was about twenty years old, and the other children of Mrs. Genther were two daughters, of the age respectively, of ten and three years, and two sons of eight and six years.

The cause came on to be heard on the 6th of December 1871, when the court held that the farm called "Gunnery Hall" was the separate estate of Mrs. Wroten, and that she was entitled to hold it freed from any claim of the trustee under the deed of trust from Wroten. And from this decree the plaintiffs applied to this court for an appeal; which was allowed.

Marye & Fitzhugh, for the appellants.

252 *Little and Wallace, for the appellee.

Christian, J., delivered the opinion of the court.

This case presents a single question. It arises upon the proper construction to be given to the sixth clause of the will of the testator, John L. Shultice, which is in the following words: "All the rest and residue of my estate, of whatsoever nature, kind or description, not hereinbefore disposed of, including all my slaves and the future increase of the females thereof, on the death or marriage of my wife, I give and devise to my daughter, Eliza Ann Genther, and her children, including her child by her first husband, Wm. Rollow, dec'd, to and for her and their sole and separate use and benefit, and not to be subject to or liable in any way whatsoever for the debts of her husband, Henry D. Genther."

According to the facts agreed, at the testator's death, his daughter, Eliza Ann Genther, had five children, three daughters and two sons, one of the daughters by a former marriage being about twenty years old, the other two being ten and three years old respectively, and the two sons aged respectively six and eight years. The first named daughter, Sarah W. Rollow, intermarried with George W. Wroten in the year 1850. Suit was brought in the Circuit court of Spotsylvania to subject the property devised to Sarah Rollow by her grandfather, under the sixth clause of his will above quoted, to the debts of her husband, George W. Wroten, which property it seems was conveyed by Wroten to Wm. A. Little, trustee, to secure certain creditors of said Wroten.

The Circuit court held, "that under the sixth clause of the will of her grandfather, John L. Shultice, the defendant, Sarah W. Wroten, took the property thus devised to her, for her sole and separate use and 253 benefit *and freed from all liability for the debts of her husband; and that 'Gunnery Hall,' which is part of said devise, is the separate estate of the said Sarah W. Wroten, and was not lawfully conveyed to said Little, trustee, by the said deed of the 16th of May 1861; and that said Sarah W. Wroten is entitled to hold and enjoy it, freed from any claim of said trustee under said deed of trust." From this decree an appeal was allowed by this court.

The rule is well settled, as is abundantly shown by the authorities cited by the counsel for the appellant, to which many other cases, English and American, might be added, that courts of equity will not deprive the husband of his rights at law unless the words relied upon to create a separate estate, of themselves leave no doubt of the intention to exclude him. Schouller's Domestic Relations 191, and cases there cited.

Mr. Justice Story lays down the rule in these words: "The purpose" (to exclude any present or future husband,) "must clearly appear beyond any reasonable doubt; otherwise the husband will retain his ordinary legal and marital rights over it." 2 Story Eq. § 1381. See also, Lumb v. Milnes, 5 Ves. R. 517; Brown v. Clark, 3 Ves. R. 166; Rich v. Cochell, 9 Ves. R. 370, 377; Massey v. Parker, 2 Mylne & Keen R. 174.

In the last mentioned case the Master of the Rolls said: "The cases require very distinct and unequivocal expressions to create a separate interest in the wife; and the husband is not to be excluded except by words which leave no doubt of the intention." In Tyler v. Lake, 2 Russ. & Mylne 183, Lord Brougham said: "I take the principle to be now thoroughly established that courts of equity will not deprive the husband of his rights at law, unless there appears to be a clear intention manifested by the testator that the husband should 254 be so *excluded." The following American cases, among others, establish the same doctrine: Meredith v. Owen, 4 Sneed's R. 223; Gilliam v. Welch, 4 Dev. Law R. 286; Ashcraft v. Little, 4 Ired. R. 134; Logan v. Thrift, 20 Ohio St. R. 62.

Let us now apply this rule, which must be taken as fairly settled, to the case before us. The devise is by the grand-father to his daughter "Eliza Ann Genther and her children * * * to and for her and their sole and separate use and benefit, and not to be subject to or liable in any way whatsoever for the debts of her husband Henry D. Genther."

It is clear that under this clause there is a plain and distinct intention to exclude the marital rights of the husband of his daughter Eliza Ann Genther. But is there no doubt of his intention to exclude the future husbands of his grand-daughters, none of whom were married, and two of whom were infants of very tender years? The true

construction is, in my opinion, quite the other way. The testator is providing for his daughter and his grand-children, some of whom are males and some females. He devises his property to this family, males and females, 'to their sole and separate use, and not to be subject to or liable in any way whatever for the debts of Henry D. Genther; the husband of his daughter, and the head of that family. It was against his (Genther's) debts and liabilities that he was seeking to protect the property, and secure it for the use of his daughter and grand-children. There is no allusion made to the marriage of his grand-daughter, nor is there any thing to show that the testator had present to his mind the right which their future husbands would obtain in their property. There are certainly in this devise no words of exclusion as to the future husbands of his grandchildren, while the
255 rights of the husband *of his daughter, Henry D. Genther, are excluded in express terms. This shows that the mind of the testator was directed to the exclusion of the marital rights of his daughter's husband, but that no such intention was manifested towards the future husbands of his grand-daughters.

This view, as to the intention of the testator, is strengthened and confirmed by the fact that, in the third clause of his will, in which he made a special devise of a house and lot in the town of Fredericksburg to the only one of his grand-daughters (Sarah Rollow, now Mrs. Wroten,) who had then attained the marriageable age, he does not exclude the marital rights of any future husband she might have, by giving her a separate estate in that property.

To say the least of it, and under the established rule it is sufficient to say this, that, looking to the whole will, there does not appear a clear intention and decided purpose on the part of the testator to exclude the marital rights of the future husbands of his grand-daughters.

In the absence of such clear intention and decided purpose, the marital rights of the husband are not excluded and must attach.

We are therefore of opinion that the decree of the Circuit court of Spotsylvania must be reversed.

Decree reversed.

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256 *Rodes' Adm'r v. Rodes & als.

January Term, 1874, Richmond.

Covenant—Equity—When Jurisdiction.*—There is a joint covenant by four to pay to R $300 a year for her life. To secure which annual payment each was to execute his bond with surety, binding him to pay $75 a year; but this is not done; nor is the annuity paid to her. After the death of R, one of the four joint obligors qualified as her administrator with the will annexed, and then files his bill in equity against the obligors to recover the amount due to her. The administrator being one of the obligors could not sue the others at law, and therefore the court of equity has jurisdiction to enforce the payment of the money.

In July 1870 William W. McClung, administrator with the will annexed of Sally P. Rodes, deceased, filed his bill in the Circuit court of Nelson county against James E. Rodes, William L. Williams, himself, and James M. Harris, executor of Charles Rodes, deceased, in which he set out that John H. Rodes, of that county, died leaving a will, by which he gave to his widow, the testatrix of the plaintiff, for life, the land on which he lived, and another tract, and also certain personal property; and at her death he gave the same to his four children, two of whom plaintiff and William L. Williams had married; that after the death of said John H. Rodes, Mrs. Rodes entered into an agreement under seal, which he exhibits with his bill, with the two sons of the testator, the plaintiff and said Williams, by which she released her life interest in the property given to her for her life, to them, in consideration of which they covenanted to pay to her $300 per annum,
257 *for her life, the first payment to commence on the 25th of September 1856; to secure which annual payment each legatee was to execute to her a bond with security approved by her, obliging himself to pay her annually during her natural life, the one-fourth part of said annuity, being seventy-five dollars, the first payment to commence on the said 25th of September 1856.

The bill further states that the said Sally P. Rodes fully complied with this covenant on her part; but that the said bonds were not executed by any of the other parties; nor were the said annual sums of $300, or any part of them, paid by them to her. That she died on the 9th of February 1867, having made her will, which was duly admitted to probate, and the plaintiff qualified as her administrator with the will annexed. And making himself as one of the parties to the covenant, Williams, James E. Rodes and Harris as ex'or of Chas. Rodes, parties defendants, he asked that all proper accounts should be taken, that he might have a decree against the defendants for the amount of the said annuity, with interest, and for general relief.

Williams alone appeared. He demurred to the bill on the ground that the plaintiff had a complete and effectual remedy at law. He also answered; but it is not necessary to state his grounds of defence.

The cause came on to be heard on the 15th of September 1870, when the court sustained the demurrer, and dismissed the bill, with costs. And the plaintiff thereupon applied to this court for an appeal; which was allowed.

Darneale, for the appellant.

There was no counsel for the appellees.

***Covenant—Equity—When Jurisdiction.**—See on this point, Spooner v. Hilbish, 92 Va. 338, 23 S. E. Rep. 751, citing the principal case. See also, Booth v. Kinsey, 8 Gratt. 560, and Ralphsnyder v. Ralphsnyders, 17 W. Va. 37.

Anderson, J., delivered the opinion of the court.

258 *The covenant is a joint one, to pay to Mrs. Sally P. Rodes, annually during her life, in consideration of her relinquishing her life estate, three hundred dollars. The provision that each of the four covenantors, in order to secure the payment of the $300 annually, should execute their bonds to her severally, with security for the payment annually of $75 each, does not release them from the joint obligation, at least until that was done, until each of the four obligors had executed his bond with security, as provided. That not having been done, the joint obligation to pay $300 annually is a subsisting one.

Mrs. Rodes might, in her life time, have maintained an action at law against them jointly upon the covenant; but since her death, one of the joint covenantors being her personal representative, he could not maintain an action at law upon the covenant; because it being joint, an action of covenant could only be maintained against them jointly, and he was one of them. It is clear that at common law a party can not sue himself, either alone or in conjunction with others. Stor. on Part. § 221. In an action by several, as executors, a plea in bar that the promises were made by one of the defendants, jointly with one of the plaintiffs, is sufficient. 1 Chitty Plead. Marg. p. 26, citing 2 Bos. & Pul. R. 124. Upon the technical principles of the common law, no person can maintain a suit against himself, or against himself and others. The objection is at law a complete bar to the action. 1 Stor. Eq. Juris. § 679.

But in equity there is no difficulty. It is sufficient that all parties in interest are before the court, either as plaintiffs or defendants. They need not, as at law, be on the opposite sides of the record. Ibid. § 680. Although in such cases there is no remedy at law, yet in equity an appropriate remedy may and will be granted 259 whenever *it is ex equo et bono necessary and proper. Stor. on Part. § 222; 2 Bos. & Pul. 124; 6 Taunt 605.

The court is therefore of opinion, that a bill in equity was the proper remedy of the administrator cum testamento annexo, of Mrs. Sally P. Rodes to enforce the joint covenant in which he was one of the covenantors; and that it was error to sustain the demurrer and to dismiss the plaintiff's bill for want of jurisdiction, which is the only point in the case.

The court is of opinion, therefore, to reverse the decree of the Circuit court, and remand the cause for further proceedings to be had therein in conformity with this opinion.

Since this opinion was written, my attention has been called by J. Staples to the decision of this court in Booth v. Kinsey, 8 Gratt. 560, by which we are fully sustained. See J. Moncure's opinion, p. 562.

Decree reversed.

260 *Puryear & als. v. Cabell & als.

January Term, 1874, Richmond.

Wills.—W died in 1857. By his will he gave his estate to his wife W, for her life, to be used and controlled by her at her entire discretion; but as certain of his children, named, came of age or married she was at liberty to give them or either of them, as also his daughter Mrs. C, such part of his estate as she could conveniently spare, she to be the sole judge of it. And at her death he gave his estate equally among his children named, each of whom was to account for what they had or might receive. In 1858 W has a tract of land and a number of slaves divided and valued, to allot a part to each to whom she was authorized to make advancements, and she conveys and delivers one of the parts to each of said children except Mrs. C. Her part is retained by W until January 1865, when it is delivered to the guardian of Mrs. C's children, she being then dead. In dividing the estate on the death of W, HELD:

1. **Same—Advancements.***—The advancements made to the children in 1858 are to be taken at the valuation then put upon them, but without interest during W's life.
2. **Same—Same.**—The advancements to Mrs. C's children is to be valued as at the time it was delivered to their guardian.
3. **Same—Same—Time of Valuation.**—The slaves in this lot were not then free, and are to be valued at what they were then worth to the children of Mrs. C.
4. **Same—Same.**—The husband of one of the children having cut timber off another tract, which he and W intended should be accounted for, its value is to be charged to him and his wife in the division.

Nathaniel Wilson, late of Pittsylvania county, departed this life in 1857, having made his will, which was duly admitted to probate in the County court of said county. In the second clause of his will he says: "After the payment of my debts I lend unto my beloved wife, Winefred H. for and 261 during her natural life, and to *be by her, held, used, possessed, enjoyed, managed and controlled at her entire discretion, the whole of the residue of my estate, both real and personal, of whatsoever nature or kind, subject however to the exceptions and bequests herein after mentioned: but as my children, George, Ann Eliza, Nathaniel, Virginia, Indiana, Winefred, Maria Louisa and Agnes, become of age or marry, my said wife is at liberty to give them or either of them, as well as to my daughter Mary C. Cabell, wife of John Roy Cabell, such part of my estate as she may think she can conveniently spare, she being the sole judge of it in every respect."

After devising, to his son George a piece of land and an island and ferry attached at Danville, to his daughter Agnes, a place called Reed Island, in the fifth clause of the will he says: "At the death of my said

*Wills—Advancements.—See Cabells v. Puryear, 27 Gratt. 902, and *note*: and see Kyle v. Conrad, 25 W. Va. 780; Beidler v. Beidler, 87 Va. 302, 12 S. E. Rep. 753; and West v. Jones, 85 Va. 620, 8 S. E. Rep. 468, all citing the principal case. See also, Code Va. 1887, §§ 2522-2561.

wife, I wish the whole of my estate, both real and personal, to be equally divided between my following named children, to wit; Mary L. Baptist, wife of Richard B. Baptist, Isabella G. Lumpkin, wife of Henry Lumpkin, Martha C.. Cabell, wife of John Roy Cabell, George, Ann Eliza, Nathaniel, Virginia, Indiana, Winefred, Maria Louisa and Agnes, to them and their heirs forever, such of them as have already received or may hereafter receive a part of my estate to account for it upon a division, except that my son George is not to account for the ferry and land attached thereto, and the share of my daughter Martha is to be subject to the trust hereinafter mentioned. By a subsequent clause the testator directed that the share of Mrs. Cabell should be vested in trustees for her separate use for her life, and at her death to be divided among her issue. Mrs. Wilson was appointed an executrix of the will and qualified as such.

In 1858 Mrs. Wilson, being willing to distribute a part of the property, a bill
262 was filed for the purpose of *carrying this purpose into effect, and commissioners were appointed to make the division. These commissioners proceeded to act, and divided the land, assigning one of the shares to each of the parties mentioned in the second clause of the will, each share of the land being valued, the lowest at $8,490, and the highest at $9,000. But before the court acted upon the report, John R. Cabell who acted for his wife, objected to the division, and nothing further was done in that case.

The proceedings in the suit having been stopped, Mrs. Wilson proceeded in September 1858, to divide the land which had been divided and valued by the commissioners, and certain slaves which were divided and valued by three persons selected by her, among the children of Nathaniel Wilson mentioned in the second clause of his will; (the lots of the slaves were valued at from $3,750 to $3,900;) and she conveyed the several lots of land to these several children, except Mrs. Cabell; and she also delivered the slaves allotted to each of them; with the same exception. She retained in her possession the land and slaves allotted to Mrs. Cabell, until January 1865, when Mrs. Cabell having died, she delivered but did not convey, the land and slaves allotted to Mrs. Cabell, except one slave who had died, to John R. Cabell as guardian of Mrs. Cabell's children.

Mrs. Wilson died about 1867; and in May 1868 Mrs. Puryear by her next friend, instituted this suit for a division and distribution of the estate of her father Nathaniel Wilson, making the other parties interested defendants in the case. In November 1868 a decree was made in the cause directing a commissioner to take an account of all and every advancement made to the children of Nathaniel Wilson mentioned in the fifth clause of his will; and he was directed to report the amount and estimated value
263 of all the real estate which *the widow Mrs. Wilson left undisposed of at her death.

The commissioner made his report, and the disputed questions arising on that report, were as to the value of the advancements made to Mrs. Cabell's children: when the advancement of land and slaves made by Mrs. Wilson to the other parties were to be valued; and whether Mrs. Puryear should be charged with the value of wood taken by her husband from the land remaining in the possession of Mrs. Wilson, and sold by him. Upon this last question there was no doubt that Puryear took and sold the wood; and though the witnesses put very different estimates upon it, the commissioner fixed it at $1,000. This court was of opinion that the evidence showed that Puryear and Mrs. Wilson intended the wood to be an advancement.

The evidence showed that the land which had been set apart for Mrs. Cabell, was deteriorated in value from several causes, between the time of its valuation by the commissioners and the time of its delivery to the children of Mrs. Cabell. The commissioner took the appraised value of the land in 1858, $9,000, and deducted the estimated injury to it at $1,800, and also for interest six years that the property was retained by Mrs. Wilson $1,200, making $3,016.67, and reported the advancement at $5,983.33. The slaves received by John R. Cabell for his children were valued in Confederate money as at the time they were received, at $18,000, which was reduced to current funds at the rate of fifty-five for one, making $327.27.

There were exceptions to the report raising the questions before mentioned. And the cause came on to be heard on the 21st of March 1870, when the court held that the value of the advancements made by Mrs. Wilson to the devisees respectively, was to be ascertained as of the time the advancements were respectively made
264 *to and received by them; and that the commissioner erred in the mode of arriving at the value of the land delivered to Mrs. Cabell's children. And the court taking the estimates of witnesses as to its value, and scaling these estimates according to the gold value of Confederate money in January 1865, ascertained the value of the land by this process, to be eight dollars per acre, or $2,400 for the whole tract. As to the slaves the court held that in January 1865 by the constitution and laws of the State the slaves were free, or if not they were of no value to the children of Mrs. Cabell, but rather an expense. And Mrs. Puryear was held chargeable with the value of the wood sold by her husband: And the report was recommitted. From this decree Mrs. Puryear by her next friend Mary L. Baptist, and others of the devisees applied to this court for an appeal; which was allowed.

J. Alfred Jones and Grattan, for the appellants.

Ould & Carrington, for the appellees.

Staples, J., delivered the opinion of the court.

This is an appeal from a decree rendered by the Circuit court of Pittsylvania county. The parties to the controversy are the legatees and devisees of Nathaniel Wilson deceased. The questions to be decided grow out of a contest as to the true interpretation of the testator's will, and a proper division of his estate. Mr. Wilson, by his will executed on the 3rd of December 1847, and admitted to probate in October 1857, gave to his wife for life, subject to certain bequests in said will contained, all his real and personal estate, to be held, controlled and managed by her at her entire discretion; and he authorized her, as her children became of age or married, to give them 265 or either of them, including *Mrs. Martha C. Cabell, such part of her estate as she might think she could conveniently spare; she being the sole judge of it in every respect. At the death of his wife, he directed the whole of his estate to be equally divided among his children; such of them as had already received, or who might thereafter receive, any part of his estate, to account for it upon a division.

In conformity with the authority thus vested in her by the will, Mrs. Wilson, in the month of September 1858, divided among the children a valuable tract of land belonging to the estate; and in December of the same year she distributed among the same parties a large number of slaves. Mrs. Cabell, however, was not permitted to participate in this division. Her share, or supposed share, both in land and slaves was designated and set apart by the persons acting as commissioners, but they were retained by Mrs. Wilson in her own possession, used and enjoyed by her until January 1865, when after the death of Mrs. Cabell, both land and slaves were placed in the possession of the guardian of the children. In the mean time, however, one of the slaves thus designated had died, and the land had from various causes been much injured and greatly diminished in value; so that the share or portion received by Mrs. Cabell's representatives was not equal to that received by either of the legatees and devisees of Mrs. Wilson's estate. It is very clear that thus far gross injustice has been done Mrs. Cabell in the division of the estate. The main controversy between the parties is as to the mode and manner of the redress to be adopted by the court.

There can be no serious question but that the division of the estate made by Mrs. Wilson in 1858 constituted an advancement to each of the children participating in that division. It is equally clear that the 266 value of the *advancement must be accounted for at the time it was made. This is the general rule, and there is nothing in the circumstances of this case to justify a departure from it. The division of the land was first made under a decree of the Circuit court; but objection being made the decree was set aside and the suit dismissed. Mrs. Wilson, however, persisted in her purpose of having a division, which was formally and regularly made, and a deed of release executed by her and accepted by the donees. They were put in possession of their respective portions, and they or their alienees have ever since been in the enjoyment of the rents and profits. They would have been entitled to any benefit resulting from an appreciation of their respective estates, and they must be content to submit to any loss arising from the depreciation. The same rules must apply to the slaves. The division and allotment were regularly made, the legatees were placed in the possession of their respective portions by Mrs. Wilson, and they were ever thereafter regarded as the absolute owners, exercising complete dominion over the slaves, enjoying all the advantages of their increase and their services, under a title unquestioned and unquestionable. This view is fully sustained by the will of the testator. He authorized Mrs. Wilson to give to his children or either of them such portion of his estate as she could conveniently spare. It was not his intention that what was so given by her should ever be returned; unless perhaps, indeed, it might be essential to an equal division of his estate; but that the part received should be accounted for upon a final division. It is difficult to imagine a stronger case for the application of the rule fixing the liability for the value of the advancement when made.

In regard to the charge of interest upon the advancements, no exception was 267 taken in the court below to the *report of the commissioner for the failure to allow it; and it may be a question how far it is competent to urge the objection for the first time in this court.

However this may be, the general rule is, that the legatee or distributee is to be charged with the value of the advancement without interest. There is nothing in the will of Mr. Wilson or the circumstances of this case which requires the application of a different rule.

In the next place, it is very clear that Mrs. Cabell was not advanced along with the other children in 1858. The mere act of designating a tract of land and a lot of slaves as hers, did not constitute an advancement in any sense of the word. It gave her no title to or control of the property. It was never placed in her possession, nor did she ever receive the slightest benefit from it. It cannot be regarded as a present advancement, because there was no possession so as to bestow immediate enjoyment or opportunity of enjoyment; nor could it operate as a future advancement, because the gift was not executed. If Mrs. Wilson had died without perfecting it by a delivery of the possession, Mrs. Cabell would have had no valid claim to this or any other specific portion of the estate, but only a right to participate in the undivided residuum. And even if it can be regarded as a future advancement, its value must be

estimated at the time the gift substantially took effect, which was in January 1865. The real difficulty lies in fixing a rule by which such value may be fairly ascertained. As a general rule, the price which property commands in market is the safest standard of value. But clearly that would not be a just standard in this case, as applied to the negroes received by the children of Mrs. Cabell in January 1865. The negroes remained in their possession a little over two months; when they were emancipated
268 by the results of the war, and the *evidence tends strongly to show that during this time they were of but little service to the children. Taking into consideration the time when this advancement was made, and the circumstances attending the transaction, it would be grossly unjust to the infants to charge them with eighteen thousand dollars, the market value of the negroes, and then, by reducing that to gold, to hold them responsible for the amount thus ascertained.

On the other hand, the Circuit court erred in holding that the negroes had ceased to be slaves in Jan. 1865. They were recognized as slaves by the Constitution and laws in force at that time in all this region of Virginia. They were received and employed as slaves by the guardian, until the termination of the war, and though of little real value or service to the parties, whatever it was, they must be charged with it.

So far as the land is concerned, the same observations apply to some extent. For reasons too obvious to mention, it would not be just to the other legatees to estimate the value in Confederate currency and to charge the children with the gold value of such currency. It must be admitted there is always some difficulty in adopting a standard by which to assess the value of real estate during the existence of the war, especially at the period immediately preceding the close of the struggle. The difficulty is, however, more apparent than real; as will be seen by reference to the history of a number of cases decided by this court. Meredith v. Salmon, 21 Gratt. 762; Pharis v. Dice, Ibid. 363; Kraker v. Shields, 20 Gratt. 377.

It is no more difficult to ascertain the value of a tract of land in the present currency in January 1865, than in May, or August, or September of that year. Accordingly, I think the commissioner should have been directed to estimate in the
269 present currency the value of *the tract in question at the time it was turned over to the children by Mrs. Wilson; and for that value they should be held accountable. Without intending to express any decided opinion upon the subject, the weight of the evidence indicates that the Circuit Judge somewhat underrated the value of the land in fixing it at eight dollars per acre. As, however, the report of the commissioner has to be reformed in other respects, the parties will have an opportunity, if they desire it, of adducing additional testimony upon this point.

The only remaining matter for consideration is in respect to the charge against Mrs. Puryear for timber taken by her husband from lands belonging to the estate.

It is very clearly proved that Puryear, with the consent of Mrs. Wilson, appropriated to his own use large quantities of this timber; that it was received by him and his wife as an advancement, and was so regarded by Mrs. Wilson and the Circuit court was entirely correct in so treating it.

For the errors already adverted to in regard to the valuation of the land and slaves, the decree must be reversed and the case remanded for further proceedings in conformity with the views herein expressed; but in every other respect is affirmed.

The other judges concurred in the opinion of Staples, J.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the negroes delivered to the guardian of the appellees, the children of Martha C. Cabell, dec'd, in January 1865, were slaves at the time of such delivery, recognized as such by the Constitution and laws then in operation, and so treated and used by the said guardian until the close of hos-
270 tilities. *The Circuit court therefore, erred in holding they were not the subject of advancement. And although the said appellees were not liable for the market price of said slaves, estimated in Confederate currency reduced to gold, as reported by the commissioner, they are chargeable with the fair value of said slaves, or for their services during the period they were under the control of said guardian. The Circuit court ought to have directed an enquiry by its commissioner, with the view to ascertain the sum or amount properly chargeable against the said appellees upon the basis herein indicated; the evidence not warranting the opinion of the said Circuit court that said slaves were practically of no value, but rather an expense to the infant children.

The court is further of opinion, that the tract of land received by the guardian of the infant appellees in January 1865, constitutes an advancement as of that date, to be accounted for by them at its then existing value. The Circuit court, however, erred in fixing the price to be paid by the appellees at eight dollars per acre; that estimate, according to the weight of the evidence, being below the real value of the tract. In the present aspect of the case, it is not deemed advisable for this court to indicate any opinion as to what precise sum is chargeable upon the appellees in this respect. The whole subject is peculiarly proper for enquiry by a commissioner of the court, upon the testimony already in the record, and such further evidence as the parties may desire to adduce. The commissioner should be directed to enquire into and report the real value of the tract in question in January 1865, estimated in the present currency of the country, and with

that amount the said appellees should be charged.

The court is of opinion that there is no other error in the said decree than as aforesaid.

271 *Therefore, it is decreed and ordered, that so much of the said decree as is above declared to be erroneous, be reversed and annulled, and the residue thereof affirmed; and that the costs of the appellants and appellees in prosecuting and defending this suit respectively, be paid out of the proceeds of the sale of the land decreed to be sold in this case, by the commissioners who may make such sale. And it is ordered that the cause be remanded to the said Circuit court for further proceedings to be had therein to a final decree, in conformity with the foregoing opinion and decree.

Which is ordered to be certified to the said Circuit court of the town of Danville.

Decree reversed.

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272 *Crenshaw v. Seigfried.

January Term, 1874, Richmond.

1. **Bond—Interest.***—A bond on its face bears interest, and is secured by deed of trust on land, and obligor and obligee live near each other, and within the Confederate States during the war; and sums about equal to the interest upon the bond are paid upon it annually until after the war. The bond is properly chargeable with interest during the war.
2. **Same—Assignment—Equity.**—The bond is assigned, and passes through numerous hands, and besides the payments of interest there are other payments; the trustee having advertised the land to be sold under the deed for the payment of the balance of the debt, the obligor may come into a court of equity to ascertain the amount due upon the bond, and who is the owner of it.
3. **Same—Same—Same.**†—The court having possession of the case, may in its discretion, after ascertaining the amount due and who is the owner of the bond, either dissolve the injunction as to the amount due, and dismiss the bill, or may retain the case and have the trust executed under its own supervision.
4. **Same—Same—Same.**—The deed providing that if the debt is not paid the land shall be sold for cash for enough to pay the expenses of executing the trust, and the amount due upon the bond, the court may appoint a commissioner to make the sale; but must pursue the provision of the deed as to the terms of sale, and sell for cash for enough to pay the expenses of sale, and the balance due upon the bond, unless the terms are altered with the consent of the creditor.
5. **Same—Same—Same.**—The commissioner may at the request of the owner of the land sell a part of it, if that will bring enough in cash to pay the expenses of sale, and the balance due upon the bond.

*Bond—Interest.—See on this subject, monographic *note* on "Interest" appended to Fred v. Dixon, 27 Gratt. 541.

†Bond—Assignment—Equity.—See Kinports v. Rawson, 36 W. Va. 237, 15 S. E. Rep. 66. See also, Farland v. Wood, 35 W. Va. 458, 14 S. E. Rep. 140.

273 *By bond bearing date the 26th of March 1852, Anna Seigfried promised to pay to Anne C. Morris, guardian of James M. Morris, two thousand dollars, twelve months after the date thereof, with interest from the date. And by a deed dated on the next day, she conveyed to Wm. F. Gordon and Wm. J. Robinson, a tract of land containing seven hundred and five acres, upon trust to secure the payment of said debt. The deed provided that upon the failure to pay, on the request of Anne C. Morris or her representative, the said trustee, or either of them, should proceed to sell at public auction for ready money, upon the premises, the said tract, after advertising &c., and out of the proceeds pay to Anne C. Morris or her representative, whatever balance of principal or interest which might be then due and unpaid on said bond. And to pay the residue to the said Seigfried or her legally authorized representatives.

The said bond was assigned by Mrs. Morris to James M. Morris, in April 1856. In 1859 he assigned it to Wm. J. Robinson, trustee; and in December 1863 Robinson assigned it to Richard O. Morris. After this it passed through several hands, and at length came into the possession of Dr. O. A. Crenshaw. There are eleven endorsements on the bond, of credit by interest, commencing March 26th 1855, and coming down to March 26th 1868. There was a further payment of $240 March 14th 1870, and further payments of $500 on the 30th of December 1870 and $200 on the 19th of January 1871.

Wm. F. Gordon, one of the trustees in the deed of trust, having advertised the land for sale, and stating in the advertisement that cash would be required for $1,500 and the costs of sale, Mrs. Seigfried obtained an injunction to prevent it. The grounds on which she relied were, that it was necessary to have an enquiry into the amount due upon the bond, and who was the 274 proper *person to receive the money. There was also a charge of usury against Crenshaw; but it need not be noticed further.

In October 1871 the court made a decree directing a commissioner to enquire and report who was the owner of the bond, and the persons through whom it was acquired; and also what payments had been made upon it.

The commissioner John M. White, made his report, stating how and by whom the bond had been transferred, and that Dr. O. A. Crenshaw was then the exclusive owner. He also made a statement showing the payments that had been made upon it, as for interest, which was paid down to March 26th 1870; and that afterwards the two payments of $500 and $200 were made, which reduced the amount due on the bond on January 1st 1872 to $1,478.55; of which $1,396.62 was principal. To this report the plaintiff excepted because the commissioner allowed the defendant Crenshaw interest during the war.

The cause came on again to be heard on the 23d of May 1872, when the court sustained the exception; and held that the payments made during the war should be applied to the principal of the bond, at their scaled value. And the report having been referred to the commissioner, he corrected it in accordance with the directions of the court, and reported the balance due on the bond on January 1st 1872 at $1,296.16, of which $1,226 49 cts. was principal. And the court confirmed the statement as showing the true balance due from the plaintiff to the defendant Crenshaw: And holding that the plaintiff had good cause for coming into equity, refused to dissolve the injunction, and appointed special commissioners to sell the tract of land conveyed by the deed of trust at public auction, on the
275 premises, for cash as to so *much of the purchase money as would be sufficient to pay the expenses of sale, and for the balance on a credit of one two and three years, in equal instalments, with interest from the day of sale; the purchaser to give bonds with good security for such instalments, and the title to be retained. From this decree Crenshaw applied to this court for an appeal; which was allowed.

Watson, for the appellant.

Blakey, for the appellee.

Moncure, P., delivered the opinion of the court.

The first error assigned by the appellant, in the decree appealed from, is, that it sustains the plaintiff's exception to commissioner White's report: the said exception being, "because the commissioner allows defendant war interest; and, whilst not allowing war interest to be charged on the bond in the proceedings mentioned for the period of the late war, deducts from the principal the scaled value of the Confederate money, which was paid on account of interest during that time.

The said decree appealed from was pronounced on the 23d day of May 1872, and therefore the act in force April 2, 1873, entitled "an act to amend and re-enact section 14 of chapter 187 of the Code of 1860, in relation to interest," acts of Assembly 1872-73, page 344, chap. 353, does not apply to this case, and it is unnecessary, and would be improper, to express any opinion in regard to the validity of so much of said act as relates to the remission of interest on contracts from the 17th day of April 1861 to the 10th day of April 1865; especially as that question is understood to be involved in other cases now pending in this court.

Nor is it necessary to decide the
276 question, very much *and ably discussed in this case, whether interest on any contract, for the period aforesaid, or any part thereof, can lawfully be remitted by a court or jury, merely because of the existence of the war during that period. Both the debtor and the creditor were citizens of the Confederate States, and resided therein, and in the neighborhood of each other, during the whole war.

There are two plain and undeniable propositions, on which the question involved in the first assignment of error depends, which are decisive of the question in favor of the appellant; and they are:

1st. That the debtor bound herself by contract to pay, not only the principal of the debt, but interest thereon, till payment; and,

2dly. That the interest which accrued on the principal, during the war, was actually paid, annually, by the debtor to the holder and owner of the bond.

In regard to the first of these two propositions: The debt was for $2,000, loaned to the debtor, Anna Seigfried, on the 27th day of March 1852, by Anne C. Morris, guardian of James M. Morris. It was an investment, by the guardian, of so much of the ward's money; and for its security, the borrower executed her bond, payable to the said guardian twelve months after date, with interest from the date, and a deed of trust on a tract of land, containing 705 acres, lying in the county of Albemarle. The principal of the debt was not paid at its maturity, twelve months after the date of the bond, to wit: on the 27th day of March, 1853; nor was any part of it paid until the 30th day of December 1870, when it appears that a payment of five hundred dollars was made on account of the bond. But the interest was no doubt punctually paid annually as it accrued, at least down to the 26th day of March 1868. This appears to have been certainly the case as to all the in-
277 terest which *accrued during the war, which is regularly credited on the bond. In fact all the interest which accrued on the bond down to the 26th of March 1870, was regularly credited by endorsements on the bond, except the interest for the last two years, $240, which was paid by a check, dated March 14th, 1870. It is manifest from these facts, that this was a permanent loan and investment of two thousand dollars of the ward's money; of which, by an understanding and agreement between the parties the borrower was to have the use, in consideration of which use, and so long as it continued, she was to pay, punctually, to the lender, the annual interest accruing on the bond. Certainly, the use of money is a valuable and legal consideration for a promise to pay legal interest thereon; and even an act of the legislature passed to annul or impair such a promise, would be unconstitutional and void. Of course a decree, declaring such a promise to be void, even in the absence of such an act, must therefore be erroneous.

In regard to the second of the said two propositions: There cannot be a reasonable doubt, but that the interest which accrued upon the bond during the war, was actually paid, annually, by the debtor to the creditor. The exact amount of the annual interest is regularly credited on the bond, on or about the very day on which it accrued; and these payments must have been intended

by the debtor to be in discharge of the interest, and not on account of the principal of the debt. No doubt, receipts were given by the creditor to the debtor, corresponding with the credits of interest endorsed on the bond. In one of these endorsements, such a receipt is expressly referred to. These receipts, no doubt, are in the hands of the debtor; and would, if produced, show clearly, as the endorsements show, that they were given for interest, and not on account of the principal of the debt.

278 It *is fair to presume, that these endorsements, or some of them at least, (and they are numerous, and all of them are, expressly, for interest to date,) were made in the presence, and with the knowledge and consent of the debtor. The loan having been made in good money; not only the principal, but the interest also, was demandable in good money; and yet, the holder of the bond was content to receive, and did actually receive, all the interest which accrued during the war, in Confederate money, though greatly depreciated most of the time. The interest which accrued for the last year of that time, and which became due on the 26th of March, 1865, and was then paid, though $120 in amount in Confederate money, was worth in gold, when paid, but one dollar and eighty-four cents. By sustaining the exception to the commissioner's report, the court below deprived the creditor of the benefit of these reduced payments of interest, and caused them to be applied to the reduction of the principal.

We are therefore of opinion that the Circuit court erred in sustaining the plaintiff's exception to the commissioner's report, and instead of sustaining ought to have overruled the said exception.

The appellant's second assignment of error is, that the decree "did not dissolve the injunction, as to the amount due upon the bond, according to commissioner White's original report, and leave petitioner to make the same by selling under his deed of trust. The plaintiff had no cause for going into a court of chancery," &c.

We think the plaintiff had a right to go into a court of chancery, at least for the purpose of having the precise balance due upon the debt ascertained by an account, if not for the purpose of ascertaining by an enquiry who was entitled to the bond, of which there had been many different holders, of whom some were trustees

279 *for the benefit of persons under disability. And having ascertained, by such an account and enquiry, the balance due upon the debt, and who was certainly entitled to receive the same, it was competent for the court, in the exercise of a sound discretion, either to have dissolved the injunction as to the balance due upon the debt and interest, and left the appellant to make the same by selling under his deed of trust, or to have had the trust executed by a commissioner appointed by the court, and under its immediate supervision and direction.

We are therefore of the opinion that the Circuit court did not err in the respect mentioned in the second assignment of error.

The appellant's third assignment of error is, that "if the court was right in refusing to dissolve the injunction and in assuming to administer the trust, it erred in wholly setting aside and annulling the deed of trust, except so far as to give a lien for the debt. The substitution of commissioners of sale in lieu of the trustees named in the deed, and the direction to sell on one, two and three years' credit, instead of for cash, at least to the extent of the debt due, are plain violations of the contract between the parties, and the latter provision is highly injurious to the rights of the creditor; since after having been kept at bay, for ten months, by the debtor, he is now to be delayed in the collection of the debt, at the least, thirteen months, and quite probably several years longer; for there may be a succession of sales before a dollar of the purchase money, applicable to the payment of the debt, is realized."

Of course the court had not a right to set aside and annul the deed of trust in any respect, and therefore had not a right, without the consent of the creditor, to decree a sale on one, two and three years'

280 credit, instead *of for cash, at least to the extent of the expenses of executing the trust and of the balance due on account of the debt and interest. But, as we have already said, the court, in the exercise of a sound discretion, had authority to substitute commissioners of sale in lieu of the trustees named in the deed. We therefore think the Circuit court erred, to the extent just indicated, in regard to the matter set out in the third assignment of error; which is the last one made by the appellant.

But the appellee, the plaintiff in the court below, in the argument of her counsel in this court, assigned an error in the decree of the 23d of April 1872, and asked this court to correct it; viz: that the said decree directs the whole of the land to be sold, instead of only so much thereof as was necessary to pay the debt. The deed directs the whole tract to be sold for cash, and after satisfying the expenses attending the sale and trust, that the balance due upon the debt and interest shall be paid to the creditor, and the residue of the trust fund shall be paid to the debtor or her representative. Of course the creditor is interested only in getting the full amount of the balance due upon the debt and interest without any unnecessary delay: And if the debtor, or her representatives or assigns, desire credit to be given for the payment of the residue of the purchase money which will be coming to her or them; or that a particular and designated portion of the land, fully adequate, by a sale for cash, to produce the amount of said expenses and of the balance due on account of said debt and interest, such desire ought to be carried into effect by the court below.

We are therefore of opinion, that so much of the decree appealed from as is in conflict with the foregoing opinion, is erroneous, and ought to be reversed and annulled, with costs to the appellant; and the
281 residue *thereof affirmed; that the true balance due on account of the debt and interest secured by the said deed of trust, is fourteen hundred and seventy-eight dollars and fifty-five cents, with legal interest on thirteen hundred and ninety-six dollars and sixty-two cents, part thereof, from the first day of January 1872 till paid, for the payment of which balance and interest the appellant is entitled to have the deed of trust enforced and executed; and that the cause should be remanded to the said Circuit court, for further proceedings to be had therein, in conformity with the foregoing opinion.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in sustaining the exception of the plaintiff in the court below, to commissioner White's original report; and instead of sustaining, ought to have overruled, the said exception.

The court is further of opinion, that the said plaintiff had a right to go into a court of chancery, at least for the purpose of having the precise balance due upon the bond in the proceedings mentioned, ascertained by an account; if not for the purpose of ascertaining, by an enquiry, who was entitled to the said bond, of which there had been many different holders, of whom some were trustees for the benefit of persons under disability: And having ascertained, by such an account and enquiry, the balance due upon the said bond, and who was certainly entitled to receive the same, it was competent for the court, in the exercise of a sound discretion, either to have dissolved the injunction, as to the balance due upon the debt and interest, and left the appellant to cause the same to be made by a sale,
282 under, and in pursuance *of, the deed of trust; or to have had the trust executed by a commissioner appointed by the court, and under its immediate supervision and direction.

The court is further of opinion, that the Circuit court had not a right to set aside and annul the deed of trust in any respect; and therefore had not a right, without the consent of the appellant, to decree a sale on one, two and three years' credit, instead of for cash; at least to the extent of the expenses of executing the trust and of the balance due on account of the debt and interest secured by the said deed. Of course the creditor is interested only in getting the full amount of the balance due upon the debt and interest aforesaid, without any unnecessary delay; and if the debtor, or her assigns, desire credit to be given for the payment of the residue of the purchase money of the said land, which will be coming to her or them, after satisfying the purposes of the trust; or that a particular and designated portion of the land, fully adequate, by a sale for cash, to produce the amount of said expenses and of the balance due on account of said debt and interest, such desire ought to be carried into effect by the court below.

The court is further of opinion, that the true balance due on account of the debt and interest secured by the said deed of trust is fourteen hundred and seventy-eight dollars and fifty-five cents, with legal interest on thirteen hundred and ninety-six dollars and sixty-two cents, part thereof, from the first day of January 1872 till paid, according to the said original report of commissioner White; for the payment of which said balance and interest, the appellant is entitled to have the said deed of trust enforced and executed as aforesaid.

Therefore, it is decreed and ordered, that so much of the decree appealed from as is in conflict with the forego-
283 ing *opinion, be reversed and annulled, and the residue thereof affirmed, and that the appellee, Anna C. Seigfried, pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here. And it is ordered, that the cause be remanded to the said Circuit court, for further proceedings to be had therein, to a final decree, in conformity with the foregoing opinion.

Which is ordered to be certified to the said Circuit court of Albemarle county.

Decree reversed.

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284 *Corprew & als. v. Boyle & als.

January Term, 1874, Richmond.

Official Bonds.—In June 1854 H was elected sergeant of the city of Norfolk for three years, and in the same month he executed his official bond with sureties in the penalty of $30,000; that being the amount fixed by the court. The condition was that he should faithfully discharge the duties of his office. In December 1855 the justices of the city having been regularly summoned and a majority present, for the purpose of examining the bond of H, an order was made directing him to give at the next term of the court, a new bond, in the penalty of $60,000, with security; and this he does; the condition in both being the same. Upon an estate committed to him he receives money before the order for the second bond; and in November 1856 his account settled showed a balance against him. HELD:

1. **Same—Additional Bonds.***—The court had authority to take the second bond, and therefore, it is valid and binding on the sureties in it.
2. **Same—Same.**—The sureties in both bonds are equally liable for the money H failed to pay over.

In June 1854 Wm. T. Hendren was elected sergeant of the city of Norfolk, for three

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***Official Bonds—Additional Bonds.**—See on this point, Chapman v. Com., 25 Gratt. 741, citing the principal case. See also, Lingle v. Cook, 32 Gratt. 262. See Reed and Roper v. Hedges, 16 W. Va. 167, citing the principal case. Harrison v. Lane, 5 Leigh 414; Rosenbaum v. Goodman, 78 Va. 121.

years; and on the 29th of the same month he executed his official bond in the penalty of $30,000, that being the amount fixed by the court; with J. Hendren, J. Hardy Hendren and three others as his sureties. The condition of the bond reciting that Hendren had been elected sergeant of the city of Norfolk for the term of three years, provides that if he shall faithfully discharge
285 the duties of his said office, *then the obligation to be void; else to remain in full force.

On the 29th of December 1855, the justices having been summoned and a majority of them being present, for the purpose of examining into the official bond of Wm. T. Hendren, sergeant of the city, for the faithful discharge of the duties of his office, it was ordered that said Hendren, at the next term of the court, execute a new bond in the penalty of $60,000, with security for the due and faithful discharge of the duties of his office as sergeant. And on the 29th of January 1856 he executed the bond with Thomas J. Corprew and seven others, as his sureties, with the same condition as the first bond.

On the 21st of November 1855 the estate of Mary Boyle was committed to Hendren, the sergeant, for administration; and he settled his account before the court of probate, which showed a balance of $514.99 in his hands on the 21st of November 1856.

In 1870 Ann Boyle and others, the next of kin and distributees of Mary Boyle, deceased, filed their bill in the Corporation court of Norfolk against the administrator of Hendren, and his sureties in both his bonds, setting out the foregoing facts; stating that Hendren died leaving no estate for the payment of his debts, and praying for the payment of the said sum of $514.99, with interest, by the defendants, or such of them as the court might decide to be legally liable therefor; and for general relief.

Thomas J. Corprew and some others of the sureties in the second bond of Hendren, answered, and denied their liability, on the grounds: first, that the second bond was executed without authority of law, and therefore null and void; and, second, that all the moneys received by Hendren
286 was received by him before the *second bond was required by the court or executed by the sureties.

It appears from the account settled before the court of probate, that all the moneys received by Hendren on account of Mary Boyle's estate, was received on or prior to the 5th of December 1855; though the principal payments by him were between that date and February 11th, 1856.

The final decree in the cause was made on the 17th of June 1871, when the court held that the sureties in both bonds were liable for the amount due by Hendren the sergeant, and decreed that they should pay to the plaintiffs the sum of $514.99, with interest from the 21st of November 1856 till paid, and their costs. And from this decree Corprew and two other of the sureties in the second bond, applied to a judge of this court for an appeal; which was allowed.

Tazewell Taylor and Goode & Chaplain, for the appellants.

J. Alfred Jones and Baker & Walke, for the appellees.

Christian, J. Two questions are presented in this case: 1st—Whether the bond executed by Wm. T. Hendren, sergeant of the city of Norfolk, and his sureties, on the 29th January 1856, is a valid bond; and 2d, if valid, whether the sureties in said bond are equally bound with the sureties in a former bond executed by said Hendren as sergeant, on the 29th June 1854, for moneys which came into his hands belonging to the appellees, in December 1855.

Chapter 49, section 2, of the Code 1860, contains the following provision: "From every person elected sheriff of any county or corporation, and from every
287 *sergeant of a corporation who is the collector of taxes assessed therein, the court of such county or corporation shall take bond in such penalty as it may deem sufficient; not less than thirty thousand nor more than ninety thousand dollars: provided, that the penalty of the bond of the sheriff of the city of Richmond shall be not less than five hundred thousand dollars."

It appears that Wm. T. Hendren was elected sergeant of the city of Norfolk on the 24th June 1854, and on the 29th June 1854 entered into and acknowledged a bond in the penalty of thirty thousand dollars, before the corporation court of said city, with certain securities therein named, conditioned according to law.

On the 26th day of December 1855, the following order was entered in the said Corporation court of the city of Norfolk: "It appearing to the satisfaction of the court, that the order made on the 26th instant, directing that all the acting justices of the city be summoned to attend court to-day, for the purpose of examining into the official bond of Wm. T. Hendren, sergeant of this city, for the due and faithful discharge of the duties of his office of sergeant as aforesaid, has been duly executed, a majority of the justices being present, and the matter being duly considered; and the court being of opinion that the bond heretofore given by the said Wm. T. Hendren, as sergeant as aforesaid, was in a sum insufficient, it is ordered, that the said Wm. T. Hendren, sergeant as aforesaid, at the next term of the court, execute a new bond, in the penalty of $60,000, with security for the due and faithful discharge of the duties of his office as sergeant as aforesaid."

It is insisted by the learned counsel for the appellants, that this action of the Corporation court was without authority of law; and that the Court having before fixed the penalty of the bond at the sum of
288 $30,000, *and the sergeant having executed that bond with security as required, the powers of the court were exhausted in that act; and having once exercised its jurisdiction, is functus officio as to that matter: that, therefore, the second

bond executed by Hendren and his securities, in conformity with the above order, is of no validity whatever.

It requires but a slight consideration to see that such a construction of the statute referred to would lead to the most inconvenient and disastrous results. The term of office is three years. Suppose it should happen, as it often may, that after the penalty is fixed and the bond given, there is a material change in the condition of things: the court finds that the public levies have doubled or quadrupled, or that large sums of money are to be raised by executions; and these public levies and other moneys which will come into the hands of the sergeant, exceed in amount the penalty of the bond given: Or, suppose it turns out that the court has been imposed upon and deceived as to the sureties offered by the sergeant, and they prove to be men of straw, that both sergeant and sureties have all become insolvent; yet, according to the theory of the appellants' counsel the court is powerless to act, because it has exhausted its jurisdiction by taking one bond; though the penalty be entirely insufficient, or the securities utterly insolvent: and thus the revenues of the corporation must be squandered, the money of creditors lost, and the estates of dead men wasted, because the bond affords no remedy for their protection. A construction fraught with so great mischief, ought not to be given, unless the law speaks a plain and unmistakable mandate. In the absence of prohibitory language in the statute, such a construction ought not to prevail. But there is no such prohibitory language in the statute. It declares 289 that the *county or corporation court "shall take bond in such penalty as it may deem sufficient, not less than thirty thousand nor more than ninety thousand." The only limit on the power of the court is, that the penalty of the bond shall not be more than ninety thousand dollars, nor less than thirty thousand dollars. Between these two amounts any amount which the court may deem sufficient shall be the penalty of the bond. Nor is there anything in this section, or elsewhere, which declares, that this discretion as to the amount within certain limits, shall be exercised only once during the term of office of the sergeant. What might be deemed a sufficient penalty at the commencement of the office might well be deemed insufficient a year afterwards. In this case, on the 29th day of June 1854, the Corporation court of Norfolk deemed sufficient a bond in the penalty of $30,000. Afterwards, in December 1855, that penalty was deemed insufficient, and a bond in the penalty of $60,000 was required. We must presume that after the lapse of eighteen months there was some reason known to the court, why the penalty should be increased. It was done upon full notice, after summoning all the acting justices of the city, "for the purpose (as expressed in the order) of examining into the official bond of Wm. T. Hendren; and the matter being duly considered, and the court being of opinion that the bond heretofore given by said Wm. T. Hendren as sergeant, &c., was in a sum insufficient, it is ordered, &c." Now upon what principles of construction can it be maintained, that the fact, that on the 29th June 1854, the court "deemed" the penalty of the bond fixed at $30,000 sufficient, could restrict the power of the court on the 29th of December 1855, when for satisfactory reasons it "deemed" that penalty insufficient? I think it is clear, that from the very 290 necessity of the case, as *well as upon a fair and reasonable interpretation of the legislative will expressed in the statute, the court had the authority from time to time, upon proper cause shown, to increase the penalty of the bond to any amount not exceeding $90,000.

The second bond executed by Hendren and his sureties, being a valid bond, under the 2d section, chap. 49, Code 1860, it only remains to enquire which of the sureties are liable for the amount in controversy in this suit; whether the sureties in the first bond or those in the second bond, or both. The court below held that all the sureties in both bonds were equally liable. In this opinion I fully concur. It is a maxim adopted by courts of equity in regard to co-sureties, that equality is equity among persons standing in the same situation. It is well settled that, if different persons are sureties for the same debt, or for the performance of the same duties, each will be made, in equity, to contribute, though they be bound by different bonds, and though they knew nothing at the time of the obligations of each other. 1 Lead. Cases in Equity, (edition of 1859,) p. 131, Note, and cases there cited. See also Harrison v. Lane, 5 Leigh, 414.

In the case before us, the sureties in each bond are bound for the same obligations, for the performance of the same duties on the part of their principal. The condition of each bond is precisely the same. That condition is, that Wm. T. Hendren, who was duly elected on the 24th day of June 1854 sergeant of the city of Norfolk, "shall faithfully discharge the duties of his said office." The breach of duty in this case was his failure to pay over to the appellees moneys which came into his hands as such sergeant. For this all of his sureties are equally bound. It does not alter the case or change their liability, that the money came into his hands, before the 291 *second bond was given. It was properly in his hands; it was his right and duty to receive it; and he received it about twenty days before the second bond was given. The breach of his obligation was, in not paying it over to the parties entitled to receive it; and it is for this that all of his sureties are alike and equally responsible.

The claim for contribution among co-sureties is founded not upon contract, but upon a principle of natural justice and equity. This principle has been uniformly declared by the courts of England and this country since the leading case of Deering v. Earl of Winchelsea, 1 Cox's R. 308, decided in

1787 and followed ever since. That case is exactly in point here. Thomas Denny was appointed collector of duties belonging to the customs; and it became necessary, upon his appointment, to enter into bonds to the Crown, with three securities, for the due performance of his office; the same obligation as in the case before us. Three separate bonds were executed with different sureties. One of them to which Sir Edward Denny was security, was put in suit by the Crown, for certain default on the part of Thomas Deering the principal, and judgment recovered for £3,883. Sir Edward Denny filed his bill against the Earl of Winchelsea, and Sir John Rand, the sureties in the other two bonds, claiming from them a contribution towards the sum so recovered against him. It was held that where sureties are bound by different instruments, but for the same principal, and the same engagement, they shall contribute. Lord Chief Baron Eyre said "contribution between co-sureties is bottomed and fixed on general principles of justice, and does not spring from contract." * * * "It is clear that one surety may compel a 292 contribution from *another towards payment of a debt for which they are jointly bound. On what principle? Can it be necessary to resort to the circumstance of a joint bond? What if they are jointly and severally bound? What difference does it make if they are severally bound and by different instruments, but for the same principal, and the same engagement? In all these cases the sureties have a common interest and a common burthen; they are joined by the common end and purpose of their several obligations, as much as if they were joined in one and the same instrument."

This may be considered as the settled doctrine of courts of equity.

Nor is the case of Harrison v. Lane, 5 Leigh, 414, cited by the counsel for the appellee, at all in opposition to this view; but expressly affirms the principle I have asserted. The decision in that case, turned upon an endorsement which was made on the second bond limiting the liability of the sureties; and which was considered by the court as a part of the bond itself. Both Judge Cabell and Judge Carr, as well as President Tucker, (all of whom delivered opinions in the case), recognize distinctly the principle laid down in Deering v. Earl of Winchelsea; for they all say, in substance, that in the case before them, if the sureties in the second bond were bound for the same thing for which the sureties in the first bond were bound, they would be liable for contribution, although their engagement was made at a subsequent time and by a different instrument.

Upon the whole case I am of opinion that the decree of the Corporation court of the city of Norfolk should be affirmed.

293 *Moncure P., Anderson and Staples Js., concurred in the opinion of Christian J.

Bouldin J., dissented.

Decree affirmed.

294 *Stuart v. James River & Kan. Co.

January Term, 1874, Richmond.

Absent—BOULDIN, J.

1. **Act of 1867—Contract—Beneficiaries.***—The act of March 1st 1867 entitled "An act to authorize the James River & Kanawha Company to borrow money;" though when accepted by the Company it creates a contract between the Company and the State, does not create a contract between the Company and the holders of the $180,000 of State bonds therein mentioned; and a holder of one of these bonds cannot maintain an action thereon against the Company.

2. **Same—Same—Same.**—Though the Company has executed a mortgage on its property to secure the money authorized to be borrowed by said act, yet if the Company has not borrowed the money or made use of the bonds intended to be secured by the mortgage, it cannot be held to have accepted the terms of the act or become liable under its proviso, in relation to said $180,000 of State bonds.

This was an action of debt in the circuit court of the city of Richmond, brought in April 1869 by W. A. Stuart against the James River & Kanawha Company, to recover the sum of $15,000, the amount of a certain bond of the State of Virginia, which was issued to the James River & Kanawha Company; and the interest thereon. The declaration sets out that heretofore to wit on or about the 1st of March 1867, the general assembly of Virginia did pass an act, the title whereof is "An act to authorize the James River & Kanawha Company to borrow money," and did in and by said 295 act authorize the said company *to borrow the sum of $750,000, to be applied to paying off the floating debt of the company, and to putting and keeping its present works in repair; and to the end of making sure the repayment of the sum of money to be borrowed, the said general assembly did, in and by said act, authorize the defendants to grant and convey in mortgage their property, franchises and net revenues. And it was further set out, that the said act was made on several conditions, one of which was that the defendants should recognize as a part of their floating debt, $180,000 of State bonds, received by the defendants under the act of the 18th of March 1862, and the same should discharge and satisfy by payment, or by delivery to the holders of said bonds, an equal amount of the registered stock of the Commonwealth of Virginia issued prior to the 17th of April 1861, for the full amount of the principal and interest of the said bonds. And it is further set out, that on or about the 20th day of March 1867, the defendants did, in pursuance of said act first aforesaid, make and execute a mortgage of all their property

*Contracts—Suits by Beneficiaries.—See Ross v. Milne, 12 Leigh 204, 37 Am. Dec. 646. See also, Clemmitt v. Life Ins. Co., 76 Va. 355; Jones v. Thomas, 21 Gratt. 96; Willard v. Worsham, 76 Va. 392 and Newberry Land Co. v. Newberry, 95 Va. 120, 27 S. E. Rep. 899, citing the principal case. See Code Va. 1887, § 2415. See Johnson v. McClung, 26 W. Va. 659, construing the West Virginia statute on this subject.

and franchises and net revenues, to render sure the repayment of the money thereafter to be borrowed as aforesaid. And it was averred that the plaintiff is the owner and the holder of one of the said bonds which were issued by the State and received and sold by the defendants, under the said act of the 18th of March 1862, but that the said bond does not purport to have been issued under this last act, or contain any reference to it; but on the contrary, contains the recital that it is stock issued in pursuance of an act passed on the 23d of March 1860; and the plaintiff did buy the said bond in the belief that the same was authorized by and issued under the act of the 23d of March 1860; and that the said bond, held by the plaintiff, is for the payment of the sum of $15,000 with interest. And the plain-
296 tiff further says that the *defendants under and by virtue of the said act of 1st of March 1867 and their acceptance of the franchise granted in the same, became liable to pay the said sum of money in the said bond named; and that afterwards, to wit on the 10th of March 1869, he made a demand on the defendants for the payment of the same; but that the defendants wholly refused to pay the same, &c., &c.

It was agreed of record by counsel, that the court may treat the declaration as if it contained a separate count for interest on the State bond mentioned in the said first count.

The defendants demurred to the declaration, and to each count thereof, and also pleaded "nil debit," and there was a joinder in the demurrer and issue on the plea. The court sustained the demurrers, and rendered a judgment for the defendants: whereupon Stuart applied to this court for a writ of error and supersedeas; which was awarded.

Page & Maury, for the appellant.

Ould & Carrington, for the appellees.

Anderson, J., delivered the opinion of the court.

This is an action of debt to recover fifteen thousand dollars, alleged to be due and owing the plaintiff, by the defendant. The first count in the declaration demands the debt of $15,000, in the gold currency of the United States of America, with interest thereon from the first day of January 1864. The second count is for the interest. It is not written out; but it is agreed by the counsel of both parties, that the court may treat the declaration as if it contained a separate count for the interest; which agreement was entered on the record.

The action is founded upon an act of
297 assembly, passed *the first of March 1867, which is entitled "An act to authorize the James River and Kanawha Company to borrow money." The defendant demurred generally to the declaration, and to each count thereof, and the plaintiff joined in the demurrer. The defendant then pleaded nil debit; and the plaintiff took issue thereon.

"At common law an indenture, or deed inter partes, is only available between the parties to it, and their privies; and third parties can maintain no action thereon, though made for their benefit." Though this rule does not apply to deeds poll, it must manifestly appear that the covenants were made for the benefit of the parties suing thereon. Jones v. Thomas, 21 Gratt. 96. In Fellows v. Gilman, 4 Wend. R. 414, cited by J. Staples, in the above case, it was held that it must undoubtedly appear that the covenant, alleged to have been broken, was made for the benefit of the person bringing the action. This was an established rule at common law; and it is not changed by section 2 of chap. 116, of the Code of 1860. In the cases coming within its purview, it only gives the right of action to the person to whom the promise or covenant is not made, when it is made "for the sole benefit" of such person.

It is necessary, then, to enquire: Does the act of March 1st, 1867, upon which this action is founded, create a contract or liability on the part of the Company, for the benefit of the plaintiff? The court is of opinion that it does not. The act of 1862, to which this act refers, authorized the issue to the President and Directors of the J. R. & K. Company, registered stock of the commonwealth, not exceeding $200,000 in amount, when the said company shall execute their bond in the penalty of $400,000, with condition to return, in like registered stock of this commonwealth, such amount of said stock as may be applied under
298 this act to the purposes therein *designated, with interest thereon, within six years after the date of such bond. Under this act, registered stock of the commonwealth was issued to the Canal Company to the amount of $180,000: One of which bonds, to the amount of $15,000, is the subject of this suit. But the Company has not fulfilled the condition of its obligation to the State.

When, in 1867, the Company was again an applicant for an extension of its franchises, the legislature was unwilling to grant its prayer, except with the condition that it would fulfill this obligation; and they passed the said act of March 1st, 1867, authorizing the Company to borrow $750,000 upon the faith of its own credit, and to execute a mortgage upon its own property and franchises, to secure its payment; but with the proviso, that the Company should recognize the $180,000 of State bonds received by it under the said act of 1862, as a part of its floating debt; which it may discharge by paying it, or delivering to the holders of said bonds an equal amount of the registered stock of the commonwealth, issued prior to the 17th of April 1861, for the full amount of the principal and interest.

Was this provision made for the benefit of the bond-holder? And was it designed to fix a direct liability on the Company to him, which could be enforced by suit in his own name against the Company, with whom

and himself there was no privity of contract? Or was it designed to benefit the State, by calling in her bonds for $180,000, and extinguishing her liabilities to that amount? A compliance by the Company with the terms proposed would give the holder of these bonds of the State an equal amount of other State bonds in their stead.

If the Company borrowed the money authorized by the act, it must be held to
299 have consented to the terms *upon which the act proposed to bestow that privilege; which was substantially to relieve the State from her liability for said debt. But it was a contract between the Company and the State, to which the bond-holders were not parties, and by which they were not bound. The State, by making such a contract with the Company, could not release herself from her liability, if any, to the bond-holders: That could only be done by the bond-holders consenting thereto. There is nothing in the act showing their consent, or binding them thereto. And there is nothing in the record, which shows that they have by any act of theirs, consented to release the commonwealth, and look alone to the Company for the payment of bonds of the State which they hold. And the court is of opinion, that whilst the borrowing of the money by the Company, as authorized by the act, would evidence its assent to the terms proposed by the act, and would complete the contract, it only evidences a contract between the commonwealth and the Company, to which the bond-holders are strangers. And if the Company has failed to comply with its terms, it is amenable only to the commonwealth.

There was no liability of the company to the holders of the bonds. They were purchased, undoubtedly, upon the faith of the commonwealth, and not upon that of the Canal company. The holders when they purchased, looked alone to the commonwealth for payment, and not to the Company. The credit of the Company could not have entered into the consideration of the purchaser, and the holder had no right to look to the Company for payment. There was no relation of debtor and creditor between the Company and the bond-holder. And the court is of opinion, that the act aforesaid, prescribing terms to the Company for the benefit of the State, upon which they could exercise a privilege,
300 did not create *the relation of debtor and creditor between the Company and the bond-holders, who were not parties to the transactions. The non-compliance of the Company with the terms, could hardly extinguish the relation of debtor and creditor between the Company and the State, and create such relation between the Company, and the holder of the State bonds. The Company having failed to fulfill the condition on which the privilege was granted, is amenable to the State, and not to strangers to the contract.

If the Company was guilty of a fraud, or deceit, in the sale of the bonds in question, as bonds issued under the act of March 1860, as they purport on their face, when in fact they were issued under the act of March 1862, the holder of the bond is not entitled to redress the wrong in an action of debt against the Company. Nor does it appear by any averment in the act which is the foundation of this action, or from anything therein contained, that there is any ground for such an allegation against the Company; or that such alleged fraud or deceit of the Company, formed any part of the consideration suggesting, or moving to, the condition or proviso in the said act in relation to the said Company. If there was any liability to the bondholders on part of the Company, upon which no opinion is indicated, it could only be enforced in a different form of action.

It is not averred in the declaration, nor does it appear any where in the record, that the Company ever borrowed any money under the said act of 1867. It is averred in the declaration, that it executed the mortgage to secure its bonds to be executed for money thereafter to be borrowed, but it is not averred that any use was made of said bonds, or that the Company ever raised any money upon them. And it is the opinion of the court, that the Company could
301 not be held to have accepted *the terms of the act, and become liable under its proviso merely by executing a mortgage, to secure its bonds to be executed for money thereafter to be borrowed, which were never issued nor made available for the borrowing of money, which was the leading object and purpose of the act, and that for want of such averment the declaration is defective and demurrable.

Various other and intensely interesting and important questions were argued with marked learning and ability by the counsel; but the court considering that the points which we have commented on and very imperfectly presented in this opinion were decisive of the case, have deemed it unnecessary to consider and decide the other questions. Upon the grounds stated, the court is of opinion that the demurrer was well taken to both counts in the declaration, and that there is no error in the judgment of the court below in sustaining it, and that the same must be affirmed.

Judgment affirmed.

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302 ***Durrett v. Davis, Guardian & als.**

January Term, 1874, Richmond.

1. **Sale of Lands of Infant.***—There has been a sale of the land of an infant under the decree of the proper court, in 1860, and a payment of the purchase money. In 1870, the infant by his next friend

***Sale of Lands of Infant.**—See Lancaster v. Barton, 92 Va. 623, 24 S. E. Rep. 251. and Smith v. Henkel, 81 Va. 524, citing the principal case; Zirkle v. McCue, 26 Gratt. 517, and *note*; Walker's Ex'or v. Page, 21 Gratt. 686; Blackwell's Adm'r v. Bragg, 78 Va. 529. See also, Dunfee v. Childs, 45 W. Va. 155, 30 S. E. Rep. 102.

files his petition in the cause to set aside the decree and sale, on various grounds. HELD:

1. **Same—Title of Purchaser.**—Although a purchaser at a judicial sale may be required to see to the regularity of the proceedings upon which the jurisdiction of the court is founded, he is not bound to investigate the truth of the matters stated in the bill and deposed to by the witnesses touching the estate owned by the infant. His title cannot be affected because the case made by the record happens not to be warranted by the facts.

2. **Same—Same.**—The guardian of the infant who brought the suit is one of the persons who would be entitled to the estate if the infant died under age, and he is not a party as such. At the same term at which the decree for the sale of the land was made, the guardian resigned his guardianship, and it was ordered that the suit abate as to him, and that it should proceed in the name of the second guardian who had qualified. At the sale of the land the first guardian became the surety of the purchaser of the land for the purchase money. He could never be heard to impeach the decree or the title acquired under it. But if he could, though the purchaser might object, the infant cannot object because the purchaser has not acquired a perfect title.

3. **Same—Regularity of.**—The answer filed by the guardian *ad litem* of the infant, purports to be the answer of the infant by his guardian *ad litem*; but it is signed by the latter. It is the opinions, statements and responses of the guardian 303 that are given; and *it has the same effect as if it had been designated and filed as the answer of the guardian in his proper person.

4. **Same—Same.**—The decree reciting that the cause came on to be heard upon the answer of the guardian *ad litem*, it will be presumed that the answer was sworn to, though there is not now any evidence of the fact in the record.

5. **Same—Same—Presumption.*** —The statute requires that the bill shall be verified by the oath of the guardian of the infant. Though it may be most regular that this should be done when the bill is filed, this is not indispensable, and it is sufficient if it is sworn to at any time before the court acts upon it and decrees a sale.

6. **Same—Same—Same.**—The decree reciting that the cause came on as to the defendants who had not answered, upon the return of the subpœnas executed, it will be presumed that the bill was filed at the proper time.

7. **Same—Same.**—It is no valid objection to the proceedings, that the depositions were taken before the same person as commissioner who was the guardian *ad litem* of the infant.

8. **Same—Same.**—It is no objection to the proceedings, that the dower of the widow in the land was not laid off or provided for before the sale; the widow having answered and assented to it.

9. **Same—Same.**—The chancery courts in this State having always had the power to appoint guardians, the power is not taken from them by the statute, ch. 129, s. 11, of the Code of 1849.

10. **Same—Same.**—But if the chancery courts have no power to appoint guardians in the first instance, but only to remove and appoint, yet when they have appointed, the validity of the appointment cannot be questioned in a collateral proceeding. No other court, unless it be an appellate tribunal, is authorized to examine the records to ascertain whether the occasion was one for the exercise of the power.

11. **Same—Same.**—In determining whether the sale was a beneficial one for the infant, we must look to the circumstances as they existed at the time it was made, and not to subsequent events.

In February 1855 David W. Davis, of Greene county, departed this life intes- 304 tate, leaving his wife surviving *him, and one child, Thomas Davis, of three or four years of age. In November 1857 the Circuit court of Greene county "sitting in chancery," appointed Isaac B. Davis guardian of Thomas Davis, and Mrs. Davis seems to have married, on or about that year, E. K. Durrett; her dower in the estate of her first husband not having been assigned to her.

In May 1858 Isaac B. Davis, as guardian of Thomas Davis, instituted a suit in equity in the Circuit court of Greene county, for the sale of the land of his ward. It does not appear when the bill was filed, but the affidavit to it was not made until the 15th of September 1858. In the bill he states that the infant was entitled to a tract of land, which he describes, and slaves who are named, and that this is all of his property. That the plaintiff, a brother of the infant's father, Mrs. Martha H. Henshaw, Elizabeth K. Simms, his sisters, and Philip T. Henshaw, the son of Mary A., another sister, an infant under twenty-one years, are all the parties, who in the event of the death of Thomas Davis, would be interested in the land. He makes these parties and Thomas Davis, E. K. Durrett and his wife, defendants, and asks for a sale of the land, and that one-third of the proceeds be invested, and the interest paid to Mrs. Durrett.

Answers were filed by guardians ad litem of Thomas Davis and Philip T. Henshaw. The answers, however, commence in the form of an answer of the infant by his guardian ad litem; and there is no evidence in the record that they were sworn to; E. K. Durrett and wife answered, concurring in the prayer of the bill.

The cause came on to be heard on the 17th of November 1858, upon the answers of the guardians ad litem, and Durrett and wife, and upon the bill taken for confessed as to the other parties, upon the return of the subpœnas executed, as stated in 305 the decree, when the *court made a decree appointing commissioners to sell the land, upon the terms of cash for enough to pay the expenses, and for the balance upon a credit of one, two, three, four, five and six years, with interest to be paid annually, from the day of sale.

During the same term of the court, Isaac B. Davis resigned his office of guardian of

*Same — Regularity — Presumption.— See Smith v. Henkel, 81 Va. 528; Hull v. Hull, 26 W. Va. 25; Hull's Adm'r v. Hull's Heirs, 35 W. Va. 156, 13 S. E. Rep. 49; Pennybacker v. Switzer, 75 Va. 687, citing principal case. See also, Dickel v. Smith, 38 W. Va. 635, 18 S. E. Rep. 721.

the infant defendant Thomas Davis, and the court made an order in the cause, that the fact of his resignation be suggested on the record, and this suit abate as to him; and it further appearing that the defendant Elijah K. Durrett had qualified as guardian of the said infant defendant, it was ordered that the suit should be proceeded in in the name of the said Durrett, as guardian of said Thomas Davis, as plaintiff.

In January 1859 the commissioners proceeded to sell the land, when Peter C. Durrett became the purchaser at the price of $17,112.50; and paid in cash $300, and gave his bond, with I. B. Davis as one of his sureties, with condition to make the payments as prescribed in the decree. And the commissioners having reported the sale, the court by its decree of June 21, 1860, confirmed the same.

The commissioners who were authorized to collect the purchase money for the land, reported their collections from time to time; and in February 1865 the whole purchase money seems to have been paid, and invested either in certificates of debt of the State of Virginia or of the Confederate States.

In November 1870 Thomas Davis, who was still an infant, by his next friend Daniel Miller, filed a petition to set aside the proceedings in the cause, on the grounds, 1st. That the bill did not state plainly all the estate, real and personal, which belonged to the petitioner. He is informed that his father, at the time of his death, was 306 *farming on his estate, and had horses, stock, farming implements, &c., worth several thousand dollars. 2d. That the proper parties were not before the court at the time the decree for the sale was made. Isaac B. Davis, though a party as guardian, was not a party in his own right; nor was Mary A. Henshaw; and the bill does not state she was dead, though it makes her son a party. 3d. Because the cause was not properly matured for a hearing; the answer put in by the guardian ad litem being in fact the answer of the infant, when it should have been the answer of the guardian ad litem. And if it could be considered the answer of the guardian ad litem it was not sworn to. That moreover the parties who did not answer the bill were summoned to answer at rules in June, and the bill was not filed until September; and under the statute the suit should have been dismissed. 4th. That the testimony taken to prove the propriety of the sale, was not taken upon interrogatories agreed upon by the guardian ad litem of the infant, nor was it taken in his presence when he was so disconnected from all other relations to the cause as to give the interest of the infant the protection of his whole undivided attention. Fourth. It was error to decree a sale of the land until the dower of Mrs. Durrett had been assigned to her, or she had agreed, in some lawful way, to accept the interest upon one-third of the proceeds of sale or the then value of her dower estate. And this not being done, tended to depreciate the market value of the land. 5th. Because neither Isaac B. Davis nor Elijah K. Durrett was ever the lawful guardian of Thomas Davis.

The cause came on to be heard upon the petition of the infant defendant, on the 23d of November 1870, when the court decreed that the decrees entered in the cause on the 17th of November 1858, and on the 21st of June 1860 be set aside; that the sale 307 of the land to *Peter C. Durrett be also set aside, and that he deliver possession of the same to Isaac B. Davis, the guardian of Thomas Davis. And a commissioner was directed to take certain accounts. From this decree Peter C. Durrett applied to this court for an appeal; which was allowed.

Wm. Green, for the appellant.

Field & Gray, for Thomas Davis.

Staples, J., delivered the opinion of the court.

This case has been very ably and elaborately argued; many authorities have been cited, and much valuable learning displayed. The industry and researches of counsel on both sides have relieved the court of much labor, and rendered unnecessary any extended discussion of the various questions presented by the record. I do not propose to attempt to follow the learned counsel in the wide range they have taken, but simply to give the conclusions to which the court has arrived, with a brief statement of the reasons upon which these conclusions are founded.

It is perhaps better to consider the objections taken to the proceedings and decree for the sale of the appellee's land, in the order in which they are presented by him in his petition for a rehearing.

And first, it is suggested that the bill did not plainly state all the estate both real and personal which belonged to the appellee, as required by the provisions of the second section of chap. 128, Code of 1860.

The bill states that David W. Davis, the father of the appellee, died in February 1855, intestate, seized and possessed of a tract of land, which is the subject of controversy, and a number of slaves, 308 whose names and ages *are given; and that this constituted all the estate belonging to the appellee. These averments are fully sustained by the evidence taken and filed by the guardian before the decree for the sale of the land was rendered. The appellee did not attempt, in the court below, to controvert this evidence; but contented himself with a general averment, that, as he had been informed, his father, at the time of his death, was possessed of stock and farming implements which must have been worth several thousand dollars. All of which may be true, and the statements of the bill also true, as the property may have been sold by the personal representative, and the proceeds exhausted in the payment of debts.

It is to be further observed that the application of the guardian for a decree to sell the appellee's land, was based upon grounds which would have justified the sale even though it had appeared on the face of the bill that the appellee then owned all the property claimed in his petition.

But a more conclusive answer is, that although a purchaser, at a judicial sale, may be required to see to the regularity of the proceedings upon which the jurisdiction of the court is founded, he is not bound to investigate the truth of the matters stated in the bill and deposed to by the witnesses touching the estate owned by the infant. The title cannot be affected because the case made by the record happens not to be warranted by the facts. This principle received the unanimous approval of this court in Walker's ex'or vs. Page, 21 Gratt. 636, 645. It was there held that the infant cannot reopen the case, and introduce evidence to contradict that already given and relied upon by the court that entered the decree.

The second objection set forth in the petition, is for want of proper parties.
309 It is claimed that Isaac B. Davis, *the guardian, ought to have been made a defendant in his character as heir, inasmuch as the statute requires that "the infant and all those who would be his heirs if he were dead, shall be made defendants:" that the main object of this provision is to afford the infant the security derived from the presence of the next of kin before the court.

The suit was brought by Isaac B. Davis, and the bill verified by his affidavit; and when he ceased to have any connection with the case as guardian, he united as surety in the bond given for the payment of the purchase money. It is clear, therefore, that in his opinion the interest of the appellee was promoted by a sale. If he had been made a party as heir, he must necessarily have assented to the statements made by himself as guardian. What other assurance could he have given? What other representation could he have made, that would in any wise have enured to the benefit of the appellee. Are we to vacate the decree and the sale upon some vague and undefined notion that the appellee possibly has sustained damage because the party asking for the sale as plaintiff was not before the court as defendant? this would indeed be to sacrifice substance for the merest shadow. Isaac B. Davis having by his active agency obtained the decree, being a party on the record when it was rendered, having united with the purchaser in the execution of the bond, can never be heard to impeach that decree, or the title acquired under it. But let it be conceded that he may impeach it, how is the appellee affected? What cause of complaint has he if the purchaser is willing to incur the hazards of future litigation? It is not for him to object to the sale because the purchaser has not acquired a perfect title.

The appellee, in his petition, made
310 the further objection *that Mary A. Henshaw, his paternal aunt, was not before the court. I understand his counsel, however, in the printed note of argument, as abandoning this ground, and very properly so; because, as he well said, "the court was justified in taking the statement in the bill as an averment that the said Mary A. Henshaw was dead; and that Philip T. Henshaw, one of the defendants, was her only child.

In thus disposing of the objections for the want of proper parties, I do not wish to be understood as conceding, that the learned counsel for the appellee is correct in his interpretation of the statute, when he says the main purpose in view was to protect the interests of the infant, in requiring those who would be his heirs to be made defendants. This is a very grave question, not necessary now to be decided, and no opinion is intended to be expressed upon the point.

The third error assigned by the appellee is, that the cause was not matured for a hearing according to law at the time the decree was rendered. The first branch of this objection, is based upon the ground, that although an answer was filed by the guardian ad litem, it was not in fact his answer, but that of the infant; and if, in any view, it can be considered the answer of the guardian ad litem, it was not verified by his affidavit.

It is true the answer purports to be the infant's by his guardian ad litem; but it is signed by the latter, and a careful reading will show that it is in fact his answer. It is the opinions, statements and responses of the guardian that are given; and however the judge or clerk may have regarded or termed it in the hurry and confusion of the court, it has the same effect as if it was formally designated and filed as the answer of the guardian in his proper person.

It is also true it does not appear that
311 the answer was *sworn to. But it may have been done in open court, and the entry omitted by the clerk, or the paper containing the endorsement lost or mislaid during the war, at the time the public records were taken from the clerk's office and concealed in the country. We are not to presume that the able and efficient judge then occupying the bench was ignorant of a plain provision of the statute requiring such oath, or that he would have received and acted upon an answer not in conformity with these provisions. Every reasonable intendment should be made in this court, in favor of the regularity of the proceedings below, where the contrary does not plainly appear. And this upon the maxim, omnia praesumunter rite esse acta. More especially ought this to be the case after this lapse of time, in favor of a bona fide purchaser for value, and in support of a sale clearly established to be for the benefit of the infant at the time it was made.

The second branch of this objection, is, that the suit was brought to the June rules, and the defendants summoned then to appear; and yet the bill was not filed or sworn to until the 15th of September following:

Consequently the suit stood dismissed for want of a bill, by the express provisions of the statute.

The law certainly requires the bill to be verified by the oath of the guardian. It is perhaps more regular that this should be done when the bill is filed; but it is not indispensable. The main object of the statute, in requiring such oath, is, I imagine, that the court may have the assurance, derived from the guardian's oath, that the averments of the bill are true; that the interests of the infant will be promoted by a sale; and that the guardian himself honestly entertains this opinion. And clearly this object is fully attained if the bill is sworn to at any time before the court acts upon it and renders the decree of sale. Here the decree was rendered at the 312 *November term, and the bill sworn to in the preceding month of September: which, for all practical purposes, was the same thing as if the oath had been taken when the bill was filed.

As to the other objection, that the bill was not filed in due time, it is sufficient to say, that it might have been filed at the June, July, or August rules, without new process against the defendants. The decree substantially recites that the process was returned properly executed, the bill was filed in due time, and all the steps regularly taken to mature the cause as to the defendants. Upon the authority of numerous cases, these recitals must be held conclusive in this court. Craig v. Sebrell, 9 Gratt. 131; and cases there cited.

The 4th objection is, that the depositions were taken and certified by the same person as commissioner who was acting as guardian. The learned counsel, in his printed notes, very rightly does not attach much importance to this objection, and it may be dismissed with a single remark, that there is nothing incompatible with the interests of the infant, in the guardian ad litem acting as an officer to take the depositions; nor is there any thing in the letter or spirit of the statute which militates against it.

The fifth ground presented in the petition, is the supposed error of the court in decreeing a sale of the land until the dower of Mrs. Durrett was assigned her, or she had agreed, in some lawful way, to accept the interest upon one-third of the proceeds of sale; and that a sale of the land before that obstacle was removed, tended to depreciate the market value of the property. The obvious answer to this, is, that Mrs. Durrett, in conjunction with her husband, filed her answer to the bill, consenting to a sale. The sale was accordingly made, and her part of the proceeds, no doubt, properly secured to her. So far from the market value of 313 the property being depreciated *by this course of proceeding, the infant was benefited by a sale of the entire tract unencumbered with the lien of the dower estate.

The sixth and main objection, was reserved by the learned counsel for appellee, to be last presented in the petition. It is that Isaac B. Davis, in whose name the bill was filed, was never the legal guardian of the appellee; he having been appointed by the Circuit court of Greene county "in chancery sitting." It is insisted that the Chancery courts are not authorized to appoint guardians for infants: but that this power appertains exclusively, to the Circuit or County courts in the exercise of their common law or probate jurisdiction.

There is no question but that the English courts of chancery from an early period, have assumed as a part of their jurisdiction, the power to appoint guardians where no testamentary guardians existed. However it may have originated, or upon whatever principle or necessity founded, it is now an established doctrine of these courts, and is never called in question. Tyler on Infancy and Coverture, page 254; 2 Story Eq. Ju., sec. 1333. In some of the States of the Union chancery guardianship, as recognized in England has never been adopted; but the jurisdiction in such cases is confided exclusively to surrogates' or orphan's courts; special tribunals bearing in many respects a strong resemblance to the English ecclesiastical courts. They are clothed with power to issue letters of guardianship to revoke them when necessary and to supervise generally the conduct of such fiduciaries and the settlement of their accounts. The whole matter is regulated by statute, the chancery jurisdiction in such cases being wholly unknown.

In Virginia the practice in the earlier history of the country was in conform- 314 ity with the English course of *proceeding. As far back as 1795 the General court determined it had no authority in the matter of appointing guardians. 3 Rob. Prac. 467. And in Ficklin v. Ficklin, 2 Va. Cas. 204, the same court in 1820 decided that the appointment of a guardian by election of the infant, after he arrives at the age of fourteen, is made on the chancery side of the County court, and not on the common law side. In a note to that case Judge Brockenbrough states that the Superior courts of law in this State had uniformly refused to appoint guardians, and receive the election of infants. And he expresses the opinion that, as the courts of chancery have such a controlling power over the estates, government and education of wards, and over the conduct of guardians, they are the proper tribunals before whom the election by an infant of his guardian should be made. It will be observed that Judge Brockenbrough is speaking of guardians by election of the infant. He did not mean, I take it, to suggest that a different jurisdiction prevailed as to infants who had attained fourteen and those who were under that age. In the nature of things no such distinction could ever exist unless established by some express legislative enactment. The reference is no doubt, to the rule of the common law by which the minor, upon reaching the age of fourteen, was competent to select his guardian, and the person thus selected, if possessed of the

proper qualifications, was invariably appointed by the court.

According to the authorities just cited, it is clear that prior to the revisal of 1819, and subsequent to it, the Chancery courts exercised the power of appointing guardians; and they were considered the only tribunals clothed with the power of making such appointments. They must equally possess it now, unless a change was made by the revisal of 1849–'50. The settled rule, however, in construing the Code, is, that the 315 old law was *not intended to be altered, unless such intention plainly appears. Parramore v. Taylor, 11 Gratt. 220; Owners of Steamboat Wenona v. Bragdon, 21 Gratt. 685.

The statute found in the Code of 1849, merely declares that the Circuit, County or Corporation court of any county or corporation, in which a minor resides, may appoint a gaurdian for him. Now, conceding that this provision confers upon the Circuit and County courts the power of appointment as courts of probate, upon what principle is it to be construed as taking away the jurisdiction of the Chancery courts. According to any rule of interpretation the inference is that a cumulative, and not an exclusive, jurisdiction was intended. Wayland v. Tucker, 4 Gratt. 267.

It has been argued, however, that by the express terms of the 11th section, chap. 128, Code of 1860, the Chancery courts are authorized to remove and appoint guardians; but not to appoint in the first instance; from which it is to be fairly inferred the intention was to limit them to cases of removal and appointment. The same provision, substantially, is in the Code of 1819; and was the law long anterior thereto. But it was never construed as limiting the general jurisdiction of the Chancery courts upon the subject; a jurisdiction which had existed from our earliest history, and was based upon principles lying at the foundation of our system of equity jurisprudence. As a general rule a statute conferring power upon a court in special, enumerated cases, is not to be construed as divesting a general jurisdiction in cases of an analogous nature not enumerated.

But if the chancery courts have no power to appoint guardians in the first instance, but only to remove and appoint, it would seem to be clear where they have appointed, the validity of that appointment cannot be questioned in a collateral proceeding. 316 No other court, *unless it be an appellate tribunal, is authorized to examine the records to ascertain whether the occasion was one for the proper exercise of the power in question. They are courts of general jurisdiction, and their decrees and orders are conclusive until reversed by a proper proceeding. This principle has received the sanction of the courts in innumerable instances. It is only necessary to refer to one, the case of Fisher v. Bassett, 9 Leigh 119. In that case Judge Parker said: The distinction between the acts of a court having jurisdiction over the subject matter under some circumstances, and those of one which in no possible state of things can take jurisdiction over the subject, is a sound and sufficiently intelligible one to guide our judgments in the present case. If under any circumstances the Hustings court could grant administration to Scott, it had jurisdiction of the subject, and must judge of those circumstances. See cases cited in Devaughn vs. Devaughn, 19 Gratt. 563; Ballard vs. Thomas, Ibid. 14. In the present case, if the ward may question the appointment, so may the sureties in the guardian's bond, and so may a stranger sued by the guardian for any matter affecting the ward's estate. Indeed this case affords in itself a most apt illustration of the evil results of the doctrine asserted. An appointment made by a court of general jurisdiction, recognized by another, is to be pronounced utterly void to the extent of reversing a decree and invalidating the title of a bona fide purchaser for value.

Before a result of that sort is reached we should be clearly satisfied that the law on the subject is express and mandatory.

These constitute the main, if not all the objections, urged by the appellee to the proceedings and decree under which his land was sold. In considering them this court has not been unmindful of the impor- 317 tance of a *faithful observance of the various statutes enacted for the benefit of the infant, and for the protection of his inheritance. The power to sell the estate of those who have no capacity to be heard is a very grave one, and only to be exercised with great caution. Still it is an indispensable power, and is vested in some tribunal in every well regulated State. Sound policy requires that judicial sales shall not be brought into disrepute by the practice of vacating decrees for slight and minute defects in the preparation of causes, when the true meaning and spirit of the law has been observed. If the court clearly perceives that the sale when made was an advantageous one, it ought not to regard mere technical informalities which do not substantially affect the validity of the proceedings, or the rights and interests of the infant. In determining whether the sale was a beneficial one, we must look to the circumstances as they existed at the time it was made, and not to subsequent events. The purchase money may be lost by the mismanagement of the court, or its officers, or by injudicious investments, or by the occurrence of war; but surely such consideration ought not to affect the purchaser. These are matters with which he cannot interfere, and by which he should never be prejudiced.

In considering the numerous objections urged in this case, I have made no reference to a very important question very ably discussed by counsel. And that is, conceding the validity of these objections and the necessity of reversing the decree, whether the appellee is entitled to the restitution of his property as against the appellant, who stands in the attitude of a bona fide pur-

chaser for value. Whatever may be the current of authorities in other States, the question may be regarded, to some extent, an open one in Virginia. The tendency of opinion has been that the title falls 318 with the reversal of the decree, *except so far as the sale is within the influence of the statute.

The decision of the question is, however, wholly unnecessary in this case, because, as has been seen, the objections are insufficient when considered singly or collectively. Nor are we called on to consider any of the proceedings subsequent to the sale. The decree of the Circuit court is based upon the alleged irregularities in the conduct of the suit; and to these our opinion is confined.

For the reasons stated, the decree of the Circuit court must be reversed, and the cause remanded for further proceedings.

Decree reversed.

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319 *Robinson v. Rogers, 2d Auditor.

January Term, 1874, Richmond.

1. **Act of 1871—Bonds—Funding Act.**—The holder of bonds of the State issued before the war to the Kanawha Board of the James River and Kanawha Company, under § 9 of the act of March 23d, 1860, is entitled to have them transferred upon the books of the 2d auditor, and funded under the provisions of the act of March 30, 1871, as amended by the repealing clause of the act of March 7, 1872, entitled an act declaring what shall be received in payment of taxes, &c.
2. **Same—Same—Mandamus to Enforce.***—The proceeding by *mandamus* is the proper proceeding to compel the 2d auditor to transfer and fund said bonds; his act in doing so being merely ministerial.
3. **Same—Repeal.**—The act of March 18, 1862, passed by the Richmond Government, in relation to said bonds, was temporary in its character, and has been repealed by implication

This case is sufficiently stated in the opinion of Judge Bouldin.

Neeson and Morton, for the petitioner.

Taylor, Attorney-General, for the commonwealth.

Bouldin, J. This is an original application to this court, by Wm. G. Robinson of Oswego, in the State of New York, for a writ of mandamus to the second auditor of the State, to compel him to transfer on the books of his office, to said Robinson, certain bonds of the State of Virginia issued to the Kanawha Board of the James River and Kanawha Company, under the 9th 320 section of *the act of March 23d, 1860, amounting to $18,000 in the aggregate, and more particularly described in the petition; and also, to fund the same under act of March 30, 1871, commonly designated "the funding act."

The bonds are all filed with the petition; and it is admitted in writing by the parties, that all of them were duly issued and delivered by the State of Virginia, to said Kanawha Board, under the 9th section of the act aforesaid; that they came to the hands of the petitioner by proper assignment; and that the powers of attorney to transfer the same, referred to in the petition, are duly executed and attested.

It is further agreed, that said bonds and powers of attorney were in the early part of the month of December, 1871, (the second auditor says about the 2d,) presented to Asa Rogers, then and now the second auditor of the State of Virginia, to be transferred and funded under the act aforesaid of March 30th, 1871.

The auditor refused either to transfer or fund the bonds, assigning as his only reason for the refusal, "that the same was not funded on account of the provisions contained in the act of March 18th, 1862," being an act of the Richmond government during the late war. The issue by the State, and the assignment to the petitioner, being all conceded to be "duly" and "properly" made, and the bonds, with the powers of attorney duly executed, having been regularly presented to the second auditor in December 1871, to be properly transferred and funded, the question, and only question before us, is, whether the act of assembly referred to by him, constituted a valid objection to the petitioner's demand? Did that act justify the second auditor in refusing to make the transfer and to fund the debt? This is the only question.

321 *By the general laws of this State existing when these bonds were issued by the State of Virginia, and when they came to the hand of the petitioner, it was the duty of the second auditor, on the presentation to him of these bonds by the petitioner, with proper power of attorney authorizing the transfer of the bonds to him as the holder, to have the transfer made; and such thence hitherto hath been and still is the law of Virginia. See Code 1860, pp. 264–5, ch. 44, §§ 23, 24, 25, &c., Code 1873, pp. 407–8, ch. 42, §§ 27, 28, 29, &c.

In addition to this general law of the State she contracted on the face of these bonds, with the person or persons to whom they might be issued, and with all persons who might become holders thereof, that they should be transferable on the books of the second auditor, by appearance in person or by attorney; thus making the general law of the land a part of the contract in express terms on the face of each bond. The language on the face of each certificate or bond is as follows: "This certificate is transferable on the books of the second auditor, by appearance in person or by attorney." The right thus to appear in person or by attorney, and to transfer the bond to another, is absolutely essential to its beneficial use by the holder. Without such power, its con-

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***Mandamus—Ministerial Act.**—See, for instances of *mandamus* to compel the exercise of a ministerial act, Dawson v. Thruston, 2 Hen. & M. 132; Manns v. Givens, 7 Leigh 689; Randolph Justices v. Stalnaker, 13 Gratt. 523; Wolfe v. McCaull, 76 Va. 876; Wise v. Bigger, 79 Va. 269.

vertibility into money would be destroyed; and this essential right being secured to the holder by the contract of the State, the obligation of that contract cannot be impaired by subsequent legislation. If, then, the act of the Richmond government of March 18, 1862, be a statute of the State of Virginia, and if the second auditor be right in supposing that the statute prohibits him from allowing any transfer, either in person or by attorney, of bonds legally issued under the act of September 23d, 1860, and in the hands of bona fide holders prior to the passage of the prohibitory act, 322 *the latter act would certainly deprive the holder of the bond of a most valuable and important element of his contract, and would therefore impair its obligation. On that account and to that extent the act, if on our statute book, is unconstitutional and void, and constitutes no answer to the petitioner's demand to have his bonds transferred and funded.

But, is the prohibitory portion of the act of March 18, 1862, now a law of Virginia, conceding it to have been a law and to be constitutional? I think not. It might, perhaps, be contended, and with much show of reason, under the ruling of this court in the cases of Commonwealth v. Chalkey, 20 Gratt. 404, and De Rothschild v. Auditor, 22 Gratt. 41, that no legislative act of the Richmond government, during the war, could in any wise affect the obligations of this State, issued, and the rights of her creditors beyond the State vested, anterior to the war. But, waiving that question altogether, I am of opinion that the portion of the act referred to is, for other reasons which will be given, no longer a part of the law of Virginia. The act itself did not undertake wholly to repudiate the obligations of the State therein referred to; but, treating them as valid, merely interposed a temporary obstruction to their transfer. It was evidently a quasi war measure, intended to bolster the resources of the government, and was, on its face, temporary in its character; and so far as my researches enable me to speak on the subject, and they have been prosecuted with some care, it has not been recognized, nor even referred to, in any act passed since the war in relation to the public debt. In none of our statutes, making provision for the public debt since the war, has there been any discrimination against the bonds issued to the Kanawha Board. Beginning with the act entitled "an act to provide for funding the 323 interest upon the public *debt," passed March 2d, 1866, we find that its provisions extend to all holders of the bonds of the State issued before the 17th day of April 1861, without exception; making no discrimination against the bonds lawfully issued under the act aforesaid of March 23d, 1860. Sess. Acts 1865-6, ch. 9, p. 79. Nor is there any such discrimination to be found in any of the subsequent statutes. See Act March 21, 1867. Sess. Acts 1866-7, ch. 35, p. 805; Ibid. ch. 74, p. 877; Ibid. ch. 103, p. 904; and Sess. Acts 1871-2, ch. 166, p. 218. And in the joint resolution of the 7th January, 1873, "in regard to the public debt," "the holders of the bonds of the State of Virginia," without exception, are invited to a conference with a committee of the general assembly. The holders of bonds regularly issued through the Kanawha Board were not excluded in the resolution, and in fact, these bonds constitute a part of the public debt as annually stated by the auditor and published with the acts of assembly. In addition to all this, the funding act of March 30th, 1871, itself makes no such discrimination; on the contrary, it gives in express terms the privilege of funding to "the owners of any of the bonds, stocks or interest certificates heretofore issued by the State, which are recognized by its constitution and laws as legal; except the five per centum dollar bonds and what are known as sterling bonds." There is no exception of bonds issued through the "Kanawha Board."

Under these circumstances, I am of opinion, that the temporary war measure of March 18, 1862, if ever in force at all after the war, has been long since repealed by implication, and that there was no statute in force on or about the 2d of December 1871, or since, to interfere with the petitioner's right to have the bonds in his petition mentioned, transferred and funded under the act of March 30th, 1871, as 324 amended by the repealing *clause of the act of March 7, 1872, entitled "an act declaring what shall be received in payment of taxes or other demands of the State," and as now in force.

I am further of opinion, upon the principles established by this court in the cases of Antoni v. Wright, sh'ff, and Wright, sh'ff, v. Smith, both on principle and authority, that the writ of mandamus is the proper remedy in this case; the duty of the second auditor, under the act of assembly, being purely ministerial.

My opinion is that a peremptory writ of mandamus should be awarded, commanding the second auditor to allow the transfer to the petitioner of the several bonds filed with the petition to be made on his books, as prayed for in the petition; and to fund the same under the provisions of the act of March 30th, 1871, as amended by the repealing clause of the act of March 7, 1872, entitled "an act declaring what shall be received in payment of taxes or other demands of the State," and as now in force.

The other judges concurred in the opinion of Bouldin, J.

Peremptory mandamus issued.

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325 *Beasley v. Robinson & als.

January Term, 1874, Richmond.

1. **Action on Bond—Variance.**—A notice is addressed by B to R, late sheriff, and his surviving sureties by name, survivors of themselves and James Sims. On the trial B introduces the bond which is signed by R and all the surviving sureties; but it is

objected to as evidence because the name described in the address of the notice as James Sims is written Jos. Sin. This is not a material variance, and the bond should be admitted as evidence.

2. **Same—Evidence.**—The court having excluded the bond for the variance, B proposes to introduce the record of the court setting out the qualification of R as sheriff, and the names of his sureties, of whom James Sims is one, who signed, sealed and acknowledged said bond. But the defendants objected to the introduction of said evidence and the admission of said bond. The record is proper evidence and should be admitted.

3. **Same—Variance—Immaterial.**—If it could be considered a case of variance between the pleadings and the proofs, it would have been such an one as might and ought to have been cured by an amendment, according to the Code of 1860, ch. 177, § 7.

This is a supersedeas to a judgment of the Circuit court of Greene county, rendered on the 18th day of June 1873, on a motion made by the plaintiff in error, Beasley, against the defendants in error, Robinson, and his surviving sureties as late sheriff of said county, for certain sums of money, directed by the County court of said county to be paid by said sheriff to said Beasley, out of the levy of said county. The motion was made under the Code of 1860, ch. 326 53, section 17, page 311. The *notice is in due form, and was addressed "to Benjamin Robinson, late sheriff of Greene county," and his surviving sureties by name, who are described as "surviving sureties of themselves and James Sims, deceased, on the official bond of said Benjamin Robinson." The notice having been duly served on all the defendants, and the cause having been several times continued on the motion of the defendants, it came on at length to be tried on the 18th day of June 1873, when a jury empanelled in the case found a verdict for the defendants, and judgment was thereupon rendered accordingly.

Two bills of exceptions were taken by the plaintiff, to opinions given by the court during the progress of the trial, and were made a part of the record. The 1st states, that upon the trial of the cause, the plaintiff, to maintain the issue joined on his part, offered in evidence to the jury, the official bond of Benjamin Robinson, sheriff of Greene county, dated the 15th day of August 1866, which is set out in haec verba, and is in due form, embodying the names of the sheriff and all his sureties, and with the names of the sheriff and all his surviving sureties, against whom only the motion was made, duly subscribed to the bond; but instead of the name of "James Sims," the deceased surety, being fully subscribed to the bond, the name "Jos. Sin," appears by the printed record to have been subscribed thereto. "Whereupon the defendants, by counsel, moved the court to exclude the said bond from the jury, because there is a variance between the bond described in the plaintiff's notice, and that offered in evidence; in this, that the bond described in the notice, is described as the bond of James Sims and the other obligors named in said notice, and the bond offered in evidence is the bond of Jos. Sin and the other co-obligors, and not the bond of James Sims 327 and others; and it did not appear *to be the bond of James Sims. Which motion the court sustained, and excluded the said bond from going as evidence to the jury; to which opinion of the court the plaintiff excepted."

The 2d bill of exceptions states, that upon the trial of the cause, "the plaintiff, to maintain the issue joined on his part, and after the court had excluded the bond as set out in plaintiff's first bill of exceptions, which bill is asked to be taken as a part of this bill, he offered to prove by the order-book of the County court of Greene, that the said James Sims appeared in said court, signed, sealed and acknowledged the said bond as his bond, which order is in the words and figures following, to wit: 'Benjamin Robinson, who has been elected sheriff by the voters of Greene county for the period of two years, commencing on the 1st of January 1867, appeared in court, and took the several oaths required by law; and, together with Wm. F. Melone, George J. Stephens, Richard D. Melone, James M. Robinson and James Sims, his securities, who justified as to their sufficiency, entered into and acknowledged a bond in the penalty of $30,000, payable to the commonwealth of Virginia, conditioned according to law.' And the defendants, by counsel, objected to the introduction of the said evidence, and to the admission of said bond, on the ground set out in the first bill of exceptions. Which objection the court sustained, and overruled the motion of the plaintiff, and again excluded said bond, and also the said order of the County court, and all evidence offered to prove that the said bond was the bond of the said James Sims. To which opinion of the court the plaintiff excepted."

Upon the application of Beazley this court awarded a supersedeas to the judgment.

328 *Field and Gray, for the appellant.

Blakey, for the appellees.

Moncure, P., delivered the opinion of the court. After stating the case, he proceeded:

The only question involved in this case is, whether the opinions of the court excepted to as aforesaid, or either of them, are erroneous. We are of opinion that both of them are.

First. The court erred in excluding the bond on the ground of variance, when offered by itself without other evidence, as mentioned in the first bill of exceptions. There is no further description of the bond in the notice than is contained in its address, "to Benjamin Robinson, late sheriff of Greene county, and George J. Stephens, James M. Robinson, William F. Melone, R. D. Melone, surviving sureties of themselves and James Sims, deceased, on the official bond of said Benjamin Robinson." The bond

offered in evidence was the official bond thus described. There were inserted in the body of the bond, the names of all the obligors, principal and sureties, to whom the notice was addressed. And there were subscribed to the bond, signatures and seals corresponding to the names of the obligors, so written in the body of the bond, except that the name apparently intended for "James Sims" is obscurely or imperfectly written; and, as the defendants in error contend, is written, "Jos. Sin." It is so written in the printed record. But the original bond has been brought before us by the clerk of the County court of Greene, upon a subpœna duces tecum; and upon an inspection of it, we think the signature was intended for "James Sims," and may as well be read "Jas. Sim," or "Jas. Sims," as "Jos. Sin." It was evidently
329 *written by a very bad writer, and probably by an old man; and we know it is quite common, in such a case, that the name should be misspelt, or a letter be omitted by mistake. The name is written opposite the word "seal," inserted in a scroll; and the end of the letter "m," of the name "Sim," appears to be written over the scroll; and immediately after the name "Sim," is written the word "seal"; the first letter of which word serves well enough for, and may possibly have been adopted, by the signer as the last letter of the name "Sim"; and thus the name "Jas. Sims" would be perfected. But whether this be so or not, and even if we suppose the name as written is "Jas. Sin" or "Jos. Sin," still we think that the bond ought not to have been excluded as evidence, and that the jury would have been well warranted in finding, from that evidence alone, on a plea of non est factum, that the bond was the bond of the obligors whose names were inserted in the body of it. The fact is, most of the names subscribed to the bond are imperfectly written. Indeed, not one of them is perfectly written. In one there is a letter too many, and in another a letter too few. In all of them letters are put for Christian names, or those names are contracted. The name of James M. Robinson, appears to be written, "Jus. M. Robinson." Now, it might just as well have been said there was a variance in regard to all these names, as in regard to that of James Sims, only. But we know that these apparent variances, if they may be so called, are of every day's occurrence, and they are not real or legal variances. The bond in this case was prima facie evidence, that it was the bond of all the parties whose names were inserted therein, and was apparently intended to be subscribed thereto; and that fact could not be controverted without an affidavit, that the instrument was not
330 the deed of the alleged obligors *or some of them. Code of 1860, ch. 171, § 38, p. 713; Acts of 1869-70, ch. 271, p. 425.

Second. It follows as a matter of course, from what we have already said, that we think the Circuit court erred in excluding the evidence set out in the second bill of exceptions. Certainly, if the bond was not sufficient evidence of itself, in the absence of any affidavit to the contrary, that it was the bond of all the obligors therein named, the order of the court stating that they all appeared in court and entered into and acknowledged the bond, is the highest, to wit, record evidence of that fact. It appears, also, from the bill of exceptions, that other evidence was offered to prove that the said bond was the bond of the said James Sims; which evidence was also excluded. And it does not appear that a particle of evidence was offered on the other side to prove that the said bond was not the bond of James Sims, or that there was any person in the world by the name of "Jos. Sin," whose the signature could have been intended to be. A man may adopt a signature written for him by another person; or he may adopt his cross mark for his signature. Here James Sims made, or attempted to make, his own signature, and acknowledged it as such in open court.

But if this could be considered as a case of variance between the pleadings and the proofs, it would have been such a one as might and ought to have been cured by an amendment, according to the Code of 1860, ch. 177, § 7, which declares that "If, at the trial of any action, there appears to be a variance between the evidence and the allegations or recitals, the court, if it consider the same not material to the merits of the case, and that the opposite party cannot have been prejudiced thereby, may allow the pleadings to be amended on such terms as to payments of costs or postponement of trial, or both, as it may deem reasonable."

331 *On every view of the case, therefore, we are of opinion that the judgment of the Circuit court is erroneous, and ought to be reversed and annulled; and that the verdict of the jury ought to be set aside and the cause remanded for a new trial to be had therein, in conformity with the foregoing opinion.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in excluding the evidence mentioned in the first and second bills of exception, all of which evidence was admissible. Therefore, it is considered that the said judgment be reversed and annulled, and that the plaintiff in error recover against the defendants in error, his costs by him expended in the prosecution of his writ of supersedeas aforesaid here. And it is ordered that the verdict of the jury be set aside, and the cause remanded to the Circuit court for a new trial to be had therein; on which trial the said evidence, if offered again, or such part thereof (including the official bond in said bills mentioned) as may be offered again, shall be admitted.

Which is ordered to be certified to the Circuit court of Greene county.

Judgment reversed.

332 *Allen & als. v. Paul & als.

January Term, 1874. Richmond.

Unlawful Detainer.*—By two deeds a lot of ground was conveyed to certain persons by name and their successors, to be held in trust for the Methodist Episcopal Church of Petersburg. A house of worship, called the Union-Street Methodist church, was built upon this lot, in which this church worshipped until 1842, when they built a house of worship on Washington street in the city, and in 1844 they resolved that the Union-Street church should be appropriated to the use of the colored congregation; which was constituted of persons who were members of the Methodist Episcopal church of Petersburg. These continued to worship there, and to be represented at the quarterly conference held at the Washington-Street church, until 1865, when they connected themselves with the African Methodist Episcopal Zion church. After this change was made, in the year 1866, the then trustees of the Methodist Episcopal church property, who were the regularly constituted successors of the original trustees, agreed with the persons who, according to the rules and discipline of Zion church, were then the trustees and official authorities of said congregation, as part of Zion church, that until the said property should be required for the use of the Methodist Episcopal Church South, the said first trustees would permit said trustees and congregation to occupy the same as a place of worship without rent, they paying insurance and repairs; and to this the said trustees and congregation agreed; and they held the said property on these terms, until 1871, without claiming any other right thereto. In 1871, the trustees of the colored congregation resigned, and others were elected; and then the judge of the Circuit court of Petersburg made an order appointing the persons elected trustees of said church, in whom the legal title to the land
333 owned by said congregation should be *vested. And these trustees from that time claimed the premises and the legal title thereto. The trustees of the property thereupon demanded possession of it, which was refused; and they brought this proceeding of unlawful detainer.

HELD:

1. **Same—Adverse Possession.**†—The defendants, or their predecessors, having been put into possession of the premises by the plaintiffs, or their predecessors, and having acknowledged the title of the latter, the possession of the former is the possession of the latter, until the former, as such tenants, by some act disclaim to hold of the latter as their landlords.

2. **Same—Same.**—The defendant cannot set up any right or title adverse to the plaintiffs, unless they prove that they disclaimed to hold of them, or *bona fide* abandoned possession of the premises, or asserted and claimed an adverse right to the premises, with notice thereof to the plaintiffs or their predecessors, three years before the institution of the suit. And *quære*, if the mere disclaiming the landlord's title and claiming to hold in fee for three years, is sufficient to defeat the plaintiff's recovery.

3. **Same—Same—Notice.**—The defendants having disclaimed to hold as tenants of the plaintiffs, and claimed to hold the premises in fee, no notice to quit was necessary to entitle the plaintiffs to proceed immediately to recover the property.

4. **Same—Same.**—The plaintiffs, as the regularly appointed successors of the original trustees in the deeds conveying the property, may maintain the action to recover the possession of the church building against the defendants, who claim to be the trustees of the A. M. E. Zion church in Petersburg, and to be invested with the title to the property belonging to said church; and as such to be in possession of the property in controversy.

5. **Same—Who May Bring.**—It is immaterial to the support of the action, whether the plaintiffs acquired any personal ownership in the property by the deeds; it not being competent for the defendants, who claim to hold as successors of the plaintiffs' tenants, to deny the plaintiffs' title.

6. **Same—Trustees—Title.**—Although the order of the court was legal and was binding so far as it constituted the defendants trustees, and the regularity and validity of this order, or the said
334 appointment *of the defendants as trustees, cannot be enquired into in this suit, yet the said order does not vest in them the legal title to the property for the time being, or for an instant, unless the congregation which they represent are the owners of it. And the predecessors of the defendants having acknowledged the title of the plaintiffs, and held under them, the defendant claiming through them, as their sucessors, cannot deny the the plaintiffs' title.

7. **Same—Adverse Possession.**—That the defendants and those under whom they claim have held possession of the premises for more than three years, will not defeat the plaintiffs' action, unless such possession was adversary.

8. **Same—Same.**—The resolution of 1844 implies that the title and ownership of the property is retained by the Methodist Episcopal Church, and the use of it only given to the colored congregation, which the owners had at any time the right to recall.

This was a proceeding of unlawful detainer in the Corporation court of Petersburg, instituted by D'Arcy Paul and others against James Allen and others, to recover the possession of a lot and buildings thereon called "the Union street Methodist church." Upon the trial of the case, it appeared that by the deed executed in August, 1818, a part of the lot had been conveyed to certain persons styled trustees of the Methodist Episcopal church in the Town of Petersburg, and to the survivors of them and their successors, to be held for the uses and purposes of the said church, either for a place of worship or for any other purpose to which the said chuch should direct it to be appropriated.

By another deed executed in 1829, the other part of said lot was conveyed to the then trus-

*Unlawful Detainer.—See Olinger v. Shepherd, 12 Gratt. 462; Norfolk City v. Cooke, 27 Gratt. 438; Power v. Tazewells, 25 Gratt. 786; Pannill v. Coles, 81 Va. 380; Frazier v. Va. Military Institute, 81 Va. 59; Davis v. Mayo, 82 Va. 97; Pettit v. Cowherd, 83 Va. 20, 1 S. E. Rep. 392; Mears v. Dexter, 86 Va. 828, 11 S. E. Rep. 538. See also, Board of Education v. Crawford, 14 W. Va. 790, and Va. Code 1887, ch. 123.

†Unlawful Detainer—Adverse Possession.—See monographic *note* on "Adverse Possession" appended to Nowlin v. Reynolds, 25 Gratt. 187.

tees of the Methodist Episcopal church in the town of Petersburg, and the survivors of them and their successors, for the same uses and purposes contained in the first deed. And it appeared that the plaintiffs were
335 the successors of the *original grantees, appointed according to the forms of the Methodist Episcopal church.

In 1842 the church that had worshipped and conducted their quarterly conference at this church, built a house of worship on Washington street, in the same town, and removed to that house, where they worshipped and held their quarterly conference; and there being a large number of colored members of that church, by a resolution of the conference, in February 1844, the house on Union street was appropriated to the use of the colored congregation; and they worshipped there from 1842 to 1865, and were represented at the quarterly conference held at Washington street church by the stationed preacher sent to said congregation by the Virginia Conference of the Methodist church, and the trustees who held the property.

It appears further, that in 1865 all the colored members worshipping at Union-Street church connected themselves with the African Methodist Episcopal Zion church; and assumed the name, and adopted and submitted to the discipline and government of that church, and became part thereof. And since that time they have received their preachers from the conference of said Zion church.

After this change was made, in the year 1866, the plaintiffs agreed with the persons, who according to the rules and discipline of said Zion church, were then the trustees and official authorities of said congregation, as part of Zion church, that until the said property should be required for the use of the Methodist Episcopal Church South, the plaintiffs would permit the said trustees and congregation to occupy said property as a place of worship, without rent, they paying only the costs of repairs and insurance during their occupancy; and the said trustees and officials agreed to hold the said property of the plaintiff's on these terms; and said
336 trustees and officers *did thereafter pay the costs of insurance and repairs, getting the consent of the plaintiffs before making repairs and to an increase of insurance made in the year 1869: and the persons who were trustees by election of said congregation from the year 1866 to the fall of the year 1871, held the Union-Street property of the plaintiffs, and with their consent on the terms aforesaid, without claiming any other right or title thereto.

About the month of September 1871, a controversy arose in the Union-Street church, in consequence of which the trustees hereinbefore mentioned, resigned, and the defendants were elected as trustees of said congregation. And on the 24th of November 1871, the following order was made by the Circuit court of Petersburg:

On the motion of the proper authorities of the congregation of the Union-Street A. M. E. Zion church, in the city of Petersburg, the court doth appoint James Allen, &c., naming the defendants, trustees of said church, in whom the legal title to the land owned by said congregation shall be vested.

And from that time the defendants claimed the premises in controversy and the legal title thereto, adversely to the plaintiffs and as owners of the fee simple thereof: of which the plaintiffs were informed on the 10th of December 1871; and immediately thereafter they demanded possession of the property, and took steps towards the institution of this suit.

It further appeared that the congregation by whom the defendants were elected trustees, and who at the time of the trial worshipped in said Union street church, is the same congregation that began to worship is said Union street church in 1842, as aforesaid, without other changes than those result-
337 ing from natural and ordinary *causes, and the changes hereinbefore stated as having occurred in 1865.

After the evidence was introduced the plaintiffs asked the court to instruct the jury as follows:

"If the jury believe, from the evidence, that the defendants, or those under whom they claim, were put into possession of the premises in controversy by the plaintiffs, or their predecessors, trustees, or tenants of said plaintiffs, or their predecessors, as landlords, the possession of the defendants, with the consent of said landlords, is to be deemed the possession of said landlords, until such tenants, by some act, disclaim to hold of their said landlords, as tenants, and full notice of such disclaimer be given to the landlords."

"If the jury believe, from the evidence, that the defendants, or those under whom they claim, were put into possession of the premises in controversy by the plaintiffs or their predecessors, trustees, as tenants of said plaintiffs, or their predecessors, as landlords, then the defendants will not be permitted, in this suit, to set up any title or right of possession adverse to that of the plaintiffs; unless the defendants shall prove that they or their predecessors disclaimed to hold of their said landlords, or bona fide abandoned possession of the premises, or asserted and claimed an adverse right to the premises, with notice thereof to the plaintiffs, or their predecessors, three years before the institution of this suit."

"If the jury believe, from the evidence, that the defendants, or those under whom they claim, were put into possession of the premises in controversy by the plaintiffs, or their predecessors, trustees, as tenants of said plaintiffs, as landlords; and that the defendants have, within three years before the institution of this suit, set their said landlords at defiance, and done any act disclaiming
338 *to hold of them, as tenants, or claimed to hold the premises in fee, no notice to quit is necessary, and the defendants are liable to be proceeded against in this form of proceeding immediately."

And the defendants objected to said instructions.

And the defendants, by counsel, asked the court to instruct the jury as follows:

First instruction. "That the deeds conveyed the property in controversy, for the use of the congregation of the Methodist church, in the town of Petersburg, and that neither the original trustees named in said deeds, nor any successors of theirs, as trustees, acquired any personal ownership or right of possession to the said property; nor can they maintain this action to recover possession of said church edifice from the congregation actually worshiping therein."

Second instruction. "That the church edifice in question belongs to the local congregation worshiping therein, and not to the church at large; and that the various changes in the name of the church congregation worshiping in the property in question do not affect either the title to the property or the right to occupy the same; and that no trustee can maintain this form of action against the Methodist church congregation actually occupying it."

Third instruction. "That the order of the Circuit court of the city of Petersburg, dated the 21st of November 1871, appointing the defendants in this suit trustees of the Union-Street A. M. E. Zion church, is a legal and binding order, and vests the legal title for the time being, and for the uses mentioned in said deeds, in these defendants; and that neither the regularity or validity of the said order, or the appointment of these defendants, as trustees thereunder, can be inquired of in 339 *this suit; nor can these defendants be removed from their trusteeship, nor be dispossessed of the property in controversy by any proceeding in this suit."

Fourth instruction. "That James Allen and the other defendants are the legal trustees of the colored Methodist congregation working on Union street, in the town of Petersburg, in the church property described in this suit."

Fifth instruction. "That if the jury believe, from the evidence in this case, that the trustees appointed by the Union-Street Methodist church congregation, have held possession of the property in question for the use of the congregation for more than three years, and until these defendants were appointed, then their possession would toll the possession of these defendants, and constitute an uninterrupted possession."

Sixth instruction. "That if the jury believe, from the evidence, that the property in controversy was held by the congregation which now holds it, for three years next preceding the commencement of this suit, then the plaintiffs are not entitled to recover."

Seventh instruction. "That the resolution adopted by the board of trustees of Washington-Street church, of which these plaintiffs are the successors, dated February 8th, 1844, appropriated the property in controversy to the use of the colored congregation worshiping therein; and if the jury believe, from the testimony, that the congregation now worshiping there is the same in succession with that worshiping there at the date of the resolution, then they must find for the defendants."

Eighth instruction. "That the question whether the congregation now worshiping in the property in controversy holds to the same faith and doctrine, or adheres to the same church government, as it did in 1842, cannot be enquired into in this action."

340 *Ninth instruction. "That the direction by Allen, one of the defendants, to the sexton, to close the church on the morning of the 10th of December 1871, as testified in this case, did not bind the church congregation, nor the majority of his co-trustees; nor did it change or affect the possession or right of possession to the church property, unless it is shown that he acted by their authority."

Tenth instruction. "That the plaintiffs in this case are not entitled to recover the property in question from the defendants in this action of unlawful detainer."

And the plaintiffs objected to said instructions.

And the court having heard the arguments of counsel, gave the jury the instructions asked for by the plaintiffs, and refused to give the instructions asked for by the defendants.

To which opinions and rulings of the court giving the instructionsasked for by the plaintiffs, and refusing the instruction asked for by the defendants in manner and form aforesaid, the defendants, by counsel, excepted.

The jury found a verdict for the plaintiffs for the premises in controversy; and the defendants moved for a new trial, which was refused; and they excepted, and applied to this court for a supersedeas; which was awarded.

Wells, for the appellants.

John Lyon, for the appellees.

Anderson, J., delivered the opinion of the court.

This suit was instituted by a summons against James Allen and others, the plaintiffs in error, to answer the complaint of D'Arcy Paul and others, who are described "trustees of the 'Methodist Episcopal Church 341 South,' *in Petersburg, Virginia;" that the said defendants are in possession, and unlawfully withhold from the plaintiffs a certain lot or parcel of land, with three brick tenements thereon, commonly called "the Union-street Methodist church," situate in Petersburg, &c. There was a verdict for the plaintiffs, "that the defendants unlawfully detain from the plaintiffs the whole of the premises described in the within writ;" which the defendants moved the court to set aside, upon the ground that it was contrary to law and the evidence. The court overruled the motion, and gave judgment for the plaintiffs. To which ruling of the court the defendants excepted; and the facts proved are certified by the court. The defendants also excepted, in the progress of the trial, to two other rulings of the court. The first was to the opinion of the court admitting certain deeds in evidence; and the second, to the giving certain instructions to the jury, on motion

of the plaintiffs; and refusing to give the instructions moved by the defendants.

From the view which the court has taken of this cause, the question raised by the first bill of exceptions is wholly immaterial, and not necessary, therefore, to be considered or decided.

The hypothesis of all the instructions moved by the plaintiffs, and given by the court, is, that if the jury believe, from the evidence, that the defendants, or those under whom they claim, were put in possession of the premises by the plaintiffs, or their predecessors, and that the former, as tenants, acknowledged the title of the latter, as their landlords; upon this hypothesis, three propositions are deduced: First—That the possession of the former, is the possession of the latter, until the former, as such tenants, by some act, disclaim to hold of the latter, as their landlords, and full notice thereof be given to the latter.

342 *Secondly. That in such case the defendants will not be permitted to set up any right or title adverse to the plaintiffs, unless they prove that they disclaimed to hold of them, or bona fide abandoned possession of the premises, or asserted and claimed an adverse right to the premises, with notice thereof to the plaintiffs, or their predecessors, three years before the institution of this suit.

And, thirdly: If the said defendants have, within three years before the institution of this suit, set their landlords at defiance, and done any act disclaiming to hold of them as tenants, or claimed to hold the premises in fee, then no notice to quit is necessary, and the defendants are liable to be proceeded against in this form of action immediately.

The doctrine of these instructions is, that the possession of the tenants is the possession of his landlord, and not adverse to it; and that a tenant will not be allowed to deny his landlord's title. Thus far the instruction is in accordance with well established law. If it was conceding too much to say that the tenant might turn his possession to an adversary possession by disclaiming his landlord's title, and claiming to hold in fee, it was not error to the prejudice of the defendants; and it was surely not error against them to say, that unless that disclaimer was made three years before the institution of this proceeding it could be no bar to the plaintiff's recovery; and that, when the tenant had set his landlord's title at defiance, and claimed to hold adversely to him, no notice to quit was necessary; and he might be proceeded against in this form of action immediately.

The court is also of opinion that the first instruction propounded by the defendants was properly rejected by the court. There can be no doubt that this action could

343 *be maintained by the plaintiffs against the defendants, who claimed to be the trustees of the African Methodist Episcopal Zion church in Petersburg, and to be invested with the title to any property belonging to said church, and as such to be in possession of the property in controversy. And it was competent for the plaintiffs to institute this proceeding in their names, for the recovery of the possession, against the defendants, who claim to be the successors of the trustees of said church, who held as tenants of the plaintiffs, and through whom, and not adversely to whom, they acquired possession; the said first set of trustees having resigned and these being appointed to succeed them. And it is immaterial whether the plaintiffs acquired any personal ownership to the property in controversy by the conveyance referred to, it not being competent for the defendants, who claim to hold as the successors of their tenants, to deny the plaintiff's title. It would be different, if they had acquired the possession under a claim of title adverse to those who held as tenants of the plaintiffs.

The court is of opinion, that the second instruction announces an abstract principle; and whether it be law or not, it is immaterial. Whether it is true or not, "that no trustees can maintain this form of action against the Methodist Church congregation actually occupying" the church property, the plaintiffs could maintain it, as lessors, against their tenants, as trustees of the congregation, who acknowledged their title, and their successors, and it was not competent for them to deny their title.

The third instruction is a mixture of truth and error. It is true that the order of the Circuit court of November 1871, appointing the defendants trustees, was legal, and it was binding so far as it constituted them trustees. Nor could the regularity or validity of said order, or the appointment of the defendants as trustees thereunder,

344 *be inquired of in this suit; but the said order does not vest in them the legal title to the property in controversy "for the time being," or for a single instant, unless the congregation which they represent are the owners of it. Only the legal title to the land owned by the congregation is vested in them by the terms of the order. The question, whether the property in controversy is owned by the said congregation, is not touched by the order. Consequently it is not true, that by reason of said order they cannot be dispossessed of the property in controversy by this proceeding. On the contrary, their predecessors having acknowleged the title of plaintiffs, and held under them, it is not competent for the defendants claiming through them, and as their successors, to deny the plaintiffs' title.

The fourth instruction announces a mixed proposition of law and fact, which was immaterial to the defence, and was not controverted.

The fifth instruction is true, if it means only to assert that there was a continued and unbroken possession from their predecessors to the defendants; but such continuity of possession could not avail the defendants unless it were an adverse possession held by their predecessors, which is not asserted, and without which it is unmeaning, or an abstraction, and was properly refused.

The sixth instruction is not true, that the plaintiffs are not entitled to recover if the congregation held the property for three

years before the commencement of this suit; for they may have held it through their trustees as tenants of the plaintiffs. Nothing but an adverse holding by the congregation would bar the plaintiffs' right of recovery.

The seventh instruction is predicated of the assumption, that the resolution referred to vests the title to the church property in controversy in the colored congregation; 345 *which is an error. The said resolution implies that the title and ownership of the property is retained by the Methodist Episcopal Church, and the use of it only given to the colored congregation, which the owners had at any time the right to recall.

The eighth instruction is an abstraction, which is wholly immaterial. The ninth is also immaterial. It matters not whether Allen had authority or not to close the church doors; the fact is certified by the court as proved, "That from and after that time (the 20th of November 1871) the defendants have claimed to hold the premises in controversy, and the legal title thereto, adversely to the plaintiffs, and as owners of the fee simple thereof."

The tenth instruction, as propounded, would involve the whole case of law and fact, and was properly rejected by the court.

Finally, unless the verdict was a plain deviation from the law and evidence, the appellate tribunal ought not to disturb it. But in this case the court is of opinion, upon the facts certified, that the verdict of the jury is right, and does injustice to no one. It seems that there is a division in the colored congregation. A part of them adhere to the church to which the congregation belonged when the charity was bestowed. But the majority of the congregation have withdrawn from that church, and formed a connection with another ecclesiastical body, and have put themselves under its government, have set the owners of the property at defiance. and assert it to be theirs, and have refused to allow the ministers of the old church to occupy the pulpit. This is a perversion of the original purpose of those who bestowed the charity. The question is really which section of the colored congregation shall have the use and enjoyment of the church. It would seem to 346 be right that *the owners of the property and bestowers of the charity should have the decision of that question. And such is the effect of the verdict. Whilst, therefore, it is the conclusion of law, it is in harmony with the claims of justice. Upon the whole, the court is of opinion that there is no error in the judgment of the Hustings court. Let it be affirmed.

Judgment affirmed.

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347 *Mead v. Jones & als.

January Term, 1874, Richmond.

Confederate Money.*—In August 1860 D, as commissioner. sold land to M on a credit of one, two and three years. In October 1861, on the application of M, the court authorized him to deposit in the B bank the amount of his first and second bonds; which M does. D afterwards collects the third bond and deposits in the same bank, and reports it to the court; and his report is afterwards confirmed. The court must be presumed to have known, when the reports were confirmed, that the deposits were made in Confederate money, and neither M nor D are liable to repay the money they so deposited.

In January 1859 Samuel H. Quarles, who had been high sheriff of the county of Bedford, conveyed to Henry C. Dickinson and another two tracts of land and a number of slaves, in trust to indemnify Thomas M. Jones. Tandy K. Jones, Thomas H. Nelson and three others, his sureties in his official bond as sheriff. There being some difficulty as to the existence of liens on the land, Dickinson, in February 1860, filed his bill in the Circuit court of Bedford county, to have the trust enforced; and he made the sureties and others interested in the property parties defendants. At the May term 1860 the bill was taken for confessed as to all the defendants, and a decree was made appointing Dickinson a special commissioner to sell the land: one tract to be sold on the terms of cash for one-fourth of the purchase money, and on a credit of one, two and three 348 years, *equal instalments, with interest from the day of sale, for the balance; and the other on a credit of one, two and three years; bonds with good security to be taken from the purchasers, and the title retained.

In August 1860 the commissioner sold the first mentioned tract to Oliver J. Mead, and in September he sold the other tract to Albert M. Lowry, both of whom complied with the terms of sale. And the commissioner made his report, which was confirmed at the October term of the court. The subsequent proceedings in relation to Mead's payment of the purchase money due from him are fully set out in the opinion of the court. Dickinson received from Lowry, on account of his purchase, in January 1864 the sum of $1,096.66, and deposited it in the Bedford Savings Bank, to the credit of the cause, and reported the fact to the court in March 1864.

In July 1867 Thomas M. Jones, Isabella W. Jones, administratrix of Tandy K. Jones, deceased, William L. Goggin, administrator of Thomas H. Nelson, and the other sureties of Quarles, secured in his deed of trust, filed their bill in the same court against Henry C. Dickinson, Oliver G. Mead and others, in which they insist that the payments by Mead having been made in Confederate money were invalid, and that the land, as well as himself and surety, are liable still for the purchase money so paid, and that Dickinson is liable for the sums he collected.

Mead and Dickinson answered the bill. And the two causes coming on to be heard together on the 5th day of October 1868, the court made a decree, holding Mead liable for the sum of $11,485.96, with interest on $7,996.74, a part thereof, from the 7th of

*Confederate Money—Scaling.—See Moss v. Moorman, 24 Gratt. 97, and *note*, and Moon v. Richardson, 24 Gratt. 219, and *note*.

August 1868 till paid; that Lowry was liable for $1,967.05, as of the 5th of January 1864, of which $1,707.75 was principal; and that Dickinson was liable for $918.86, as of
349 the *1st of June 1868. And it was decreed that Dickinson should pay this sum with interest; and unless Mead and Lowry paid the amounts ascertained to be due from them, &c., the land was directed to be sold, &c. For the proceedings in this case see the opinion of the court. From this decree Mead obtained an appeal to this court.

Kean and J. F. Johnston, for appellant.

Jones and Bouldin, for Dickinson.

Haymond, for the appellees.

Bouldin, J., delivered the opinion of the court.

Bouldin, J. This is an appeal from a decree of the Circuit court of Bedford county, rendered on the 5th day of October 1868, in two suits in said court pending, and presents for our consideration questions growing out of the various and multiform transactions in Confederate States treasury notes during the late war.

The first of the two suits was a proceeding in chancery by H. C. Dickinson, trustee, to subject to sale certain property conveyed by the grantor, Quarles, to secure the payment of debts as therein mentioned; and on the 4th day of May 1860 a decree was entered ordering the sale of the property and appointing the appellee, H. C. Dickinson, a special commissioner to make it, on terms set forth in the decree. On the 4th of August thereafter the sale of the tract of land, which is the main subject of controversy, was made by the commissioner, and the appellant, Mead, became the purchaser. He promptly complied with the terms of sale, paying in cash the sum of $2,665.58½, being one-fourth of the purchase money; and for the residue executed his three bonds with security, payable in
350 one, two and three years *in equal instalments, with interest from the day of sale. The commissioner reported this sale to the court on the 26th day of September 1860; and on the 2d day of October 1860 a decree was entered confirming the sale and ordering Commissioner Dickinson to withdraw the bonds and collect the same as they should fall due. The first bond did not fall due until the 4th day of August 1861, when the war was raging between the United States and the Confederate States of America. Both Dickinson, the commissioner, and Mead, the purchaser, were then in the army of the Confederate States; and whilst Mead seems to have been ready and anxious to discharge this bond, Dickinson, owing to the unsettled condition of the country and currency and to his being in the army, was unwilling and declined to receive payment. Matters remained in this condition until October the 4th 1862, when Mead, who was still in the army, through his friend and surety, Crenshaw, applied to the court, the real creditor, for instructions; and the following order was entered in the cause:

"It being represented to the court that Oliver G. Mead, the purchaser of the tract of land in the bill mentioned, is ready to make payment of his first bond for the purchase money, and the commissioner appointed to collect the same now being in the army of the Confederate States, payment thereof cannot be made to him, the court doth adjudge, order and decree, that the said Oliver G. Mead do deposit in the Bedford Savings Bank at Liberty the principal and interest of said bond to the credit of this suit, and take a certificate of deposit therefor and file it with the papers in this cause. And the said Oliver G. Mead is at liberty in like manner to deposit in the Bedford Savings Bank at Liberty such other sums of money as he may deem proper, in payment of his second bond, due the
351 4th day of August *1862, taking like certificate of deposit therefor and filing them with papers in this cause."

On the third of October eighteen hundred and sixty-two, the day before the date of the above order, as it appears in the record, Mead deposited the amount of the first bond and interest ($3,011.25) in the Bedford Savings Bank, to the credit of the cause, as required by the order; and on 15th of the same month filed a certificate of the deposit among the papers in the cause. The discrepancy in date is immaterial, and we think may readily be explained by supposing that the order was in fact anounced and complied with on the 3d of October, but not formally entered on the order-book until the 4th.

At the date of this order, the intelligent and able judge who entered it, and the learned counsel in the cause, all knew, as matter of public history to be judicially noticed, that the common and almost the only currency in Virginia was Confederate States treasury notes; and Mead had a right to regard himself as authorized and ordered to pay in that currency, as he did pay.

Very soon thereafter, to wit: on the 12th of December 1862, Mead deposited in the Bedford Savings Bank, to the credit of the cause under the same order, the further sum of $3,041.13, amount of second bond and interest, and filed a certificate therefor among the papers in the cause. The clerk certifies that the certificate was filed on the "9th," of December; but this is evidently a mistake for "19th." as the deposit was not made until the twelfth. Both deposits were made in Confederate States treasury notes, the certificate for the latter showing that fact on its face; and the certificates remained thereafter on file with the papers in the cause.

The last bond for the purchase money of the land fell due August 4th, 1863, and Com-
352 missioner Dickinson happening *to be at home at that time and finding that the purchaser, Mead, under an order of court in the cause, had been authorized to pay the two first bonds into the Bedford Savings Bank, and had in fact paid them in Confederate State treasury notes, deemed it his duty to act in conformity with the action of the court, and on the 7th day of August 1863 collected

the amount of the last bond in the same currency, and deposited it in the same bank.

The bond fell due, as we have seen, on the 4th of August 1863—not on the 6th, as inadvertently stated in the commissioner's report; and on the 7th of the same month, as we have seen, he collected the amount due, principal and interest, $3,145.81, and deposited it in bank as aforesaid. On the same day he made report of this collection and deposit, and filed his report among the papers of the cause. There is no memorandum of the clerk of the time of filing; but Dickinson swears, in his answer, that it was immediately filed, and, from his prompt and conscientious action throughout the cause, we have no doubt that such was the fact. This report states "that all the purchase money of said land is now paid, the amount of two bonds having been deposited in bank during last year under a special order."

The next time we hear from Commissioner Dickinson was on the 19th of March 1864, when he appears to have been again at home. On that day he presented to Judge Wingfield a petition, giving the previous history of the case somewhat in detail, setting forth the sale above referred to, the purchase by Mead, the confirmation of the sale, and the order to the petitioner to withdraw and collect the bonds, the absence of the petitioner in the army, and the payment by Mead into bank of the amount of the two first bonds in Confederate States treasury notes, under an
353 order of the court in the cause, *and the subsequent collection by the petitioner of the last bond in like currency, and the deposit thereof in the same bank to the credit of the cause.

The petitioner further states, that since that time he had, as commissioner, collected from another source, A. M. Lowry, the further sum of $1,096.66, Confederate States treasury notes, and had made a like deposit thereof. These deposits were made under the impression that it was so ordered by the court; as to which he had discovered he was mistaken; misled, doubtless, by the order requiring Mead, the purchaser, to make deposits in that bank.

The petitioner calls the attention of the court to the fact that the fund does not bear interest, the bank being unwilling to pay it; that the respective interests of the parties in the fund had not been ascertained; and prays that the commissioner be allowed, "by an order of this court," to withdraw the fund from bank, and invest it "in Confederate four per cent. bonds, or in such other manner as the court may direct." This was presented to the Judge, we presume, in vacation, but evidently was, and was intended to be, a petition and report in the cause, as it was only by a decree or order in the cause that the funds to the credit of the court in that cause could be withdrawn and otherwise invested. The judge, however, seemed to treat it as an exparte application, under the then recent act of assembly, and made thereon the following endorsement: "I do not think this case comes within the purview of the act of assembly authorizing the investment of funds by fiduciaries. The petition, is, therefore, denied.

"March 18, 1864. G. A. Wingfield."

The petition was on the same day filed by the commissioner with the papers in the
354 cause, and we think *properly; being in substance and effect a report from him, and an application to the equitable jurisdiction of the court to preserve and improve the fund under its control. Having thus, as he supposed, discharged his whole duty as commissioner, and having called the attention of the judge specially to the condition of the fund, he left it where it belonged, to the future control of the court. In all this the commissioner seems to have acted with marked propriety and good faith; and indeed to have fulfilled the full measure of his duty, in his effort to call the attention of court, counsel and parties to the condition of the fund under the previous order of the court, and the propriety of preserving and improving it. Neither court, counsel nor parties, however, seemed to heed the suggestion, being satisfied, doubtless, to let the fund remain where it was; and the same being no longer under the commissioner's control, he of course had nothing more to do with it, and returned to his post in the Confederate army.

In this state of things the Circuit court, with the facts set forth in the petition aforesaid, recently and clearly presented to the mind of the judge, and with the reports and papers showing those facts all on file in the cause, entered on the 28th day of April 1864, the following decree, all parties being then before the court, viz:

"Thomas H. Nelson and Tandy K. Jones, two of the defendants, having departed this life," (being, we would remark, the first suggestion of their death), "by consent this cause is revived in the name of William L. Goggin, administrator of Thomas H. Nelson, deceased, and Isabella Jones, administratrix of Tandy K. Jones, deceased; and thereupon, this day this cause came on again to be heard on the papers formerly read, and the report of Henry C. Dickinson, the commissioner, to
355 *collect the purchase money for the tract of land in the bill and proceedings mentioned; to which report there is no exception, and was argued by counsel. Upon consideration whereof the court, approving said report, doth confirm it. And it appearing by said report, that all the purchase money for the said tract of land purchased by Oliver G. Mead, has been paid, the court doth adjudge, order and decree, that Rowland D. Buford, who is hereby appointed a commissioner for that purpose, do convey to Oliver G. Mead, the purchaser, by proper deed for that purpose, with special warranty, at the costs of said Mead, the said tract of land containing four hundred and seven acres, two roods and thirty-eight poles, describing the same by metes and boundaries as set forth in the paper filed with the complainants' bill, as Exhibit A." And the court further ordered certain accounts preliminary to the distribution of the fund.

Now, it will be observed, that when this decree was entered, finally disposing of all

questions as to the sale of the land to Mead, the collection of the purchase money, and the conveyance of the land to the purchaser, all the parties were before the court, and the attention of the personal representatives of T. H. Nelson and T. K. Jones, or their counsel, must have been directly drawn to the terms and character of the decree, for their consent was required to mature the cause for a hearing; and we are justified in saying that they must have understood it. One of those representatives, Mr. William L. Goggin, was himself an experienced lawyer and a gentleman of State reputation; and we must presume that he and the other parties to the cause knew what they were doing when they consented, with full knowledge of the facts, that the cause should be matured; and when, without exception to any thing that 356 had been *done, allowed the commissioner's report to be confirmed, and a conveyance to the purchaser to be ordered. That conveyance was in fact made on the 8th day of July 1864, and duly recorded on the same day, without objection by any one; and Mead certainly had some right to suppose, under such circumstances, that his title was good, and that he was no longer interested in the proceedings. The subsequent proceedings in the original cause were solely in reference to the distribution of the fund, except an answer filed in May 1866 by the same William L. Goggin, as administrator of Thomas H. Nelson, who, in April 1864, had, in effect, assented to the confirmation of the commissioner's report, and the conveyance to Mead, by not excepting thereto. In his answer, in 1866, when the fund had perished in the hands of the court, he claimed, for the first time, that the collection in Confederate money should be disregarded. But, of this claim, Mead, who was no party to the suit, does not appear to have had notice; nor was his title ever assailed until the second suit above mentioned was instituted on the 10th of July 1867; nearly four years after the last payment made by him for his land, three years, two months and ten days after the court had decreed him a conveyance, and three years and two days after the conveyance was executed and recorded. This second bill was filed by certain persons claiming to be creditors of Quarles, and interested in the trust fund aforesaid, viz: Thomas M. Jones and others, every one of whom were parties to the first suit, and before the court, when the decree of the 28th of April 1864 confirming Commissioner Dickinson's report of collections, and ordering a conveyance to Mead, was entered.

They sought to set aside that decree, to obtain from Mead a second payment of the money paid by him on his bonds, and to hold Dickinson responsible for any 357 *deficiency to the extent of his collections from Mead. Their claim to set aside the proceedings was based on three grounds:

1st. That Confederate States treasury notes were not money, and constituted no payment.

2d. That the order of the 4th of October 1862, authorizing Mead to pay the amount of his two first bonds in bank to the credit of the cause, was made after the death of Thomas H. Nelson and Tandy K. Jones, and before their representatives were before the court, and was ex parte and void.

3d. That the report of Commissioner Dickinson, of the 7th of August 1863, in which he reports that the purchase money for the land had all been paid, a portion to himself and the residue by deposit in bank by Mead, the purchaser, was calculated to mislead the court; because it did not state in totidem verbis, that the entire collection of the three bonds was made in Confederate States treasury notes.

These were the grounds mainly relied on to impeach the decree of April 28th, 1864; and all that was offered to sustain them was what appeared on the record in the first suit, as above set forth. There was no charge nor any attempt to prove, fraud or bad faith on the part of either Mead or Dickinson. On the contrary, in speaking of the latter, they say in the bill "they believe him incapable thereof;" yet, in the absence of any such allegation or proof, and in the face of the advice and approval of the court itself, as above set forth, the Circuit court, by the decree of the 5th day of October, 1868, entered in the two causes heard together, set aside and annulled as ex parte and void, the order of the 4th day of October 1862, authorizing Mead to pay into bank to the credit of the cause, the amount of his two first bonds: set aside the decree of the 28th of April 358 1864, *confirming Commissioner Dickinson's report of the collections from Mead, and ordering a conveyance to him of the land purchased: decreed the deed made to him to be void: required Mead to produce and file again with the papers, the three bonds which he had already paid, and without allowing him any credit for the money or its value which had been paid into bank by him to the credit of the cause, under an order of the court, and had been allowed by the court itself and the parties to perish, ordered him to pay, within six months, the entire amount of the three bonds (less the gold value of $3,145.81, Confederate States treasury notes, collected by Dickinson), amounting in the aggregate to the sum of $11,485.96, with interest on the principal; and in default of such payment, ordered the land to be resold.

By the same decree Commissioner Dickinson was held responsible for, and decreed to pay the gold value of all Confederate States treasury notes received by him. From this decree Mead appealed to this court; and Dickinson has assigned errors also, under the rule of the court.

We have been more minute in stating the proceedings in these causes than might be necessary, because the rights of the parties depend on a correct understanding of those proceedings; and because we think a fair presentation of the facts is all that is necessary to bring the case directly within the influence of the principles established by this court in the cases of Davis v. Harman, 21

Gratt. 194; Dixon, &c., v. McCue's administratrix, Id. 373, and Walker's ex'or v. Page & als., Id. 636; and other cases which have followed them. Both purchaser and commissioner in these cases seem to have acted throughout, with abundant good faith —uberima fide—and all their acts in
359 relation to the subject of controversy *were either prompted, or ordered, or fully and deliberately approved by the Circuit court. It is true that there are allegations in the bill in the second suit, and suggestions by the Circuit court in the decree appealed from, that there was ambiguity in the commissioner's report of collections in not stating in terms, that these collections had been made in Confederate States treasury notes, and that the decree confirming it was improvidently made. The court says, that "the order made in said cause on the 28th of April 1864, based upon the report of the receiver, Henry C. Dickinson, that the purchase money owing by the said Mead had all been paid, which report was made upon the supposition that the payments in Confederate States treasury notes were good and valid payments, was improvidently made upon the statement in said report, 'that all the purchase money had been paid,' when in fact nothing but Confederate States treasury notes had passed from the said Mead to the Bedford Savings Bank, or to said Dickinson, as receiver; and the court doth therefore adjudge, order and decree," &c.

We cannot regard the reasons thus suggested by the learned judge of the Circuit court, as sufficient grounds to set aside a decree so deliberately made and so long acquiesced in. Whatever doubts and perplexities as to the character of Confederate States treasury notes and the validity of proper payments therein, may have attended the administration of justice at an early period after the close of the late war with the United States, there cannot, at this day, be a doubt that they constituted a valid consideration; and that transactions therein closed in good faith during the war by parties understanding them and competent to contract, will not be reopened by this court, because they were based on Confederate States treasury notes. Hale v. Wilkin-
360 son, 21 *Gratt. 75; Ambrouse's heirs v. Keller, 22d Id. 769; Staples v. Staples' ex'or, decided at the November term. Supra, 225. The fact that the court and the parties did not, and could not know, at the time, what might thereafter be decided as to the character of such transactions, could not affect their legal validity.

Nor do we think there is any force in the suggestion in the decree, that Commissioner Dickinson had reported "that all the purchase money had been paid, when in fact nothing but Confederate States treasury notes had been paid." That statement of the commissioner, we are well satisfied, misled no one; and we are bound to hold, from the facts appearing on this record, that the Circuit court knew, both judicially and in fact, and that all the parties knew, by counsel, when the decree of April 28th, 1864 was entered, confirming Commissioner Dickinson's report of collections, and ordering a conveyance to Mead, that every dollar of Mead's three bonds had been paid in Confederate States treasury notes. We say, judicially, because, when the court, by its order of October 4th, 1862, allowed and ordered Mead to pay the amount of his two first bonds into the Bedford Savings Bank, it knew judicially that Confederate States treasury notes constituted not only the general, but almost the only, currency in Virginia; and the plain and irresistible presumption was, that the payments were intended to be made, and would be made, in that currency; because, in obedience to the order of the court, the certificates of payment into bank were promptly filed by Mead among the papers in the cause; and there remained more than a year before the decree of confirmation, one of them showing on its face that it was payable in Confederate States treasury notes; and the court was bound to know judicially, what thus appeared by papers regularly filed in the cause under its own order; and be-
361 cause the last *bond was collected by the commissioner as late as the 7th of August 1863, only three days after it fell due, and the collection reported, and report filed with the papers, on the same day. This report referred on its face to the deposit in bank made by Mead, under "special order," and remained with the papers more than eight months before its final confirmation. All this must be presumed to be known to the court; and under such circumstances we are fully warranted in saying, that on the 28th day of April 1864, when Commissioner Dickinson's report was confirmed, and a deed ordered to be made to Mead, the Circuit court judicially knew that every dollar of the purchase money secured by Mead's bonds had been paid into court, or to the receiver of the court, in Confederate States treasury notes. But the court knew it also in point of fact; for it was plainly set forth in the petition and report of March 19th, 1864, which was read and examined by the judge, as appears by his own endorsement thereon, and which was on file when the decree of the 28th of April 1864 was rendered; and the parties, by counsel, must also be presumed to have known what thus plainly appeared by the record. There is nothing, therefore, in this objection.

Nor do we think there is more in the objection that at the date of the order of the 4th of October 1862, allowing Mead to pay the amount of his two first bonds into bank, Thomas H. Nelson and Tandy K. Jones were dead, and had no personal representatives before the court. The fact is not established in the cause. The death of those parties was not suggested until the 28th of April 1864, and there is no proof in the cause of the date of their respective deaths; and this court will make no presumption to operate an injustice, unless compelled so to do by some inflexible rule of law. But if the fact were as alleged,

we are not prepared to say that the
362 death *of a party to a suit in equity
would suspend the equitable jurisdiction of the court to protect and preserve the fund under its control until the revival of the cause against the representative of the deceased. Such a result would be seriously inconvenient, and might, under some circumstances, prove disastrous to all concerned. But if such order be conceded to be irregular, it would not be void, but at most voidable only at the instance of the representatives of the decedents; and we think in this case, by voluntarily appearing and consenting to the hearing without exception to the commissioner's report, or any objection to the irregular order, and by actual acquiescence for years afterwards, these representatives have lost all right they might have otherwise had to object thereto.

These objections aside, the case as to Mead, the purchaser, stands upon the facts above detailed: payment by him of one-fourth his purchase money in cash, and of the residue in the currency of the country at the time; the payments ordered, approved and confirmed by the court; approved by the parties interested and acquiesced in for years; a deed made to the purchaser; the fund held for years exclusively under the control of the court for the benefit of creditors, and allowed by them to perish ultimately with no shadow of fault on the part of the purchaser. To make him under such circumstances, pay his money a second time, when it is impossible to restore him what he paid, we think would be manifestly unjust; and in conflict with the principles established by this court in the cases we have cited. The language of Judge Staples in Dixon, &c., v. McCue's administratrix, &c., speaking for the whole court at p. 381, although applied in that case to the commissioner, would have been equally applicable to the purchaser, had the exigencies
of the case, as here, called for its ap-
363 plication *to him. He says, "no objection was ever made to any of the proceedings; and now, after the loss of the fund by the disastrous termination of the war, it is sought to make the commissioner responsible for an act approved by the court, and never disapproved, so far as this record discloses, by the parties or their counsel. A rule of this sort adopted by this court would produce incalculable mischief throughout the State, and tend to the utter ruin of a vast number of innocent officers acting under the sanction and by the authority of the courts, during the protracted struggle in which the country was engaged. Every consideration of sound policy and justice requires that such officers should not be held responsible for acts bona fide performed under the direct approval and sanction of the court appointing them." Every word thus quoted from Judge Staples' opinion applies with equal force and propriety, mutatis mutandis, to the case of an innocent purchaser like Mead. The same principle rules both cases; for where it is lawful and proper to receive, it would seem necessarily to be equally lawful and proper to pay.

We are of opinion, therefore, that the Circuit court erred, to the prejudice of the appellant, Mead, in setting aside the order of the 4th of October 1862, and the decree of the 28th of April 1864, in the first cause, and in decreeing that he should pay the sum of $11,485.96, with interest on the principal, instead of dismissing the bill as to him, as it should have done.

And now as to the decree against Commissioner Dickinson. What has been held above as to Mead must necessarily lead to a reversal of the decree against Dickinson, so far, at least, as relates to collections from Mead. For all his acts in relation to that matter he had the deliberate sanction and approval of the court whose officer he
was; the tacit approval and long ac-
364 quiescence of all *the parties interested; and no complaint from any quarter until long after the fund had perished in the hands of the court, not by any fault or neglect of his, but when it was beyond his control. To such a case the language of this court, through Judge Staples, above quoted, applies without a change of a word or letter. The case of Davis v. Harman is also decisive of this question. It was error, therefore, to charge the appellee with the gold value of the Confederate States treasury notes collected from Mead. About the charge for the value of $1,096, Confederate States treasury notes, collected of A. M. Lowry, there is no more doubt. This sum was collected under the same order under which the amount of Mead's last bond was collected, but was received after that collection was reported to the court, and of course was not embraced in that report. It was promptly deposited, as were the other funds, in the Bedford Savings Bank, and the fact of collection and deposit was reported to the court in the petition and report of March 19, 1864, already referred to. That document remained on file among the papers in the cause down to the decree of April 28, 1864, and was before the court and the parties when that decree was entered; and although not in terms confirmed by that order, we have a right to presume, as no objection or exception thereto was taken by any party, that this collection, like the other, was approved by the court and the parties. If not approved, objection should have been made, and the money deposited to the credit of the court in the cause ought at once to have been returned, by an order of court, to the commissioner. But it was retained by the court and parties where it was beyond the commissioner's control, without the slightest intimation of dissatisfaction on the part of the court or parties until long after the fund had perished, without fault
on the part of Dickinson. Under such
365 circumstances, *we think, on the principles above declared, that it was error to charge Dickinson with the value of the money thus collected. Davis v. Har-

man, 21 Gratt. 194. And this decision as to Dickinson must necessarily lead to a correction, also, of the decree as to Lowry.

The decree as to the appellant, Mead, must be reversed with costs in this court against all the appellees except Dickinson and Lowry; and as to the said appellees, Dickinson and Lowry, the decree must be corrected, as above indicated, and affirmed.

The decree was as follows:

This day came again the parties by counsel, and the court having maturely considered the transcript of the record and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred: 1st, in setting aside the order of the 4th day of October 1862 and the decree of the 28th day of April 1864, entered in the first of these causes, and in annulling the deed to the appellant Mead, and requiring him to file his bonds again in the cause, and ordering him to pay again the amount thereof, instead of dismissing the bill as to him; 2d. In holding the appellee, Dickinson, responsible for the gold value of the Confederate States treasury notes collected by him as commissioner of the court, and deposited in the Bedford Savings Bank to the credit of the first of these causes; 3d. In holding Lowry responsible, under the circumstances of the case, for that portion of the purchase money of the land purchased by him, which was paid by him to Commissioner Dickinson in Confederate States treasury notes and deposited by the latter in bank to the credit of the cause. That amount should, under all the circumstances of the case, have been credited to his purchase at fair value. It is therefore decreed and
366 *ordered, that so much of the decree of the Circuit court of Bedford of the 3d of October 1868 as sets aside the order of the 4th of October 1862, and the decree of the 28th of April 1864, in the first of these causes, and annuls the deed made to Mead under said last mentioned decree, and requires him to file again, with the papers in the cause, the bonds executed by him to the commissioner of the court, and to pay in discharge thereof, within six months from the date of the decree, the sum of $11,485.96, with interest on $7,996.74, part thereof, from the 7th day of August 1868, and in default thereof that the land purchased by him be sold, be reversed and annulled, and that the appellees, except Dickinson and Lowry, do pay to the appellant his costs by him about the prosecution of his appeal to this court expended, such as are personal representatives to pay out of the assets of their testators or intestates. And this court, proceeding to enter such decree as the said Circuit court ought to have rendered, doth decree and order that the bill in the second of these causes be dismissed as to the defendant, Oliver G. Mead, and that the plaintiffs in the Circuit court in that suit do pay to the said defendant, O. G. Mead, his costs by him about his defence in said suit expended, (such of the plaintiffs as are personal representatives to pay out of the assets of their testators or intestates).

And as to the residue of said decree of the 5th of October 1868, it is further decreed and ordered that the same be corrected and amended as to Dickinson, by crediting the amount of $918.86, decreed against him, by the sum of $512.05, as of the 1st of June 1868, being the aggregate of the values erroneously charged to Dickinson at that date for collections from Mead and Lowry; so as to leave a balance due from Dickinson, as of that date, of only $406.81, with in-
367 terest from June *1, 1868; instead of $918.86, with like interest, as decreed against him; and that the same be further corrected and amended as to Lowry, so as to credit the decree against him for $1,967.05, by the sum of $1,096, paid on the 5th of January 1864, to H. C. Dickinson, commissioner, in Confederate States treasury notes, and deposited by the latter in bank to the credit of the first cause, as reported to the court by the petition and report of March 19, 1864; leaving a balance due on said decree against Lowry of $871.05, with interest from the 5th day of January 1864, till paid, instead of the sum of $1,967.05, as by said decree ascertained. And it is further ordered and decreed that so much of said decree of the 5th of October 1868 as is thus corrected and amended; and so much of the residue thereof as is not in conflict with this decree be affirmed.

Decree reversed.

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368 *Earp v. Boothe.

January Term, 1874, Richmond.

Mortgages—Usury—Scaling.*—Before the war B had sold and conveyed to E a tract of land at the price of $5.60 per acre, for which on the 2d of December 1862 E owed B $700. On that day E entered into a covenant with S, by which he covenants to convey to S a certain part of the land, between thirty and forty acres, if S will advance the $700 to pay B, and allow E three years to repay S the $700 after deducting the price of that part cut off for S. And if E shall fail to pay S the full amount, principal and interest, advanced by S for E, to pay for the portion retained by him, then E binds himself to convey title to the residue of said tract to S. S pays B the $700, B receiving it in Confederate money. At the time of this agreement the land was estimated by witnesses to be worth $15 per acre in Confederate money. E does not pay the money or any part of it in three years. HELD:

1. **Same—Same—Same.**—The contract is not a conditional sale, but a mortgage.
2. **Same—Same—Same.**—The contract is not usurious.

***Mortgage—Usury—Scaling.**—See Smyth v. Sutton, 24 Gratt. 191, and *note*; Moss v. Moorman, 24 Gratt. 97, and *note*; McComb v. Donald's Adm'r, 82 Va. 903, 5 S. E. Rep. 558, and cases cited; Snavely v. Pickle, 29 Gratt. 27, and *note*; Zane v. Fink, 18 W. Va. 718; McNeel's Ex'ors v. Auldridge, 34 W. Va. 749, 12 S. E. Rep. 851; Greer v. Mitchell, 42 W. Va. 494, 26 S. E. Rep. 302.

3. **Same—Same—Same.**—It is a Confederate contract; and the amount due is to be scaled as of the date of the contract.

The case is stated in the opinion of the court.

C. G. Dabney and Wm. Daniel, for the appellant.

Grattan, for the appellee.

Christian, J., delivered the opinion of the court.

The controversy in this suit grows 369 out of a contract *entered into on the 2d December 1862, between the appellant and the appellee, which is in the following words:

Know all men by these presents, that we, Philip Earp and Sullivan P. Boothe, of the county of Pittsylvania, State of Virginia, do make and enter into, and bind ourselves, our heirs and assigns, to abide by the following contract and agreement, to wit: Whereas the said Philip Earp did some time past purchase of a certain John Brightwell the tract of land on which the said Earp now lives and enjoys title thereto, and not being able to pay the purchase money for said land to said Brightwell, which amounts to seven hundred dollars, and the said Earp being desirous of possessing a part of the land, agrees with the said Boothe to convey to him, the said Boothe, a portion of said land by a certain line agreed, supposed to be between thirty and forty acres, for the same amount per acre, as he gave for it; provided said Boothe will advance the whole amount of the purchase money to the said Brightwell, and allow him three years to replace the amount paid by said Boothe, after deducting the price of that portion cut off for said Boothe on the north end of the tract; to which the said Boothe assents. But if the said Earp shall fail to pay the said Boothe the full amount of the principal and interest advanced for the said Earp, to pay for the portion retained by him, then he promises and binds himself, his heirs and assigns, to convey title to the residue of the said tract to said Boothe; to which said Earp assents. To a faithful performance of the above contract we do set our hands and affix our seals this 2d day of December 1862.

(Signed) Philip Earp. [Seal.]
S. P. Boothe. [Seal.]

The appellee, Boothe, complied with 370 his contract, and *paid over to Brightwell, or advanced to Earp for that purpose, who paid it to Brightwell, the whole of the purchase money, principal and interest, due to Brightwell from Earp.

Earp totally failed to comply with his contract. He neither conveyed to Boothe the thirty or forty acres lying on the north end of the tract designated in the contract, nor did he pay any part of the purchase money advanced for him to Brightwell.

In February 1866 Boothe filed his bill in the County court of Pittsylvania, the case being afterwards removed to the Circuit court, with which he exhibited the contract above referred to, alleging his compliance with it, in every particular, and the failure of the defendant, Earp, both to convey to him the portion of the tract of land according to said agreement, and to pay any part of the purchase money which he had advanced to Brightwell; and claiming that by the terms of the contract, he was entitled to have the whole of the land conveyed to him; and called upon the court to compel the defendant to make such conveyance; concluding with the usual prayer for general relief.

Earp answered the bill. He admitted that he executed the covenant filed with the bill; and admitted that the purchase money due on the land to Brightwell had been advanced by Boothe and fully paid to Brightwell, who had no further claim on the land. But he insisted that the agreement between him and Boothe was nothing more nor less than a mortgage on the land to secure the money loaned by Boothe. He also insisted that the contract was usurious and void. By way of further defence he sets up what seems to be intended as a sort of plea of tender, in which he says "that before the expiration of the three years' time allowed him to refund the money, that he 371 offered to settle *with and pay said Boothe the value of the Confederate money so lent, but the said Boothe refused to receive it, and insists upon taking the whole of the respondent's land," &c.

There was no proof in this cause that there was anything like a tender made; and this defence set up in the answer is abandoned by the counsel who argued the case in this court.

In June 1867, the cause came on to be heard on the bill, answer, replication, exhibit filed with the bill, and examination of witnesses; "and the court being of opinion, that the covenant in the proceedings mentioned is a mortgage, and not a conditional sale, as to all the tract of land therein mentioned, except that portion of the same in the north end of said tract,' agreed by said Earp to be conveyed to the plaintiff by certain lines agreed upon, supposed to contain between thirty and forty acres, to which thirty or forty acres the plaintiff is entitled at the average price to be paid by said Earp to Brightwell; * * * and the plaintiff is entitled to subject the residue of said tract to the payment of the money advanced by him after crediting Earp with the price of said thirty or forty acres of land, and after scaling the same according to the value of Confederate States treasury notes at the time of the loan from Boothe to Earp;" it was ordered that a commissioner appointed for that purpose "should survey the land on the north end of said tract, supposed to contain thirty or forty acres, according to the lines agreed upon by the parties," &c.

On the 5th day of June 1868, the cause came on to be again heard on the papers formerly read, and the report of the com-

missioner made in pursuance of decree of May term, 1867, returning map of survey of the land to which the plaintiff is
372 entitled (in the opinion *of the court), absolutely, under his covenant with defendant, to which report there was no exception; and the court approved and confirmed said report, and without deciding any other question arising in the cause, adjudged, ordered and decreed "that the plaintiff hold the thirty-five acres of land designated in the plat returned with said report, in fee simple."

On the 2d day of June 1870 another decree was entered, directing that the defendant do pay to the plaintiff the sum of one hundred and fifty-four dollars and sixty cents, with interest thereon at the rate of six per cent. per annum from the 20th day of December 1862 till paid, that being the principal sum advanced by the plaintiff on that day to pay for the land in the bill mentioned ($700), scaled as of that day, &c.

The decree further provided for a sale of the land if the sum decreed against the defendant, Earp, should not be paid within sixty days; the terms of the sale being fixed on a credit of six and twelve months, except as to the sum of seventy-five dollars, directed to be paid in cash.

From these several decrees an appeal was allowed by one of the judges of this court.

The following are the errors assigned by the counsel in this court:

1st. That the contract between Earp and Boothe was usurious and void; and that it was error to have rendered any decree in favor of the plaintiff.

2d. That it was error to require Earp (the appellant) to pay the value of the money at the time it was lent, instead of at the maturity of the contract.

3d. That it was error to have decreed a sale upon the terms and conditions prescribed in the decree.

As to the defence of usury, set up in the answer, there is nothing in the facts to show that the purchase of the
373 *thirty or forty acres by Boothe was a shift or device to obtain from Earp a greater rate of interest than that allowed by law. As to that tract of land Boothe agreed to take the shoes of Earp in the purchase from Brightwell, at the same price which Earp had agreed to pay. It is true, he was paid in Confederate money, and the land, in the opinion of one witness, was worth $15.00 per acre in that currency, while the price fixed upon it was $5.60 per acre. But this latter sum was what Earp had agreed to pay Brightwell, who was willing to receive, and did receive, the same amount, in the same currency, from Boothe. Earp could have retained the land by paying $5.60 per acre to Brightwell. Boothe simply paid the debt due to Brightwell; and as to this part of the land, took the place of Earp in the purchase. If the price was low, it was exactly the same which Earp agreed to pay, and Brightwell was willing to receive in Confederate currency. All that can be said of such a transaction, is, that the necessities of the debtor and his anxiety to retain a part of the land, might have induced him to sell it for something less than its real value, but it cannot be said to be marked by those indiciæ which stamp it as usurious.

The second error assigned, is, that "the appellant was required to pay the value of the Confederate currency at the time it was lent, instead of at the maturity of the contract."

This objection is founded upon a misapprehension of the legal effect of the contract between the parties. It was not a contract to pay a certain sum of money three years after date; but Earp had the right, at any time within three years, to return the money advanced for him by Boothe to Brightwell; and if he had tendered it the next day, Boothe would have been bound to receive it.

374 *It was a privilege enuring to Earp under the contract, to repay the money at any time within three years, while Boothe could not demand it until the end of the three years. Earp permitted the three years to elapse without having paid a dollar. At that time Confederate money had perished and was of course without value to be scaled, and the court, in adjusting the rights of the parties after Confederate money, which was the subject of the loan, had passed out of existence, properly scaled the amount to its value at the time when it was advanced by Boothe.

As to the third assignment of error to the effect that different terms ought to have been prescribed in the decree of sale, it is sufficient to remark that this decree was entered before the passage of the act requiring judicial sales of land to be made on a credit of one, two and three years, and that under all the circumstances of the case, the terms of sale, upon a credit of six and twelve months, were not unreasonable.

The court is therefore of opinion that there is no error in the decree complained of to the prejudice of the appellant. But it is contended by the learned counsel for the appellee, that there is error in the decree to the prejudice of the appellee to the extent that it declares that the contract between the parties (except as to the thirty or forty acres), is in effect a mortgage and not a conditional sale. The court is of opinion that the said decree is not erroneous in this respect.

It is often difficult to distinguish a conditional sale from a mortgage. The line of discrimination is confessedly indistinct, and each case must in a great measure depend upon its own peculiar circumstances. Generally speaking the difference between them is, that the one is a security for a debt, the other a purchase for a price paid, or to be paid, to become absolute in a
375 particular *event; or a purchase accompanied by an agreement to resell upon particular terms. The only difficulty is to ascertain the character of the transaction. It may be premised that whether upon the face of the transaction it is doubtful whether the parties intended to make a

mortgage or a conditional sale, courts of equity will always incline to consider it a mortgage, because by means of conditional sales oppression is frequently exercised over the needy, and they are too often made the vehicle of extortion. 1 Hilliard on Mortgages, 85, and cases there cited; Poindexter v. McCannon, 1 Dev. Eq. R., 375-6.

But this court has fixed the criteria which must govern in determining the character of the transaction, whether it is to be considered a conditional sale or a mortgage. In the case of Robertson v. Campbell & Wheeler, 2 Call 421, Pendleton, J., said: "It is often a nice and difficult question to draw the line between mortgages and conditional sales. But the great desideratum which this court has made the ground of their decision, is, whether the purpose of the parties was to treat of a purchase, the value of the commodity contemplated, and the price fixed; or whether the object was a loan of money, and a security or pledge for the repayment intended." This rule, laid down by Judge Pendleton, has been adopted in several cases decided by this court. See King v. Newman, 2 Munf. 40; Moss v. Green, 10 Leigh 251; 2 Rob. Prac. (old ed.) 51, and cases there cited.

Tried by these criteria and the authorities above cited, it is plain, that, (except as to the small tract of thirty or forty acres, which was purchased at a stipulated price, Boothe agreeing, as to that, to take the shoes of Earp, as purchaser from Brightwell,) the transaction between the parties must be treated, as to the main tract, as a mortgage, and not as a conditional
376 sale. As to this part of the *land, there was no negotiation as to the price. Nothing was said as to its value. The negotiation was for a loan of money; and it is so treated by the plaintiff in his bill. He says, after setting forth the purchase of the land by Earp from Brightwell: "Some time in the year 1862 the said Earp, finding he was unable to pay for it, applied to your orator to advance for him to Brightwell the said sum of $700.00, with interest," &c. The defendant, in his answer, says that he applied to plaintiff to borrow the money to pay Brightwell for the land purchased of him; and that the only terms upon which the plaintiff would agree to lend respondent, was upon the terms set forth in the covenant filed with the bill. It is thus clear that the transaction between the parties was a borrowing and lending of money, and not for a sale of the land, except as to the small quantity above referred to. The only object of the negotiation was a loan of money, and security for its repayment. In such cases the contract will be treated as a mortgage, and not a sale. Such is the unwillingness of courts of equity to sustain forfeitures and limit the right of redemption, that it will never be done, in a case where it appears that the first object of the party was to borrow money and not to sell property.

The decree of the Circuit court must be affirmed.

Decree affirmed.

377 ***Chapman's Adm'rs v. Shepherd's Adm'r & als.**

January Term, 1874, Richmond.

1. **Executors—Negligence—Liability.***—Executors who fail by their negligence to collect a debt due to their testator by bond under a penalty, the debtor being good for the money at the death of the testator and continuing good for it for fourteen years, when he fails, are chargeable with the principal and the interest thereon up to the time of the failure of the debtor; but they are not chargeable with interest since that time. But see now Code of 1849, ch. 132, § 6.
2. **Same—Same—Same.**—Under the act of February 16, 1828, sup. R. C. 217, it was the duty of the fiduciary to return to the court the settlement of his account made by the commissioners in the time prescribed, or to see that the commissioners returned it; and if this was not done he forfeited his commissions.
3. **Same—Same—Same—Interest.†**—In 1849 a suit is brought against the administrators of an executor for the settlement of his account of the administration of his testator's estate. The commissioner who is appointed to settle the account brings the administrator's account down to October 1851, when he finds a large sum of principal and a large sum of interest due from the executor. In stating the accounts with the legatees the principal and interest is not to be aggregated and interest charged upon the whole against the executor; but interest is only to be charged upon the principal up to the date of the decree disposing of the fund, and then upon the whole fund from that date.
4. **Same—Accounts.**—Though the bill does not surcharge and falsify the accounts of the executor settled before the commissioners, yet as there were errors on the face of these accounts, and they did not purport to be final or to embrace all the transactions of the executor, it was proper to refer the accounts to a commissioner to be settled and adjusted.

378 *5. **Same—Same—Explanation.**—If any charge against the executor which was not in his settled accounts is produced before the commissioner, the administrators of the executor may make any explanation thereof or defence thereto by their affidavit, which will have the effect of an answer.

6. **When Objections Come Too Late.**—If no objection is made by the defendants before the commissioner to the proceeding, and a fair and full investigation is had, no objection to the proceeding can be of avail before the appellate court.

William Shepherd, of the county of Orange, died in the year 1825, leaving a will, which was duly admitted to probate, and James Shepherd and Reynolds Chapman qualified as executors, giving separate bonds. William Shepherd had no family of his own, and he bequeathed his estate to

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***Executors—Liability—Negligence.**—See Davis v. Morriss' Ex'ors, 76 Va. 21; Tanner v. Bennett's Adm'r, 33 Gratt. 251, and *note*; Rowland v. Rowland, 11 W. Va. 262; Estill v. McClintic's Adm'r, 11 W. Va. 413; McGuire v. Wright, 18 W. Va. 512; Varner v. Core, 20 W. Va. 479, and Seabright v. Seabright, 28 W. Va. 437, all citing the principal case.

†**Same—Same—Same—Interest.**—See monographic *note* on "Interest" appended to Fred v. Dixon, 27 Gratt. 541.

his brothers and sisters, and the children of those who were dead; and these were numerous when this suit was instituted. He had been the executor of his father, who died about the year 1803, and had never settled his accounts before any court. And after his death various suits were brought in which his estate was involved, some of which were still in progress at the commencement of this suit.

James Shepherd, the executor, died in 1842, and Chapman died early in 1844. Shepherd's account as executor was settled by a commissioner, under an order made in a suit which was then pending in the court. Chapman settled his accounts before commissioners appointed by the County court; but although they seem to have been settled at the proper time, down to October 1835, the reports of the settlements were not filed until July 1843.

In 1849, Lewis B. Williams, administrator with the will annexed of George Shepherd, deceased, one of the legatees of Wm. Shepherd, instituted a suit in equity in the Circuit court of Orange county against 379 the administrator *of James Shepherd, deceased, and the administrators of Reynolds Chapman, deceased, and the sureties of said Shepherd and Chapman, and all the other parties interested in the estate of William Shepherd, for a settlement of the executorial accounts and the distribution of the estate. In his bill he does not surcharge or falsify the accounts settled, or even allude to them; but says that there has never been any division of Wm. Shepherd's estate, though it was very desirable; and there is a large amount that has come to the hands of his executors, which ought to be distributed, besides very large sums that have been lost by their culpable default, as plaintiff has been informed and charges.

Both Shepherd's and Chapman's administrators answered; and the accounts were referred to a commissioner.

In March 1860 the commissioner returned his report. He makes a separate statement of the accounts of each executor, charging to each one-half of each item of debt for which both were responsible; and distributing the assets among the several legatees. The account of the executor James Shepherd is brought down to October 17th 1842, when he is found indebted to the estate in $8,316.46 of principal, and $6,796.59 of interest, making in the aggregate $15,513.05; and in the account with the legatees he is charged with this aggregate sum as principal. The account of Chapman is brought down to October 7th, 1851, showing him indebted to the estate in $8,721.08 of principal, and $11,933.95 of interest; and in his account with the legatees he is also charged with the whole amount as an interest-bearing fund.

The plaintiff filed one exception to the commissioner's report, which it is not necessary to state. The administrator of James Shepherd filed four, and the administrators of Chapman filed six exceptions to the report. These 380 *are substantially the same, except as to one of the exceptions of Chapman's administrators. These are as follows:

1st. Because the commissioner has charged the said Chapman as executor of William Shepherd, deceased, on the 27th of July 1842, with the half of the principal and interest of the debt of James M. Bell, lost and never received by said executor; and has charged continuing interest on the said lost debt down to the present time; whereas he ought to have charged at most only one-half of the principal of the debt so lost, without interest.

It appears that by bond dated the 17th of November 1821, James M. Bell and P. Hansbrough promised to pay to William Shepherd the sum of $1,820.90, to which payment they bound themselves in the penalty of $3,641.80. Hansbrough died about 1822 or 1823, reputed to be rich. Up to February 1840, when Bell died, he was not only in possession of a large real and personal estate, but up to the year before his death many debts, one of them quite large, were made under execution against his property. And yet in all the time from the death of William Shepherd in 1825 to the death of Bell no step was taken to enforce the payment of the debt due to William Shepherd's estate; and except about $800, which was paid by Bell, it was lost to the estate.

2d. Because no commissions are allowed upon the debt of Bell and Hansbrough or on other sums not collected by the executors, with which they are charged.

3d. Because Chapman is charged on the 17th of October 1851 with the aggregate amount of principal and interest, then found against him; and this sum of $20,675.03 cents, as a principal sum of that date, is distributed among the legatees; thus compounding interest against him.

4th. Because the commissioner has 381 charged Chapman *with the sum of $1,014.00 on the 25th of September 1832, on account of a debt of James Shepherd to William Shepherd.

There is no doubt that this should be charged either to James Shepherd or to Chapman; and it was a simple question of fact, whether or not Chapman had received the money to pay it. The commissioner and the court below, as well as this court, was of opinion from the evidence, that Chapman had received the money.

5th. Because the commissioner has allowed no commission to the executor on his receipts.

6th. Because in the settlement of the account the commissioner has not regarded the accounts heretofore settled as prima facie correct, but has reviewed and settled said accounts from the beginning; when it appears that the object of this suit was not to surcharge and falsify any of said accounts heretofore settled; which accounts have been regularly confirmed by the court.

The cause came on to be heard at the May term of the court for 1860, when the court overruled all the exceptions to the report

except so much of the first exception of Chapman's administrators as relates to the charge of interest upon the debt of James M. Bell and Hansbrough to the testator, after the time when the same was lost. And the commissioner having made a statement, correcting the accounts in conformity to the opinion of the court, the cause came on again to be heard on the 8th of May 1860, when the report so amended was confirmed, and a decree was made against James Shepherd's administrator and the administrators of Chapman, in favor of the legatees of William Shepherd, deceased, in conformity to said report. And thereupon the administrators of Chapman applied to a judge of this court for an appeal; which was allowed.

382 *John Daniel, for the appellants.

Wm. Green, for the appellees.

Staples, J. The appellants' first exception is to the charge of interest upon a debt lost by the negligence of the executors. It appears that the bond evidencing this debt was executed by Hansbrough and Bell in 1821. Upon the death of the testator in 1825, it passed into the hands of the executors as assets of the estate. Although the bond was then perfectly good, and so continued until the year 1839, the executors never made the slightest effort to collect it. Upon this state of facts the Circuit court rendered a decree against their representatives for the principal of the debt, with interest thereon from the year 1821, the period of payment, to the year 1839, when it is claimed the debt was finally lost by the insolvency of the surviving obligor.

The exception taken in the court below, to the report of the commissioner, brings before us the question of the correctness of the decree in this particular.

The appellants do not deny the liability of the executors for the principal of the bond; but they insist they are not chargeable with interest, upon the ground that interest being simply in the nature of damages awarded for the detention of the debt, it cannot be known whether the executors, had they sued, would have succeeded in the recovery of any portion of it.

The question must be determined without reference to the provisions of the 6th section, chap. 132, Code of 1849; as the entire transaction occurred before that section was enacted. Independently of this statute it must be conceded that in Virginia executors and other fiduciaries are not held liable

383 for interest upon debts lost *by their negligence or other misconduct. See Rootes v. Stone, 2 Leigh, 706; Webb v. Coltson, never reported; Report of Revisors, 1848-9.

The ground of this exception, as stated by Judge Green in Webb v. Colston, is, that the charge upon the fiduciary of the amount of the debt lost by his default is in the nature of damages assessed for a failure to do his duty; which he could not know that he would be liable to pay until so adjudged by a court of justice; and upon general principles he ought not to pay damages for the delay to pay damages. Now it will be observed, that the reasoning of Judge Green goes to the extent of affirming merely that the executor himself will not be held to pay interest upon the amount with which he is chargeable. It does not affirm that he is not liable for a failure to collect the interest as well as the principal, when he might have done so by the exercise of due diligence. It no where asserts that when a bond given to the testator passes into the hands of the executor, with constantly accruing interest, and the debt is finally lost by the mismanagement of the executor, that his liability does not extend as well to the interest as the principal. This precise proposition has not been touched by any Virginia case that I have seen. It must, therefore, be regarded as an open question. Its decision depends upon a few very familiar principles of law. If the obligation is due on demand, it is evidence of a present debt payable instanter; and the writ is a demand which entitles the plaintiff to the penalty. The interest is allowed, not because the penalty is forfeited, but because the debt was from the beginning due and payable. Payne v. Britton, 6 Rand., 104; Robinson v. Bland, 2 Burr. R., 1071, 1086.

The same rule applies to obligations for the payment of money at a given day.

384 In the absence of an express *contract they always bear interest from the day appointed for the payment. This is the rule in Virginia certainly, whatever it may be in England. It does not matter whether we regard interest as damages given for the detention of the debt, or as a compensation for the use of the money. In the class of contracts just mentioned it is allowed by the court as the judgment of the law. It is in fact a legal incident of the debt, and the right to it is founded on the presumed intention of the parties.

It is true that the debtor may sometimes, under peculiar circumstances, avoid the payment of interest; but these are matters of defence, the burden of which is upon him in all cases. They are offered to show that the obligation to pay the interest has been discharged, and not that it did not originally exist. If no valid ground of defence is shown the judgment is as certainly rendered for the interest as for the principal. In contracts of the character just mentioned it is apparent, therefore, that interest is not given as damages at the discretion of the court or jury, but as an incident of the debt which the court has no discretion to refuse.

The bond executed by Hansbrough and Bell was payable on demand, and is therefore directly within the influence of these principles. But this is not all. The instrument is in the nature of a penal bill or obligation. The rule at common law is well settled, that when the debt is secured by a penalty, if the condition is not complied with by a payment at the day, the penalty becomes the debt, and neither tender nor payment after the day will relieve the forfeiture.

The statute, however, provides that judgment shall be entered for the penalty, to be discharged by the payment of the principal and the interest due thereon, and the costs of suit. Code of 1860, chap. 177, § 16. The object of this provision is to give the 385 debtor relief in the *common law courts upon the same terms as is afforded by courts of equity. In neither court can he be relieved from the penalty except upon the terms of paying both principal and interest. In these cases the interest is treated as part of the debt. Waller v. Long, 6 Munf. 71, 79; Moore v. Fenwick, Va. R. 214; Bonafous v. Rybbot, 3 Burr R. 1373.

If this view be correct, the interest upon the bond of Hansbrough and Bell must be regarded as a part of that debt. Had the executor brought suit thereon, judgment would have been entered for the penalty, to be discharged only upon payment of principal and the interest accrued to the date of the judgment, unless, indeed, the debtor had some valid defence; of which there is not the slightest pretence.

As before stated, the debt was lost in 1839. Down to that period the bond was an available security in the hands of the executor. It was assets of the estate until that time. Indeed the executors can only escape responsibility for full interest to the date of the decree by showing the loss of the debt. As that loss did not occur till 1839, that period must fix the date and measure of their liability.

The rule of law which exempts a fiduciary from the payment of interest upon a debt lost through his default, is a hard one, and has been remedied by statute. Neither sound policy, nor any well-settled principle, require that the courts shall extend this exception to interest which was as easily collectible as the principal.

It is supposed, however, that this is in conflict with Rootes v. Stone. A copy of the decree of this court in that case has been furnished by the counsel for the appellee. This decree charges the attorney with the debts lost by his negligence. But we have no means of ascertaining what these debts were. It may be that no 386 *interest had accrued upon them, or that by the form of the contract or the nature of the debt, the creditor was entitled to interest only from the date of the verdict of a jury. Upon these points the report of the case in 2 Leigh, 706, furnishes no information. Indeed that report is too meagre and obscure to render the decision a conclusive authority upon this court, in determining the questions involved in the present case.

On the other hand, the case of Holcomb v. Holcomb's ex'ors, 3 Stockt. R. 281; Stiles v. Grey, 16 Sim. 229, 1 McN. & G. 422; and Powell v. Evans, 5 Ves. R. 839, are strong authorities for the proposition, that in charging an executor or other fiduciary with debts lost by his negligence, the accrued interest thereon will be regarded as a part of the debt, and the executor will be held liable for it whenever it appears that such interest might have been collected by the exercise of due diligence. This view, I think, is substantially sustained by the reasoning of Judge Green in Webb v. Colston, a case decided by this court, but never reported. Certainly there is nothing in that opinion in direct conflict with the conclusions reached in the present case.

Upon the whole, I am satisfied there is no error in the decree of the Circuit court, in holding the estate of the executor responsible for one-half of the principal of the bond of Hansbrough and Bell, and interest thereon, which had accrued up to 1839. After that year there is no charge of interest upon this debt; and in this respect the decree is correct.

The second and fifth exceptions to the commissioner's report embrace substantially the same matter; and that is the refusal of the commissioner, sustained by the Circuit judge, to allow the executor commissions upon his receipts. The correctness of this decision depends upon the construction to be given to the act of February 16, 387 *1825, found at page 217, Supplement to the Revised Code.

By the 8th section of this act it is made the duty of the fiduciary not merely to cause his accounts to be settled and adjusted, but also to return them to the proper court, or to see that the commissioner returns them in due time. It will be seen that this enactment is very different from the provisions of the present law upon the same subject. The object, no doubt, was, that parties interested might, by a simple reference to the records of the court, ascertain the condition of the assets, the transactions of the fiduciary and the nature and extent of his liabilities. As the commissioners were appointed, on motion of the fiduciary, and generally persons of his selection, it was made his duty to return the settlement to the proper court, or to see that the commissioners returned them. If the commissioners failed in their duty in any respect, the remedy was by application to the court to compel them to complete and return the accounts, or to appoint others, who would perform that duty. At all events, the failure to return the accounts within the prescribed time was an absolute forfeiture of the commission.

In the present case the returns were not made for several years after the period fixed by law; and however hard it may be upon the estate of the executor, the court has no alternative but to enforce the plain mandates of the statute.

The appellants' third exception is to the charge of interest upon the aggregate amount of principal and interest reported against the executor as of the 7th October 1851, the period fixed by the commissioner for closing the executorial accounts.

It has been repeatedly held by this court that so soon as the purposes of the 388 administration are accomplished *for the payment of debts against the estate, the executorial accounts should be

closed. The balances then found in the hands of the personal representative should be charged against him as borrowed, and the accounts with the legatees settled upon the principles applicable to creditor and debtor. Whether the personal representative shall be charged with interest upon the aggregate of principal and interest thus found against him, depends upon the facts and circumstances of each case. This court has never undertaken to lay down any general rule upon the subject; and in the nature of things it is not expedient or advisable to do so. It is unnecessary, therefore, to review the cases bearing upon this subject, as no certain general principles can be deduced from them. It is very clear, however, that this court has not been favorably inclined to the charge of compound interest against personal representatives, except under very peculiar circumstances.

In the present case there is nothing to justify the charge of compound interest against the executors. On the contrary, there is much to repel it. The estate was involved in litigation down to, and even after, the institution of this suit. The complainant, in his amended bill, expresses the apprehension that the estate was not then in a condition for a final settlement and distribution. Although the bill was filed in 1849, so numerous were the parties, so difficult was it to ascertain their names and places of residence, that the cause could not be matured, and the accounts taken, until the year 1860. The commissioner realizing these difficulties, did not undertake to bring the executorial transactions to a close until more than two years after the inception of the proceedings. These facts tend strongly to show that the executors were not in any such default, with regard to the assets in their hands, as 389 to warrant the heavy charge *of compound interest allowed in this case. As before stated, the commissioner closes the executorial accounts on the 7th of October, 1851; and he reports a balance on that day of eight thousand seven hundred and twenty-one dollars and sixty-eight cents, principal, and ten thousand seven hundred and thirty-one dollars and fifty-four cents interest. Upon these two sums aggregated, the executors are charged with interest from the 17th of October, 1851, by the decree of the Circuit court. This is plainly erroneous. The executors ought to have been charged with interest upon the reported balances found against them only from the date of the decree.

The fourth exception is to the charge against the executors of the sum of one thousand and fourteen dollars and 90 cents, on account of a debt due to the estate of Dr. Wm. Shepherd, from Jas. Shepherd. This exception involves a question of evidence merely; and I shall content myself with simply saying that this charge is fully sustained by the proofs in the cause. It is difficult to see how any other conclusion could have been arrived at, than that reached by the commissioner and the Circuit Judge.

The sixth and last exception is to the action of the commissioner in reopening the exparte settlements in the County court, without any particular surcharge and falsification averred in the bill. The rule that administration accounts settled exparte, returned and recorded in the proper court, are to be taken as prima facie correct; liable only to be surcharged and falsified by proper averments, has received the sanction of this court in numerous cases. The inconvenience of the rule has been often felt, and in some few instances exceptions and modifications have been allowed when necessary to attain the justice of the case.

The case of Shugart's adm'r v. Thompson, 10 Leigh, 443, is a familiar illustra- 390 tion. There the answer denied *all the allegations of the bill intended to impeach the exparte settlements: it was not therefore proper to send the cause to account in the absence of evidence to sustain these allegations. Nevertheless an order of account was made, and the parties proceeded with their proofs before the commissioner.

The facts there established did not sustain the specific objections urged in the bill to the settled accounts, but they showed other grounds for surcharging the settlement. Judge Stanard said, the court might have required the plaintiff to amend his bill by inserting the further matters of surcharge and falsification, so as to afford defendants the benefit of an explanation and defence by way of answer; or dispensing with that circuitous and formal proceeding, the court might have permitted the commissioner to proceed with the investigation in like manner as if the matters had been noticed in the bill. If the defendant should object he was taken by surprise, the court should give him time to combat the new charges. If he urged his privilege of defending himself by answer, that privilege might be secured to him by allowing him to file his affidavit, and giving it all the effect of an answer.

In the case before us the exparte settlements made in the County court were erroneous upon their face in bringing charges against the legatees into the executorial accounts, and in allowing the executors commissions upon their receipts. It is also to be observed that these settlements did not profess to be final, or to embrace all the transactions of the executors. The court, therefore, very properly referred the accounts to one of its commissioners to settle and adjust. In the progress of the investigation it was discovered that the executors had omitted to charge themselves with various debts lost by their negligence, and with debts due by one of them to 391 *the testator. With the exception of these omitted items, the commissioner obtained the principal material for his account from the exparte settlements. The only important change in the settlements consisted in the addition of the omitted debts, and in separating the administrator's accounts proper from those of the legatees. The defendants did not complain of any

surprise. They did not insist upon any specifications in writing. They did not claim the benefit of an explanation by way of affidavit or answer. The fullest and most ample investigation was had; and it is very clear that no injustice has been done in reforming the exparte settlements, and in making the additional charges. Under all these circumstances it will be productive only of expense, delay and trouble to send the cause back for the plaintiff to go through with the useless formality of amending his bill by inserting matters already investigated before a commissioner, and in respect to which the defendants have not proposed to make any defence or explanation other than is already made. For these reasons I think the Circuit court did not err in overruling the sixth exception.

This disposes of all the questions arising upon the exceptions. It will be seen by them that none of them are well taken, except the third, in relation to the charge of compound interest. For the error in overruling that exception, this court is reluctantly compelled to reverse the decree, and to remand the case for further proceedings.

The other judges concurred in the opinion of Staples, J.

Decree reversed.

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392 *Osborne v. Osborne's Ex'or.*

January Term, 1874, Richmond.

Wills—Construction.—O married M who owned fifty shares of Clover Hill railroad stock. By a resolution of the company the fifty shares is made seventy, and a certificate for the whole is issued to O. O having no children, makes his will, and after giving to his wife his whole estate for her life, says, "I give to her in fee her Clover Hill stock." HELD: Looking to all the provisions of the will and the surrounding circumstances, M took the seventy shares of stock.

The case is stated in the opinion of the court.

Dunlop and J. Alfred Jones, for the appellant.

Lyon, Pegram and Burwell, for the appellee.

Bouldin, J., delivered the opinion of the court.

Dr. N. M. Osborne, late of the city of Petersburg, died in that city in the year 1869, having duly made his last will, and leaving the appellant, his widow, him surviving, but no children. By the first clause of the will the testator gave to his wife Sarah M. Osborne (the appellant) all his property for life. The second clause is as follows:

"I give to her, in fee, her Clover-Hill stock, four thousand dollars of State stock, registered bonds, nine shares of Richmond and Petersburg railroad stock, and 393 twelve *shares of Southern railroad stock, to do with as she pleases."

N. M. Osborne, jr., a nephew of the testator, was appointed and qualified as his executor; and a question arose between the executor and the appellant, as to what passed to her under these words, in the second clause of the will:

"I give to her, in fee, her Clover-Hill stock." To settle this question alone, the suit was brought by the appellant, in the Hustings court of the city of Petersburg, from the final decree in which this appeal was taken.

The facts, so far as pertinent to the question, are briefly as follows:

In the year 1857 the appellant, then Sarah M. Maitland, intermarried with the testator, N. M. Osborne. At the date of the marriage, she was possessed, in her own right, of the following stocks, viz:

Clover-Hill railroad company, 50 shares; Richmond & Petersburg railroad company, 9 shares; Southern railroad company 7 shares. After the marriage, and in the same year, (1857,) these shares were all regularly transferred to the said N. M. Osborne, and thereafter stood in his name; and in 1858, several thousand dollars of Virginia State bonds were purchased by Robert L. Maitland, trustee of appellant, with her money, and by her direction were transferred to the testator, N. M. Osborne. Whilst these stocks were standing thus in the name of Dr. Osborne, the number of shares held by him in the Southern railroad company was increased by purchase from seven to twelve shares, five being added. In this state of things, there were two successive stock dividends, (as they are called,) declared by the Southern railroad company, not out of profits realized, but simply by increasing the number of shares in the hands of the shareholder, 394 *so as to make the increased number of shares represent precisely the same capital which was before represented by the original number. It was in no sense a dividend of profits, but merely a subdivision of capital stock, describing the same capital by a larger number of shares. Under this process, the interest in the Southern railroad company, held by Dr. Osborne, was described by eighteen shares instead of twelve; and by a precisely similar process his interest in the Clover-Hill railroad company came to be described by seventy shares, instead of fifty; a nominal increase of twenty shares; but, as we have said, only a subdivision of shares, without increase of property, the increased number of shares representing precisely the same capital stock, neither more nor less. It further appears that when this increase was made, separate scrip for the twenty new shares was made out in the name of Dr. Osborne, and sent to him, and that he subsequently returned that and the scrip for the original fifty shares, and took one certificate for the whole number of seventy shares.

*For monographic note on Stock and Stockholders, see end of case.

Such was the condition of these stocks when Dr. Osborne made his will, and when he died. He had eighteen shares of Southern railroad stock, which included the seven shares acquired by his wife, the five shares purchased of Spencer, and the increased hares on both. He had the nine shares Richmond and Petersburg stock acquired by his wife, and he had the Clover Hill stock —that is to say, seventy shares Clover Hill stock acquired by his marriage with her. He had no children, and after giving his wife a life estate in all his property he gave her in fee, among other things, "her Clover Hill stock," "to do with as she pleases;" and the question was, What did he mean to give her by those words? The Hustings court held that he intended only the 395 original fifty shares; and *gave her those only, and decreed also that she should pay the costs of the suit. From this decree Mrs. Osborne has appealed to this court.

The question before us is simply this, What stock did Dr. Osborne intend to describe by the words used in his last will? The words themselves are plain and unambiguous. After having given to his wife all his property for life, in the first clause of his will, he goes on in the 2d as follows: "I give her in fee her Clover-Hill stock" (and other things) "to do with as she pleases." Now it is perfectly clear, that something was intended to be given to the wife in fee, by this language; that that something was "Clover-Hill stock"; and that there was something present to the mind of the testator which made it appropriate, in his opinion, that the "Clover-Hill stock" given to her should be designated "her Clover-Hill stock." If, then, we can find the subject matter thus described and plainly given to the wife; if we can find Clover-Hill stock under the control of the testator, which, at the date of his will, might be reasonably described by him as "her Clover-Hill stock," to all such stock Mrs. Osborne is clearly entitled. The word "her," as used by the testator in describing the stock given to his wife, was not intended to affirm that the property was in the wife; to imply that what he was giving was already hers. He knew the contrary; and the solemn duty he was then performing in giving her the stock, shows that the word was not used in that sense. There was, therefore, some fact present to the mind of the testator which induced the description. Whether there be such stock, is purely a question of fact, de hors the will. The bequest is plain. The question is: Is there a subject to answer the description? And in solving this question, precedent and authority are of but little service: it must depend solely on the facts of this case. 396 *And in making an application of these facts to the bequest under consideration, we need only to bear in mind the following principle, extracted by Judge Redfield from the cases, viz: "It is never required that all the particulars of name or description of person or thing should be precisely accurate, in order to the validity of the provisions of the will. It is always sufficient that the court, after learning the surrounding facts and circumstances, should be able, with reasonable certainty, to declare the intent of the testator." Let us then for a moment occupy the stand-point of the testator at the date of his will. He doubtless felt, for he died soon after, that his earthly career was drawing to a close, and that it was necessary and proper for him to make suitable provision for those having meritorious claims upon him. He had a wife, but no children nor descendents. His wife was naturally and in fact the prime object of his bounty; and we find that by the first clause of his will he gives her all his property for life. But he remembered, as it was right and proper that he should remember, that he then held valuable interests wholly acquired through her; interests which, as there were no children of the marriage, would by the law of distributions, pass, as far as they could be traced in kind, to her absolutely, in the event of his intestacy. What so natural and proper as that he should remember these interests at such a moment, and that he should act in relation to them at least as liberally to her as the law would in case of intestacy? We find from the will that he did so act. He acquired by her several thousand dollars Virginia State bonds, the exact amount not proved; the bill says six thousand, the answer several thousand. He gave her in fee four thousand dollars State stock, registered bonds. He held at his death nine shares Richmond and Petersburg railroad stock, acquired through his wife. He 397 *gave her all of them. He had eighteen shares Southern railroad stock, seven original shares, acquired by his wife, and five by purchase. These twelve shares were increased in number by subdivision of capital stock, or increase of shares as it is called, to eighteen, as above mentioned. Without nicely calculating the proportionate increase of the number acquired by his wife, he gave her twelve shares, being rather in excess of her due proportion; and finally, to come to the clause under consideration, (not, however, in the order in which they are mentioned in the will,) he had standing in his name seventy shares Clover Hill railroad stock, acquired, as we have seen, through his wife; 50 original shares acquired on marriage, and twenty additional, added by subdivision of capital stock, or increase of shares, as aforesaid. Separate scrip, as we have seen, was first issued to him for the twenty shares; but he returned his scrip, as well for the original fifty as for the additional twenty shares, and took one certificate for the whole number of seventy shares. He held them unchanged until his death, having at the date of his will, and at his death, no other "Clover Hill stock" than these seventy shares thus acquired through his wife; and he says in his will, "I give to her in fee her Clover Hill stock." What "Clover Hill stock?" Beyond all question the seventy

shares Clover Hill railroad stock acquired by the testator jure mariti, and which by the law would be his wife's—her's were he to die intestate. He intended to do with this stock precisely what he did with the other interests similarly acquired; which we have seen were given to her in fee.

Reading this will, then, by the light of these surrounding facts and circumstances, we think we may declare, not merely with "reasonable certainty," but almost with absolute "certainty," that it was the 398 intention of the testator, *by the bequest under consideration, to give to the appellant the seventy shares of Clover-Hill railroad stock, acquired by him through his wife as aforesaid, and standing in his name at his death. The decree of the Hustings court is, therefore, erroneous, and must be reversed, with costs to the appellant; and a decree must be entered here in accordance with this opinion, and certified to the Hustings court.

The decree was as follows:

This day came again the parties by counsel, and the court having maturely considered the transcript of the record and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Hustings court of Petersburg erred in holding that the appellant, under the testator's will, was entitled to only fifty shares of Clover-Hill railroad stock instead of seventy shares, as claimed in her bill. It is therefore decreed and ordered that the said decree of the Hustings court of Petersburg of the 18th of November 1870, be reversed and annulled, and that the appellee, out of the assets of his testator in his hands to be administered, do pay to the appellant her costs by her about her appeal to this court expended.

And this court, proceeding to enter such decree as should have been entered by said Hustings court, doth decree and order, that Nathaniel M. Osborne, as executor of Nathaniel M. Osborne, deceased, do transfer in proper form and deliver to Sarah M. Osborne, the complainant in said court, as her absolute property, seventy shares of the stock of the Clover-Hill Railroad Company, owned by the testator, Nathaniel Osborne, deceased, at his death; and that said Nathaniel M. Osborne, as executor as aforesaid, out of the assets of his testator 399 *in his hands to be administered, do pay to said Sarah M. Osborne her costs in said Hustings court expended. Which is ordered to be certified.

Decree reversed.

STOCK AND STOCKHOLDERS.

A. Stock.
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A. STOCK.

I. Definition and Nature.

In General.—"Stock" is defined generally as the sum of all the rights and duties of the shareholders of a corporation. 23 Am. & Eng. Enc. Law 548.

Capital Stock.—"Capital Stock" is the fund of money or other property fixed as the basis for conducting the business of the corporation. 23 Am. & Eng. Enc. Law 585.

Shares of Stock.—"Shares of Stock" are a species of incorporeal personal property consisting of rights in the profits, management and assets of the company. 23 Am. & Eng. Enc. Law 588.

As said by ALLEN, P., in Barksdale v. Finney, 14 Gratt. 357, "a share in a joint stock company is not strictly speaking a chattel, but bears a greater resemblance to a chose in action." See also, Ches. & O. R. Co. v. Paine, 29 Gratt. 506.

A deed which conveys all the grantors' "property, real and personal," embraces and conveys all their shares of stock in a national bank. Feckheimer v. Nat. Bank, 79 Va. 80.

II. Lien of Corporation on Stock.

For Any Debt of Stockholder.—In Bohmer v. City Bank, 77 Va. 445, the charter of a bank provided, that "the bank shall have a lien prior to all others upon any stock held by a stockholder for any debt of said stockholder to said bank." A stockholder, indebted to the bank, borrowed money from a third person and gave him the certificate as collateral with power of attorney to transfer the stock; after becoming bankrupt the original stockholder applied to the bank to transfer the stock, but the bank refused to do so until paid its debt due from the said stockholder. *Held*, the act incorporating the bank, superseded the general law providing for the transfer of stock, and gave the bank the prior lien for any debt due it from a stockholder, on his stock; hence the bank had the right to be first satisfied before transferring the stock to the lender of the stockholder; nor is this lien waived by the company's leaving the certificates outstanding. See also, Petersburg, etc., Co. v. Lumsden, 75 Va. 327.

For Balance Due upon Shares.—According to statute there is a lien upon the stock of each stockholder in a joint stock company for the balance due upon his shares of stock; and this lien is not discharged by an assignment of the stock. But the statute gives no lien to the company on the stock of a stockholder for any other debts due from him, than that which is due for unpaid stock. Petersburg, etc., Co. v. Lumsden, 75 Va. 327.

Neither does this lien extend to paid up shares to secure payment of unpaid subscriptions for other shares; and the sale of such paid up shares for such purpose by the company is void. Shen. Val. R. Co. v. Griffith, 76 Va. 913.

III. Dividends.—Where the directors fail to declare dividends at the stated time, as directed by the charter, it is not in their power to declare a dividend to extend back over the periods during which they had failed to declare dividends. Gordon v. R., F. & P. R. Co., 78 Va. 502.

The owner of certain shares of stock makes a general deed of assignment to a trustee for the benefit of his creditors. *Held*, the trustee is entitled to have transferred to him for the purposes of the trust, not only the shares, but dividends that may be due on them. Feckheimer v. Nat. Exch. Bank, 79 Va. 80.

If the board of directors of a corporation, when it is insolvent, declare a dividend of net profits, the directors concurring in the act, in their individual capacity, are jointly and severally liable to the corporation's creditors for the amount of capital stock so divided. Slaymaker's Adm'r v. Jaffray, 82 Va. 346.

IV. Guaranteed or Preferred Stock.—In Gordon v. R., F. & P. R. Co., 78 Va. 513, there is a *dictum* to the effect that, stock with guaranteed dividends, means a guarantee of dividends, but not of stock, in a winding up; while preferred stock, as contradistinguished from common stock, has a preference over common stock in a distribution of net profits.

It was held in the same case (Gordon v. R., F. & P. R. Co., 78 Va. 501), that, the holders of guaranteed stock are entitled not only to participate in due proportion in the cash dividends declared in favor of the holders of common stock, but also in the issuance of dividend obligations; and the dividends of such guaranteed stock are payable out of gross receipts of the company, and in a division of the assets, must be paid, if need be, to the exclusion of the common stock.

For sequel to the above case of Gordon v. R., F. & P. R. Co., 78 Va. 501, see 81 Va. 621, where other points on the subject of guaranteed stock are decided.

V. Liability to Attachment and Garnishment.—The shares of a stockholder in a joint stock company, incorporated by and conducting its operations, in whole or in part, in the state are such estate as is liable to be attached in a proceeding instituted for that purpose, by one of the creditors of such stockholder; and such estate may properly be considered, for the purpose of such proceeding, as in the possession of the corporation in which the shares are held, and such corporation may properly be summoned as garnishee in the case. Chesapeake & Ohio R. Co. v. Paine, 29 Gratt. 502.

If, in such a proceeding, the stock should appear to be liable to the lien of the attachment, it ought to be sold for the satisfaction of the same under an order of the court made for that purpose in the attachment proceeding; but it is error for the court to render a judgment against the garnisheed corporation for the value of the stock, unless it appears that the lien of the attaching creditor on the stock was lost by the act of the corporation. Chesapeake & Ohio R. Co. v. Paine & Co., 29 Gratt. 502.

The certificate of shares of stock not being negotiable, an attachment of such stock takes precedence over a subsequent *bona fide* purchaser thereof without notice. Shen. Val. R. Co. v. Griffith, 76 Va. 913; C. & O. R. Co. v. Paine, 29 Gratt. 502; Massey v. Yancey, 90 Va. 626, 19 S. E. Rep. 184. See monographic *note* on "Attachments," appended to Lancaster v. Wilson, 27 Gratt. 624.

VI. Taxation of Stock.

Shareholders' Liability.—Section 93 of the Act of February 15th, 1866, for the assessment of taxes, embraces express companies chartered by the State of Virginia; and the present stockholders are personally liable for taxes due to the commonwealth from the company incurred while they were stockholders; for though the charter of an express company did not make the stockholders personally liable for the debts of the company, the said assessment act passed subsequent to the charter, has so far modified the charter as to make them personally liable. Anderson v. The Commonwealth, 18 Gratt. 295.

Taxation of Capital Stock as Well as Shares of Stock.—The capital stock and the shares of the capital stock are distinct things, the former belonging to the corporation and the latter to individuals. Both may be taxed, and it is not double taxation. State Bank of Va. v. City of Richmond, 79 Va. 113; Com. v. Charlottesville Perpetual, etc., Co., 90 Va. 790, 20 S. E. Rep. 364.

B. STOCKHOLDERS.

I. Definition and Status.—A stockholder or shareholder is one who holds membership in a corporation or joint stock company by virtue of owning one or more shares of its stock. 23 Am. & Eng. Enc. Law 779.

a. Evidence of Membership.—The books of the corporation are *prima facie* evidence of its membership, and a party's name on such books as a member has been held sufficient proof of his status as a stockholder. Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. Rep. 806; Lewis v. Glenn, 84 Va. 947, 6 S. E. Rep. 866; Stuart v. Valley R. Co., 32 Gratt. 146; P., W. & K. R. Co. v. Applegate, 21 W. Va. 172; Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. Rep. 646.

But the mere signature of a subscription paper does not *per se* constitute a contract of subscription to the stock of a corporation. Stuart v. Valley R. Co., 32 Gratt. 146.

II. The Contract of Subscription.

a. Status of Stock Subscriptions Made before Incorporation.—An agreement to subscribe for shares in a corporation to be organized in future is a mere offer which may be withdrawn at any time before the corporation comes into existence and accepts the offer. Stuart v. Valley R. Co., 32 Gratt. 146; Lewis' Adm'r v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

In West Virginia it is held, that a person who signs and acknowledges an agreement under section 6, c. 54, Code, for the formation of a corporation becomes a subscriber for stock, and is bound to pay for it when the company afterwards becomes incorporated and organized. But one who signs, but does not acknowledge, such agreement, does not become a stockholder, and is not bound for the subscription therein made, unless he in some way acknowledge the existence of the corporation. And if such agreement be not acknowledged at all prior to the issue of the certificate of incorporation, the company does not obtain corporate existence as to those who by such preliminary agreement subscribe stock, and they are not compelled to pay such subscription. Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. Rep. 305.

A fundamental variance in the certificate of incorporation from such preliminary agreement will relieve one who by it subscribed stock from payment thereof. Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. Rep. 305.

b. Manner of Subscribing.—A subscription to stock may be valid though not formally in compliance

with the statutory provisions for taking subscriptions. Stuart v. Valley R. Co., 32 Gratt. 146.

c. **Defenses to Stock Subscriptions.**

1. **Fraudulent Representations.**—Where one is fraudulently induced by an agent or promoter of a corporation to subscribe to its capital stock he may repudiate the contract at his discretion. Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. Rep. 168; Crump v. U. S. Min. Co., 7 Gratt. 352, 56 Am. Dec. 116; Bosher v. Richmond, etc., Land Co., 89 Va. 455, 16 S. E. Rep. 360, 37 Am. St. Rep. 879; Owens v. Boyd Land Co., 95 Va. 560, 28 S. E. Rep. 950; McClanahan v. Ivanhoe, etc., Co., 96 Va. 124, 30 S. E. Rep. 450; West End, etc., Co. v. Claiborne, 97 Va. 734, 34 S. E. Rep. 900.

But such contracts to purchase stock, induced by fraudulent representation, are not void, but only voidable at the purchaser's option. Weisiger v. Richmond, etc., Co., 90 Va. 795, 20 S. E. Rep. 361; Wilson v. Hundley, 96 Va. 96, 30 S. E. Rep. 492; Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. Rep. 591.

Defendant signed a subscription to stock in a corporation, circulated with a prospectus stating that the corporation was to be located at R.; that the maximum capital was to be $400,000, and that its purpose was limited to "manufacturing locks, bolts, all house hardware, and other articles of a similar character." Later a second prospectus, under which the corporation was afterwards organized, was circulated for signatures, by which it was stated that the corporation was to be located outside of R.; that the maximum capital was to be $500,000, and the purpose to embrace a large variety of industries. Defendant refused to sign this second prospectus. *Held*, the defendant was not liable to plaintiff for stock he subscribed to under first prospectus. Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. Rep. 877.

"Promissory Representations."—Mere statements of true intention, or opinions, upon which the subscriber has no right to rely, are not such fraudulent representations as entitle him to a rescission of the contract of subscription. Anderson v. Creston Land Co., 96 Va. 257, 31 S. E. Rep. 82; Wilson v. Hundley, 96 Va. 96, 30 S. E. Rep. 492; Owens v. Boyd Land Co., 95 Va. 560, 28 S. E. Rep. 950.

Though in suit to collect assessments to corporate stock from a subscriber, he may set up, under Code, § 3299, the defenses of failure of consideration, fraud in the procurement of the contract, or any other matter which would entitle him to relief in equity, yet it is held, that those defences are personal to him, and do not pass to the transferee of the stock. Lewis v. Berryville Land & Improvement Co., 90 Va. 693, 19 S. E. Rep. 781.

Laches in Repudiating Contract.—Laches does not begin to run against a party fraudulently induced to subscribe to stock, until he is chargeable with notice of the fraud. And mere suspicions or random statements heard in public, or in stockholders' meetings, do not necessarily constitute notice. But after a subscriber's suspicions are reasonably aroused, it is his duty to investigate at once. The burden of proof in asserting that the subscriber had notice and was guilty of laches is on the corporation. Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. Rep. 168; Weisiger v. Richmond, etc., Co., 90 Va. 795, 20 S. E. Rep. 361; Bosher v. Richmond, etc., Land Co., 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. Rep. 360.

The capital stock of a joint stock company is the basis of its credit, and every one who deals with it has the right to assume that the stock has been paid in full in money, or its equivalent. As against creditors of the company, its stockholders cannot have their subscriptions rescinded on the ground of fraud and misrepresentations in the procurement thereof, unless proceedings for that purpose are commenced not only as soon as the fraud or misrepresentation is discovered, but as soon as the same, by the exercise of due diligence, might have been discovered. The stockholder must be diligent in discovering the fraud, and prompt in repudiating his contract after it is discovered. Martin v. South Salem Land Co., 94 Va. 30, 26 S. E. Rep. 591; Wilson v. Hundley, 96 Va. 96, 30 S. E. Rep. 492.

Affirmance of Contract.—If a party who has been defrauded in the procurement of a contract, elect, on discovery of the fraud, to affirm the contract, his election is final and conclusive. He has but one election to rescind, and, having once elected to affirm the contract, he cannot thereafter disaffirm. Wilson v. Hundley, 96 Va. 96, 30 S. E. Rep. 492.

A person who has been induced by the fraudulent representations of an agent of a company to take shares in it, cannot, after he discovers the fraud, elect to retain the shares and sue the company for damages. Wilson v. Hundley, 96 Va. 97, 30 S. E. Rep. 492.

Remedies against Agents.—If a shareholder in a joint-stock company is debarred from a rescission of his contract by the insolvency of the company, or any other cause, he is without remedy against the company, and is left to his action against the agent who, by his fraudulent representations, induced him to subscribe for the stock. Wilson v. Hundley, 96 Va. 97, 30 S. E. Rep. 492.

2. **Capital Stock Not Fully Subscribed.**—When, up to the time of trial, the proposed capital stock of a corporation has not been fully subscribed, a subscriber thereto cannot be even liable for assessment on his subscription, unless there is in the article, or in the general law under which the corporation is formed, a provision to the contrary. Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. Rep. 877; West End, etc., Co. v. Claiborne, 97 Va. 734, 34 S. E. Rep. 900.

d. **Release from Contract of Subscription.**—A release from a contract of subscription to corporate stock can be shown by the acts of both parties to the contract; and any evidence tending to show that the company did not regard a subscriber as a stockholder, or his subscription binding, may be sufficient proof of such release. Stuart v. Valley R. Co., 32 Gratt. 146.

Subscriptions to a company's capital stock are not released by unacted-upon amendments to its charter. Taylor v. Board of Supervisors, 86 Va. 506, 10 S. E. Rep. 433.

A material change in the purposes of a corporation, as set forth in the prospectus, will release a subscriber thereto from liability, if made without his consent. Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. Rep. 877.

III. **Rights of Stockholders.**

Rights to Sue on Behalf of Corporation.—A stockholder in a corporation has no right to bring a suit in equity in his own name, or for the benefit of himself and other stockholders, upon a cause of action existing in the corporation, and in which the corporation is itself the proper complainant, except where it actually or virtually refuses to institute or prosecute the suit. It must be averred and proved that application was made to the proper authorities to institute suit and they refused, or that such a state of facts exists that the application itself would be

useless, or the facts charged must be such as to show that it is reasonably certain that a suit by the corporation would be impossible. But the suit, when brought, is still the suit of the corporation, the stockholder being permitted to sue in this manner simply to set in motion the judicial machinery of the court. Mount v. Radford Trust Co., 98 Va. 427, 25 S. E. Rep. 244; B. & O. R. Co. v. City of Wheeling, 13 Gratt. 40; Stevens v. Davison, 18 Gratt. 819.

Right to Defend Suit against Corporation.—A corporation must defend a suit brought against it in its corporate name; and a purchaser of stock will not be permitted to do so, unless the corporation has refused to defend. If in such case the officers or agents of the corporation refuse to defend the suit, the court may allow such defense in equity to be made by the stockholders. Park v. Petroleum Co., 25 W. Va. 108.

Right to Enjoin Corporation.—Although a stockholder in a corporation may enjoin it from employing the property or powers of the corporation for a purpose wholly or materially different from that which was designed by the act of incorporation, yet it has no right to enjoin it from doing what is in direct furtherance of the object of its creation, and is for the benefit of all the stockholders as such; though it may be injurious to such stockholder in another character; or the interest of some other person or the public may be injuriously affected by the work about to be executed. B. & O. R. Co. v. City of Wheeling, 13 Gratt. 40; Stevens v. Davison, 18 Gratt. 819; Burr's Ex'or v. McDonald, 3 Gratt. 215.

As Agent for Other Stockholders.—A stockholder in an incorporated company is not so jointly interested with the other stockholders, or so identified with the corporation, that his unauthorized and unwarranted acts will be deemed theirs, or in any manner bind them, to their detriment. Western M. & Mfg. Co. v. Peytona, etc., Co., 8 W. Va. 407.

Power of Majority to Dissolve.—It was held in Hurst v. Coe, 30 W. Va. 158, 3 S. E. Rep. 564, that a majority of the stockholders of a corporation are not entitled, as a matter of right, to a judicial decree dissolving the corporation, without showing a legal cause therefor; though according to statute the stockholders of a corporation have the absolute right to discontinue the business of the corporation by a vote of the majority of the stockholders at a general meeting thereof.

Title to Corporate Property.—In a court of law, the property and rights of an incorporated company belong to the united association, acting in the corporate name and not to the stockholders. The latter, however, are the real owners; and a technical trust thus arises in their favor which will be protected and enforced in a court of equity. Moore v. Schoppert, 22 W. Va. 283; Park v. Petroleum Co., 25 W. Va. 108.

Where the stock of a corporation is declared to be personal estate, and the certificates are made transferable on the books of the corporation, and it is authorized to acquire real estate, such estate is vested in it as a corporation, and not in the individual shareholders. The certificate of stock is evidence of the right of the owner to his proportion of the profits or dividends, and on the expiration of the charter, to his proportion of the assets remaining after the payment of the debts; and every purchaser of the stock takes it subject to the same liabilities. Barksdale v. Finney, 14 Gratt. 338.

Calls.—In Reilly v. Oglebay, 25 W. Va. 41, it was held that a call by the secretary of a corporation, simply on authority of stockholders of one-tenth of the capital stock, was invalid and all proceedings thereunder illegal.

IV. Liabilities of Stockholders.

In General.—To the extent of his stock, each stockholder is liable individually for the debts of the corporation. Where a stockholder pays the debt of the corporation and takes an assignment thereof to himself, he cannot revive that debt by assigning it to a third party. Hardy v. Norfolk Mfg. Co., 80 Va. 404.

In Nimick v. Mingo, etc., Co., 25 W. Va. 184, it was held: (1) That the stockholders of a corporation are individually liable to the creditors thereof, if the same be necessary for the payment of its debts, in addition to their stocks in an amount equal to the stock by them subscribed or otherwise acquired; (2) That this liability is not in the nature of a penalty or forfeiture, but it arises out of the implied promise of the stockholder to assume and discharge the individual liability imposed by the statute, under which the corporation was created; (3) That this liability is not a primary resource or fund for the payment of the debts of the corporation; that it is collateral and conditional to the principal obligation which rests upon the corporation; and is to be resorted to by the creditors only in case of the insolvency of the corporation, or when payment cannot be enforced against it by the ordinary process; (4) That this liability is a security provided by law for the exclusive benefit of the creditors, over which the corporate authorities can have no control; and that this liability is several in its nature, but the right arising out of it is intended for the common and equal benefit of all creditors of the corporation; (5) That in any suit instituted for the purpose of enforcing this liability against the stockholders the corporation is a necessary party.

A subscriber to the stock of a corporation cannot escape his liability to pay his subscription, on the ground that he did not pay the sum required to be paid by statute at the time he subscribed. P., W. & K. R. Co. v. Applegate, 21 W. Va. 172; Stuart v. Valley R. Co., 32 Gratt. 146.

The stockholders of a corporation having directed the directors to create new stock and sell it; and the directors having instead, acquired original stock and sold it, their act may be ratified subsequently by the stockholders, so as to render the sales valid and binding upon the purchasers. Crump v. U. S. Mining Co., 7 Gratt. 352, 56 Am. Dec. 116.

If the law authorizes a sale of the stock of delinquent subscribers, and if the sale shall not produce the sum due, then a motion lies against such subscribers for the deficiency. Grays v. Turnpike Co., 4 Rand. 578.

On Fictitious Subscriptions.—Fictitious or colorable subscriptions to stock, made and used with intent to induce others to subscribe, with the secret understanding that no liability shall attach to the subscribers, or that they shall be allowed to withdraw, are as binding on the subscribers as if originally made in good faith, and the existence of such subscriptions does not operate as a release of *bona fide* subscribers. Wilson v. Hundley, 96 Va. 96, 30 S. E. Rep. 492.

Stockholders Imputed with Notice of Charter and By-Laws.—A stockholder is bound at his peril to take notice of the charter and by-laws of the company of which he is a member. If he pays any installment on his stock, or participates in any meetings of the stockholders after the charter is obtained, he is

estopped to deny knowledge of its terms and provisions, however much it may vary from his contract of subscriptions. West End, etc., Co. v. Claiborne, 97 Va. 734, 34 S. E. Rep. 900.

A member of a corporation is bound by an act of assembly varying the terms of the original act of incorporation; such act being passed at the instance of a legally constituted meeting of the corporation, although that individual member was not present. Currie's Adm'rs v. Mut. A. Soc., 4 H. & M. 315, 4 Am. Dec. 517.

Statute of Limitations as against Stock Subscriptions.—Under the statute regulating assessments of stockholders the statute of limitations begins to run against an action for unpaid assessments, only from the time such assessment is made. Lewis' Adm'r v. Glenn, 84 Va. 947, 6 S. E. Rep. 866.

In suit wherein a corporation is a party, the decree binds the stockholders, though they be not personally parties; and assessments made, under decree therein, payable to, and collectible by, the trustee of the corporation, may be sued for by him in his own name; and the statute of limitations begins to run against those assessments from the date of the decree. Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. Rep. 806; Hamilton v. Glenn, 85 Va. 901, 9 S. E. Rep. 129.

Issue of Stock at Less Than Par.—The guaranty of a land company that those who subscribe to its stock shall not be called upon to pay more than thirty per cent. of the stock subscribed for, may be valid as between the company and its stockholders, but as between the company and its creditors it is not binding, unless the latter had notice of the guaranty when their debts were contracted. Such guaranty is in fraud of the rights of the creditors, and cannot be enforced to their prejudice. The full amount of the subscription must be paid in money, or money's worth, if necessary to satisfy the demands of the creditors, who have no notice of a different contract between the company and its stockholders at the time when their debts are contracted. Martin v. South Salem Land Co., 94 Va. 30, 26 S. E. Rep. 591, 2 Va. Law Reg. 743.

V. Transfer of Stock.

In General.—A by-law of a banking corporation, which prohibits a stockholder who is indebted to the bank from transferring his stock without the consent of the board of directors, is void, even though notice of such by-law be endorsed on the certificate of stock. Feckheimer v. Nat. Bank, 79 Va. 80.

An option to purchase stock within three years is enforceable, though not in writing. Seddon v. Rosenbaum, 85 Va. 928, 9 S. E. Rep. 326.

Bank stock standing in the name of the guardian of an infant, may be sold and transferred by the guardian, and the officers of the bank have no right to control or prevent him from transferring it on their transfer book. Bank of Virginia v. Craig, 6 Leigh 426.

The general rule is, that the proper measure of damages for the breach of executory contracts for the sale and delivery of personal property, is the value of the article at the time it should have been delivered, with interest thereon from that date until paid. And there is no distinction, in this respect, between contracts for the delivery of stock, and other executory contracts. Enders v. The Board of Public Works, 1 Gratt. 364.

O married M who owned fifty shares of Clover Hill railroad stock. By a resolution of the company the fifty shares is made seventy, and a certificate for the whole is issued to O. O having no children, makes his will, and after giving to his wife his whole estate for her life, says, "I give to her in fee her Clover Hill stock." *Held*, looking to all the provisions of the will and the surrounding circumstances, M took the seventy shares of stock. Osborne v. Osborne's Ex'or, 24 Gratt. 392.

Liability of Transferrer.—The assignor of shares of stock is still liable for unpaid subscriptions, whether installments accrue before or after assignment. Hamilton v. Glenn, 85 Va. 901, 9 S. E. Rep. 129.

As against creditor of husband garnisheeing stock, his assignment to his wife endorsed upon the certificate, and reciting that it is for value received, was held not a valid transfer thereof in a case where the evidence shows that he had subscribed for it, that it always stood in his name, and the company's books evinced no transfer and no payment of the transfer fee; that payment of monthly dues was always by his checks; that recently before the garnishment he had presided at a meeting of the stockholders and mentioned no assignment or proxy; that she had no separate estate and never laid claim to the stock before filing the interpleader. Massey v. Yancey, 90 Va. 626, 19 S. E. Rep. 184.

Liability of Transferee.—In Gray v. Kemp, 88 Va. 201, 16 S. E. Rep. 225, the defendant had sold certain stock to the plaintiff at an agreed price which was paid; but the corporation denied that he owned the stock. The defendant then offered to refund, but plaintiff refused to accept the money, and without unreasonable delay sued for damages for breach of contract. *Held*, the plaintiffs were entitled to recover the value of the stock, or its highest price in market at any time after demand and refusal.

Where corporate stock has been transferred to a purchaser, by judicial sale, and such sale is subsequently set aside in a suit between an original stockholder and the corporation, the latter can recover the stock issued to the purchaser at the judicial sale. Webb v. City Council of Alexandria, 33 Gratt. 168.

Stock as Security.—It was held in Feckheimer v. Nat. Bank, 79 Va. 80, that § 5, 201 U. S. Rev. Statutes, prohibits banking associations from making loans upon security of shares of their own stock.

In order to bind a bank whose stock is pledged as collateral, notice of the pledge should be given its president, cashier, or other officer at its place of business, and in the usual course of business. Donnally v. Hearndon, 41 W. Va. 519, 23 S. E. Rep. 646.

Burden of Proof.—Where the answer of the defendant plainly and directly denies, that the plaintiff or any one on its behalf, ever presented a written request from certain alleged stockholders, asking him to convey or transfer certain stock as alleged in the bill, the *onus* is cash upon the plaintiff to prove the allegation in his bill. Pithole, etc., Co. v. Rittenhouse, 12 W. Va. 313.

VI. Pleading and Practice.

Multifariousness of Bill.—A bill by a number of stockholders against a corporation, alleging fraud in obtaining subscriptions, etc., is not multifarious because each complainant sets forth a different claim. Carey v. Coffee-Stemming Mach. Co. (Va.), 20 S. E. Rep. 778.

A bill may be framed in a double aspect, but the alternative case stated must be the foundation for precisely the same relief. Stockholders who come into a court of equity and seek to have their contracts of subscription rescinded on the ground that they were fraudulently obtained, cannot in the same bill complain of the malfeasance and misfeasance of the corporate directors in the management of the

corporate property, and seek relief which rests upon their relation as stockholders of the defendant company. Such relief must be considered a distinct act of affirmance and ratification of the very transaction which they, in another part of their bill, sought to repudiate. Brown v. Bedford City L. & I. Co., 91 Va. 32, 20 S. E. Rep. 968.

Allegations in Bill.—G. W. B. and C. entered into an agreement to form a joint stock company for the purpose of mining coal, &c. G. and W. put in 137 acres of land and they all jointly put in another tract of 463 acres, which were to constitute the basis of the company. The capital stock was to be sixty thousand dollars, divided as mentioned in the agreement. It was stipulated in the agreement that G. and W. were to receive from the profits of the first coal sent to market eight hundred and ten dollars of the company's money as a compensation for the excess in value of the 137 acres over the 463 acres. Before any profits were realized the lands were sold. *Held*, (1) G. and W. would be entitled to receive the said sum of eight hundred and ten dollars from the proceeds of the sale of the lands if sufficient to pay them, but the remainder of the stockholders would not be personally liable to G. and W. for the respective proportions of the eight hundred and ten dollars, unless they had actually received the proceeds of the sale of the lands or the profits of the coal sent to market; (2) As the bill of G. and W., to compel the other stockholders to pay their respective proportions of the said sum, did not charge that any profits were received, or that the other stockholders had received the proceeds of the sale of the lands, it must be dismissed. Bainbridge v. Gehring, 3 W. Va. 240.

An allegation in a bill against the stockholders of a joint stock company that certain persons mentioned in the bill "constitute, as the plaintiffs are informed, the stockholders of said defendant company" must, on demurrer, be taken as true, and is a sufficient allegation that the persons named constituted the stockholders of the company. Martin v. South Salem Land Co., 94 Va. 29, 26 S. E. Rep. 591.

A bill against a corporation and its directors alleged fraud in obtaining the stock subscriptions of the plaintiffs and failure to comply with the corporate charter, stated that plaintiff's stock had been issued to them and fully paid for, and asked a return of money so paid. *Held*, that the bill was not demurrable on the ground that plaintiffs sued as stockholders and not as stockholders at the same time. Carey v. Coffee-Stemming Mach. Co. (Va.), 20 S. E. Rep. 778.

Averments in Answer.—Where a suit is brought against a corporation, and a purchaser of the stock of the corporation files his answer in defence of the suit without showing that the corporation has refused to defend the suit, it is not error to strike out his answer. Park v. N. Y. & Ka. Oil Co., 26 W. Va. 486. See especially, monographic *note* on "Answers," appended to Tate v. Vance, 27 Gratt. 571.

Joinder of Parties.—Where a large number of persons have been fraudulently induced to become subscribers to a company by identical representations, they may unite in one bill, praying the cancellation of their subscriptions and make the offending company, and its officers and agents, through whom the fraudulent representations were made, defendants. But creditors of the company cannot be united in the same suit. Their rights and interests are not only diverse, but wholly antagonistic to those of the stockholders. There is an "irrepressible conflict" between the two classes, and if united in the same bill, it will be multifarious for misjoinder of complaints. Brown v. Bedford City Land & Imp. Co., 91 Va. 31, 20 S. E. Rep. 968; Bosher v. Richmond & Harrisonburg Land Co., 89 Va. 455, 16 S. E. Rep. 360, *distinguished*.

Under Code 1873, chapter 57, § 26 (Code 1887, § 1103), a corporation, though dissolved or expired, may be sued to enforce its liabilities, and its stockholders are not necessary parties. Hamilton v. Glenn, 85 Va. 901, 9 S. E. Rep. 129.

A corporation being a defendant to a suit in equity, the object of which is to have it declared null, the holders of stock in it are not proper parties to defend the suit. But if in such a case the holders of the stock claiming that if the corporation is annulled they have equitable interests in the property, may be admitted as parties defendants to protect their interests. Washington, Alex. & Georgetown R. R. Co. v. Alex. & Wash. R. R. Co., 19 Gratt. 592.

All the stockholders are necessary parties to a bill filed for the purpose of winding up the affairs of a corporation. But where the object of the bill is to subject corporate assets, including unpaid subscriptions to stock, to the payment of corporate debts, they are not indispensably necessary, though it would be more convenient to have before the court all who have not paid in full, except such as are unknown, insolvent, or beyond the jurisdiction of the court. It is not the duty of creditors to marshal the assets, or adjust the equities between the stockholders. If the stockholders who are parties desire it, they can have the others brought in by proper proceedings for that purpose. Martin v. South Salem Land Co., 94 Va. 29, 26 S. E. Rep. 591.

Action for Recovery of Stock Subscription.—The Act of Assembly approved December 19, 1895, entitled "An Act to prescribe the mode by which unpaid subscriptions to joint-stock companies may be recovered by said companies, their receivers, or assignee," has no application to a suit by creditors of such companies to recover stock subscriptions, because they are not embraced in the title of the Act. Nor does it apply to a suit in which there has been, before the approval of the Act, a decree entered fixing the rights of the parties, requiring stockholders to pay further sums on their subscriptions, and giving executions therefor, although further proceedings in the case were necessary in order to complete the relief for which the suit was instituted. Such a decree is a final decree on the merits within the meaning of the Act, and the case is exempt from the operation of the Act by its very terms. Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. Rep. 591.

Removal of Causes to United States Courts.—The plaintiff and the defendant corporation being corporations of this state, the owners of the stock though nonresidents, are not entitled to have the cause removed to the United States court, to have the question of the validity of the corporation decided. Wash., Alex. & Georgetown R. R. Co. v. Alex. & Wash. R. R. Co., 19 Gratt. 592.

Equity Jurisdiction.—Equity has jurisdiction where the relief asked for involves accounts, commissioners, questions of fraud, and cancellation of subscription to stock of a corporation. Carey v. Coffee-Stemming Mach. Co. (Va.), 20 S. E. Rep. 778.

A bill in equity to ascertain and determine the extent of the individual liability of the stockholders of a foreign corporation can not be sustained. Nimick v. Mingo, etc., Co., 25 W. Va. 184.

400 *Hunter's Ex'x v. Vaughan & als.

January Term, 1874, Richmond.

1. **Trustees.***—Where the trustees in a deed recorded in the clerk's office in Richmond have died or removed out of the State, or refuse to act, the Circuit court of the city of Richmond has jurisdiction to appoint a trustee in the place of such trustees. See ch. 155, § 4, and ch. 174, § 8, Code of 1873.

2. **Same—Appointment—Notice.**—The grantor and one of the trustees in a deed of trust are dead, and the other trustee has removed out of the State. On the motion of the creditor secured by the deed, for the appointment of a trustee to execute the trust, it is sufficient to give notice to the personal representatives of the grantor and of the deceased trustee, and to the surviving trustee: And it is not necessary to give notice to a subsequent purchaser from the grantor, or his personal representative, if he is dead.

This was a bill filed by James Hunter's ex'x to enjoin the sale of certain real estate in the city of Richmond, purchased by said Hunter of M. Wells, in July 1862, and upon which Wells had executed a deed of trust to Powhatan Roberts and Wm. H. Macfarland in March 1859, to secure a debt due to B. B. Vaughan. Roberts having died and Macfarland having removed from the State, Vaughan upon notice to Macfarland and to the personal representatives of Roberts and Wells, moved the Circuit court of the city of Richmond, in December 1871, to substitute a trustee in said deed in the place of Roberts and Macfarland, and James Alfred Jones was accordingly so substituted.

401 And upon the advertisement *of the sale of the property by him, the injunction was obtained; and afterwards dissolved. The case is stated in the opinion of Judge Staples.

Lyons, Stern & Stanard, for the appellant.

J. Alfred Jones, for the appellees.

Staples, J. The bill is filed by Mary Hunter, executrix of James Hunter, dec'd, against B. B. Vaughan and others. It alleges that James Hunter, on the 25th July 1862, purchased from Uriah Wells certain property in the city of Richmond, at the price of $11,580; the first instalment of which was paid in cash; that previous to this purchase, Wells, the vendor, had executed three deeds of trust upon the property, for the purpose of securing the payment of certain debts due the parties respectively named therein; and it was agreed between Hunter and Wells, that the former should pay these debts; that it was understood that the creditors had agreed to accept payment in Confederate currency; that two of the deeds were paid and satisfied in this way; and the third, for the benefit of the defendant B. B. Vaughan, would also have been satisfied, but for the refusal of Vaughan to receive the Confederate currency when tendered to him in December 1862.

*Trustees—Appointment.—See Va. Code 1887, § 3419.

The bill further charges that Vaughan knew all the circumstances of the purchase by Hunter; that he became a party to the arrangement, and assented to it; and he ought to be compelled to release the deed of trust held by him, the same having been satisfied by the tender.

These averments constitute the main ground upon which the complainants' application for relief is founded.

Vaughan, in his answer, admits

402 that Hunter, in the *year 1863, requested him to receive payment in Confederate currency, which he declined; but that there was no tender of it, and it was not insisted on by Hunter. He denies that he had any understanding before or after the sale with Hunter or Wells, that Hunter was to pay the debt due to him. He denies that he was a party to the contract of sale, or that he had any knowledge of it until after it was consummated, or that he had at any time agreed to accept payment in Confederate currency. It is true he received the interest in that currency up to January 1863; but it was because he chose to do so, and not because he was bound by any arrangement or promise to that effect.

The answer having thus positively denied the material allegations of the bill, it devolved upon the complainant to sustain them by two witnesses, or one witness with corroborating circumstances. The only evidence adduced by complainant is a letter written by Vaughan to Hunter the 1st January 1863, and an affidavit of John G. Hunter, taken without notice to the defendant, and excepted to upon that ground.

The letter is apparently an answer to an inquiry on the part of Hunter, whether Vaughan would consent to receive the principal of his debt in the then existing currency. Vaughan replied, that he only told Mr. Wells that possibly things might turn out, that he would receive the principal in currency; but he could not speak certainly about the matter. He further says, he has no use for the money, and cannot accept it; that the money was loaned in ordinary times, and that an attempt to force payment in the then existing state of things could not of course be tolerated, and he is sure would not be attempted. This language certainly does not indicate the existence of an agreement to receive Confederate money for the debt. It tends very

403 strongly to show, *that Vaughan at least, did not consider that any such arrangement was made. We must then look elsewhere for testimony in support of the bill. Does the affidavit furnish it, conceding that it is admissible evidence? It does not profess to state facts within the knowledge of the witness; but consists of opinions and inferences deduced by him from the letter already referred to, and the deeds filed in the record. It might be more appropriately considered an argument than a deposition. An answer positive and unequivocal in its terms, cannot be overthrown by a dozen affidavits of this character.

The Chancery court did not err, the efore,

in holding that the allegations of the bill were not sustained by the necessary proofs.

The next objection taken by the appellant, is, that the person acting as substituted trustee was not properly appointed; the appointment being made by the Circuit court of the city of Richmond, instead of the Chancery court. It is true that by the 6th section, chap. 155, Code of 1873, the Chancery court is clothed with exclusive jurisdiction in the enumerated cases in that section, and also all the jurisdiction vested in the Circuit courts of the State under the provisions of chap. 175. Neither the enumerated cases nor the provisions of chapter 175, however, embrace "motions and other matters" cognizable in other Circuit courts of the commonwealth. These last, by the 4th section of chapter 155, belong exclusively to the Circuit court of the city of Richmond, and not to the Chancery court. And it will be seen by reference to the 8th section of chapter 174, Code of 1873, that in any case in which the appointment of a new trustee is proper by reason of the death, removal or refusal to act of those named in the deed, application for such appointment may be made to the Circuit, County or Corporation court of the county or corpo-
404 ration *in which the deed is recorded.

These provisions make it very clear that the Circuit court of Richmond is the proper tribunal for the appointment of trustees in this and other cases of a similar character. Whether the Chancery court may also exercise jurisdiction in like cases we are not called on to decide.

In regard to the notice, it was properly given to the personal representative of the grantor in the deed, the personal representative of the trustee who was dead, and to the survivor who had removed beyond the limits of the State. It was not necessary that notice should be given to Hunter or his representative, as he was neither a grantor or grantee, nor a surety or other person intended to be secured by the deed.

The only remaining objection necessary to be considered is, that the legal title was and is in C. Q. Tompkins. In reply to this objection it has been very properly answered by the counsel for the appellee, that the point is for the first time made in this court, and was not suggested in the court below as a difficulty in the way of a sale under the trust deed; that if the objection had been then urged it might have been removed by an examination into the state of the title, or by the execution of a deed of release. But, apart from all this, I think it is very clear that Tompkins had conveyed to Wells long before the sale to Hunter. The recitals in the agreement between Tompkins and Wells show that it was understood between them a conveyance was to be made to Wells upon the payment of the instalment of $1,750 of the purchase money due the 20th June 1855; and it is manifest from the recitals in the deed from Wells to Hunter, that Wells had not only paid all the purchase money to Tompkins, but had received from him the legal title. And it is equally manifest that the only lien upon the property now prevailing, is that held by the
405 defendant *Vaughan; so that a sale by the trustee under that deed will vest in the purchaser a valid title. If there is any other cloud upon the title, it has been raised by this controversy, and will be removed by its termination, under the decree of the court below. That decree, for the reasons stated, must therefore be affirmed.

The other judges concurred in the opinion of Staples, J.

Decree affirmed.

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406 ***Davis, Trustee, v. Knight.**

January Term, 1874, Richmond.

Loan of Stock—Value.—I have this day Sept. 26, 1859, borrowed of Mrs. P. five thousand dollars, in stock of the state of Va., on which interest is payable semi-annually; and for the repayment of the same, with the accuring interest, I bind myself, my heirs, &c. Witness, &c. K. The stock was borrowed to be converted into money, and was sold in November for $4,755. HELD: P is entitled to the value of the stock at the time of the loan.

The facts of the case are stated in the opinion of Bouldin, J.

Neeson and Hudnall, for the appellant.

John Howard, for the appellee.

Bouldin, J. This case comes before us upon a writ of error to a judgment of the Circuit court of the city of Richmond. The action was a covenant upon the following obligation:

"Nottoway, Va., 26th Sept. 1859.

$5,000.

I have this day borrowed of Mrs. R. B. Parish five thousand dollars, in stock of the State of Virginia, on which interest is payable semi-annually; and for the repayment of the same, with the accruing interest, I bind myself, my heirs, &c. Witness, my hand and seal, this 26th September 1859. W. C. Knight. (Seal.)"

407 *The case was docketed, by consent, on the 14th day of January 1871, and the declaration filed in open court, on the same day. The declaration set out the covenants, and made profert thereof; and the breach assigned was, that the defendant, although reasonable time for repayment of the said sum of $5,000 had long since elapsed, had not repaid the same.

The facts of the case were agreed by the parties, by counsel; a jury was waived, and the case was submitted to the court on the law and facts. Those facts, so far as pertinent to the issue between the parties, were in substance, as follows:

On the 26th September 1859, Mrs. R. B. Parish, a sister-in-law of the defendant in error, W. C. Knight, with her daughter, was, as she had been for several years, boarding in the family of said Knight, then residing in Nottoway county; and he "borrowed" of her "five thousand dollars, in

Virginia State stock," executing and delivering to her, therefor, the obligation of which we have already given a copy. The stock was borrowed by Knight, to be converted into money, and used in payment of the purchase money of the estate called "Welton," then recently purchased by him; and was, in fact, sold by him on the —— day of November 1859 for $4,755. Mrs. Parish and daughter continued to reside with Knight down to the 30th of January 1866, when she intermarried with Hudnall; and in contemplation thereof, Knight's obligation was assigned to Davis, for her separate use; and on and after that day she ceased to board with Knight. Her daughter soon after married also, and ceased to reside with Knight. All accounts for board and charges for interest on Knight's obligation were fully stated, down to the time of the marriage; and since that time $637.50 had been paid on account of interest. Receipts passed on both sides, but it was
408 agreed *that their form was not to affect the construction of the obligation, and they need not be noticed. On or about the 2d of February, 1870, Knight indicated to Mrs. Hudnall his willingness to deliver to her, at par, State stock to the amount of five thousand dollars; that amount being then worth only about $2,500. She declined to take it; claiming $4,775, with interest on $5,000 from July 1, 1869; to which time it is agreed that interest had been paid.

The market value of the stock, when sold by Knight, in November 1859, was $4,775.12. On the 1st day of January, 1860 was $4,575; on the 1st day of January 1861 was the same, $4,575; and on the day of trial was $2,525, without interest.

And it was "further agreed that the defendant may make any defence under the pleas of covenants performed and covenants not broken that he might make under any special plea; and that the court, alike Circuit and Appellate, may draw such inferences from the facts agreed as a jury could be entitled to do."

The Circuit court gave judgment against the defendant for $2,975, being the aggregate of the then value of the stock aforesaid, and interest thereon from July 1, 1869, with interest on said aggregate sum.

To this judgment the plaintiff excepted; and the facts agreed are all spread on the record. A writ of error to the judgment was awarded by a judge of this court.

The case has been argued with marked learning and ability on both sides; but under the construction which I have placed on the contract it will not be necessary to follow their line of argument.

I concur with the learned counsel for the appellee, that the contract before us, "is either a stock contract or a money contract; it is either a loan of stock and an
409 *obligation to replace it, or it is a loan of money, the proceeds (or more appropriately the agreed value) of stock, and an obligation to repay it, with interest on the face value of the stock;" or I would add, on the money loaned, which in this case is the same thing. One or the other of these constructions, modified as above, should in my opinion be placed on Knight's obligation; but, unlike the learned counsel, I think it wholly immaterial, on the facts of this case, which construction shall be adopted. The practical result to the parties will be the same under either construction. The judges of this court differ in opinion as to which is the true construction of the contract. My own opinion is, that it is purely a money contract; simply borrowing and lending of five thousand dollars, the estimated value of State stock transferred to the borrower, with an obligation to repay the same; the five thousand dollars borrowed, with interest thereon. This, I think, is the literal construction and the legal effect of the obligation, and it is a construction which will do substantial justice between the parties. The language of the obligation, which is copied above, imports a loan of money. "I have this day borrowed from R. B. Parish, five thousand dollars, (a comma after the word dollars) in stock of the State of Virginia," &c. He does not borrow bonds or stock of the State for five thousand dollars; but he borrows "five thousand dollars in stock of the State of Virginia (how much stock it required to be worth that sum does not appear on the face of the covenant and is not shown by the facts agreed), and for the repayment of the same, with the accruing interest," he bound himself, &c., &c. Here, again, it will be observed, the words of the obligation are entirely appropriate to a loan of money, but not at all appropriate to a loan of stock. Had it been the latter, the obligation
410 would have been for its return or *replacement, and not as here, for the repayment of the same; language appropriate only to a return of money. And the learned counsel for the appellee has himself acknowledged the justice of this criticism, in stating the propositions before the court. He says, it is either a money contract with an obligation "to repay," &c., or a stock contract with an obligation "to replace," &c. He uses the right word in the right place. The language is apt and the distinction pertinent. But there is another reason apparent on the face of this obligation, for treating it as a contract for the loan of money—as an obligation for five thousand dollars—not stock, but money. There is on the margin of the obligation the usual dollar mark, and figures representing five thousand dollars, thus, "$5,000," showing, as I think unmistakably, henw taken in connection with the language, that it was the intent of the parties to secure to the lender $5,000. And I am fortified in this view of the contract by the construction uniformly placed on similar language under a like state of facts in construing legacies. Such language has been uniformly held to constitute a money legacy—a general pecuniary legacy—called demonstrative, and not a specific legacy of that much stock.

It is contended, however, that such a con-

struction would be fatal to the appellant's claim; that the contract would be usurious, and therefore void. It is not contended that the rate of interest stipulated for is usurious; for that is only six per cent. on the sum borrowed. But it is contended, that the contract, if treated as an obligation for the payment of five thousand dollars, is usurious and void, because, as alleged by the defendant in error, the State bonds, from which the loan arose, were at the date of the loan below par, and not worth the sum of $5,000, at which they were rated
411 by the parties; that *they were then worth only $4,775; and being rated at $5,000, the contract was usurious. The conclusion would be difficult to avoid, were the premises true. We have, however, the contract before us, showing that Knight borrowed $5,000 worth of stock. But, there is not a word in the facts agreed, literally nothing, showing or tending to show, either the amount of State bonds transferred, or their value at the date of the loan, except the obligation itself. That obligation values the stock, whatever the amount was, at $5,000; and, as I have said, we have literally nothing in the record to show that it was then worth less. But, it is argued that it was below par, because it is an admitted fact that on the —— day of November 1859, Knight sold the same stock for only $4,775. The fact is true, but the conclusion a non sequitur. The contract was made the 26th of September 1859, and the sale by Knight on the —— day of November 1859; (what day does not appear;) and it would be more reasonable to conclude that for some sufficient cause there was a decline in State bonds between those dates; and, more especially, when we remember that these bonds did decline between the date of Knight's sale and the first of January thereafter, at about the same rate; for it is an admitted fact, that whilst they were worth, at the date of Knight's sale, $4,775.12, they had declined, on the 1st of January 1860, say, in six weeks, to $4,575, their then value; that decline bearing, it will be seen, very nearly the same proportion to $4,775.12 as the latter sum does to $5,000, and showing a proportionate decline. I see nothing, then, in these figures, which can properly lead us to the conclusion that the stock transferred was over-estimated by the parties; and there is literally nothing in the record from which that can be legitimately inferred as a fact in the cause. We
412 must, therefore, *take the estimate of the parties as true; and the contract, in my opinion, is not usurious.

This view of the case renders it unnecessary that we should follow the learned counsel in their interesting and exhaustive arguments as to the time when the covenant was broken and the measure of damages. Being in my opinion a simple covenant to pay five thousand dollars, with legal interest thereon, the plaintiff in error was entitled to a judgment for that sum, with interest from the first day of July 1869 till paid, all interest having been fully paid to that date. And in these views Judge Anderson concurs.

It is perhaps proper to say, as undue prominence may seem to have been given to a minority opinion, that when the above was prepared the writer supposed they were the views of the court. But a majority of the judges do not concur in those views. They hold that the contract between the parties was for a loan of stock, to be replaced in kind, and not a borrowing and lending of money; that, fairly and reasonably construed, the contract was either for the loan of State bonds for five thousand dollars, of par value, to be replaced by like bonds of like value, with accruing interest; or for the loan of State bonds of the value of five thousand dollars, to be replaced by State bonds of like value, without interest. The practical result of this construction is in all respects the same with that attained by the views of the minority. The contract can only be performed by returning to the lender State stock of the same value with that of the stock loaned, viz: $5,000; and that sum, with interest, must necessarily be the measure of damages for a failure to return the stock.

But as the plaintiff in error seems never to have demanded more than the sum
413 of four thousand seven *hundred and seventy-five dollars, the amount for which the defendant in error sold the stock, soon after the loan, and does not claim more now, it is the opinion of all the judges that judgment should be entered for that sum only, with interest thereon from the first day of July 1869, till paid.

We reach this result with the greater satisfaction, because we think it reaches the substantial justice of the case. The plaintiff in error secures all that her stock sold for, very soon after the loan was made; and the defendant in error is made to pay only what he actually realized. We think that neither party contemplated a contract of speculation or hazard. Their relation to each other, at the time of the loan, forbids the idea.

The judgment of the Circuit court must be reversed, with costs to the plaintiff in error, and judgment entered here for four thousand seven hundred and seventy-five dollars, with interest from the first day of July 1869, till paid, and the costs in the Circuit court.

Anderson, J. concurred in the opinion of Bouldin, J.

The other judges did not concur in the opinion of Bouldin, J., as to the construction of the contract; but all concurred in reversing the judgment, and rendering a judgment in favor of the appellant for the value of the stock at the time of the loan.

Judgment reversed.

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414 ***Chieves & Osborne v. Gary's Adm'r.**

January Term, 1874. Richmond.

Absent, CHRISTIAN, J.

Settlement of Accounts.—C, a manufacturer of tobacco, in 1849 employs G in his business, and agrees

to give him one-fourth of the net profits of all the tobacco manufactured by C. G dies in January 1860, and G's administrator files his bill against C for an account and payment. C answers and says there is an account on his books called "factory account," which shows correctly the net profits of the business. This account, however, is only brought up to December 1858, as the business of 1859 was not closed. Upon the suggestion of the commissioner directed to take the account, C and G's administrator agree to a mode of settlement based upon the factory account. And they agree that the account for 1859 shall be settled upon the same principles. A lot of tobacco manufactured in 1858 and 1859 C claims is not within the terms of the agreement. As G was to have one-fourth of the net profits on all tobacco manufactured, the account of 1859 must be settled so as in effect to bring this lot into the factory account, and allow G one-fourth of the profits of it.

In April 1860 Travis T. Broocks, administrator of John G. E. Gary, deceased, instituted a suit in equity in the Circuit court of the city of Petersburg, against James Chieves and Edmund H. Osborne. In his bill he sets out, that about the beginning of the year 1849 John G. E. Gary, who possessed great experience and practical skill as a manufacturer of tobacco, James Chieves and Edmund H. Osborne, 415 commenced the business of *manufacturing tobacco in Petersburg in the name of James Chieves, and continued the business on a large scale until the death of Gary on the 9th day of January 1860. The business was very profitable; there was, as far as plaintiff knows, no written agreement between the parties, as to the extent or character of their respective interests; but he has been informed and believes that it was agreed between them, that the said Chieves should receive three-eighths, the said Osborne three-eighths, and the said Gary one-fourth, of the profits of said business; and he thinks it probable that beyond this there was never any express agreement between the said parties as to their respective interests. Plaintiff is unable to affirm whether all the said parties were or were not partners; but he knows that the said Osborne and Chieves, since the death of said Gary, insist that he was not a partner, and that he was only entitled to receive one-fourth of the profits as compensation for his services. The plaintiff has not such information as will enable him to affirm that these allegations are untrue, or to admit that they are true; and to enable him better to understand the rights and interests of his intestate he has been desirous to examine the books in which the accounts of said business was kept, and which are in the possession of Osborne and Chieves. This he conceived he had a right to do whether his intestate was a partner or only entitled to a share of the profits as compensation for his services. But the said Chieves and Osborne have refused, though repeatedly applied to, to allow the plaintiff to examine the said books, or any of them, unless he would first admit that his intestate was not a partner. This the plaintiff could not do, having due regard to the rights and interests of his intestate's estate. He prays that they may severally make full answer to the bill on oath; that the court may direct a settlement of all accounts 416 *and transactions between the said Gary and Chieves and Osborne; that plaintiff may have a decree for what shall be found due to him as administrator of Gary; and for general relief.

Chieves and Osborne appeared and demurred to and answered the bill separately. The demurrers were for want of equity in the bill; and were overruled.

Chieves, in his answer, says that a verbal contract of partnership was entered into in the latter part of 1848, between Osborne and himself, for the manufacture of tobacco, to be conducted under the name of James Chieves. That the business of the firm commenced on that day, and has continued, without interruption, to this day, the 20th of May 1860: they being the only partners of the firm. That a contract was made by Osborne, with said Gary, (subject to his approval,) that Gary should serve the firm of James Chieves as overseer or manager in the tobacco factory, for a compensation equal to one-fourth of the net profits realized from manufactured tobacco. To this contract respondent reluctantly assented; and Gary, on the first of January 1849, entered the service of said firm in the capacity and upon the terms aforesaid. He denies that Gary ever was a partner in said firm, or ever acted as such, or pretended to be a partner; or that he had any interest, whatever, in the business, assets or profits of the firm, except to receive one-fourth part of the net profits realized on manufactured tobacco, as compensation for his services, in pursuance of the contract of service made as aforesaid. He denies that the defendants, or either of them, have refused to render an account, or to make payment of whatever may be due to the decedent from the said firm, or from the defendants or either of them. On the contrary, this respondent proposed to the plaintiff that he might select any competent accountant 417 in the city of Petersburg *to examine the books and papers of the firm of James Chieves, and make out from them a full account of Gary's transactions and accounts with the firm; and that your respondent would give such accountant access to all his books and papers, and pay at once, in a satisfactory manner, the balance found against the firm. But respondent was and is unwilling, and still refuses, to permit the plaintiff, who is a rival in the business of manufacturing tobacco, to examine his books and papers, and learn their contents, so that he may publish to the world, or use for his own advantage, information of great value to this respondent, and acquired at great cost. He is still willing that your honor, or any competent accountant, who would respect the privacy of respondent's affairs, shall take the books and papers of the firm, and explore them, and make out Gary's account.

The defendant further says: Upon the books of the said firm there was opened, and always accurately kept, a "factory account," which showed, at the end of every year, the net profits realized upon manufactured tobacco, to one-fourth part of which Gary was entitled, as compensation for his services in money, when he might choose to demand it. His account upon the books shows that when he wanted money he obtained it, from time to time, from his employers, and was regularly charged with it. The account filed with the answer of the defendant Osborne is made up from the books, and is a full, true and correct account of the credits to which Gary was entitled, and of the sums of money with which he should be charged, and shows truly the balance due him, and is adopted as part of this answer.

The defendant further denies that he ever sought or endeavoured, directly or indirectly, to exact or otherwise obtain from the plaintiff, any admission or concession at all affecting the estate of the de-
418 cedent or the *plaintiff's rights as the decedent's representative. On the contrary defendant offered to show to the plaintiff Gary's account on the books, and to give any explanation or information in respect to it, that he might deem necessary and proper to satisfy him: but the plaintiff declined said offer; saying that if he could not examine all the books he would examine none.

The answer of the defendant Osborne is substantially the same as that of Chieves. He says—An abstract of said Gary's account made out from the books and marked Exhibit A, is herewith filed, as part of this answer, and shows that there was due to the decedent at the time of his death the balance of $23,999.72. He avers that said account is a true abstract of said Gary's account on the books of the firm, and he submits that the plaintiff is not entitled to any further account, and certainly is not entitled to the production of the books and papers of said firm, unless he can by proof or affidavit lay the foundation for the belief, that said books and papers would, if produced, establish said account to be erroneous.

The exhibit A was a statement, first of moneys received by Gary in each year commencing on the 1st of January 1850 and ending the 1st of January 1860, amounting to $48,975. Then a statement of one-fourth of the profits down to 1859 (the factory account for year 1859 not settled) $72,974.81; making amount due Gary $23,999.72.

The cause came on to be heard on the 6th of June 1860, when the court, not then deciding the question whether Gary was or was not a partner of the defendants, and interested as such in their business, decreed that the defendants render before one of the commissioners of the court an account of the business carried on by them under the name of James Chieves, so far as
419 *the same relates to the manufacture of tobacco, and so far as to show the net profits of the business of manufacturing tobacco, done under the said name, from the 1st of January 1849 to the day of Gary's death, and the amount due him on account of his share of one-fourth part of the profits of said business of manufacturing tobacco, &c. And the defendants were directed to produce before said commissioner, on oath, all books, documents, accounts, correspondence and papers relating to said business, the same to be subject to the examination of the commissioner and the plaintiff. And that both plaintiff and defendants submit to be examined on oath touching the subject matter of this reference, or touching said books, &c., as to which the commissioner or any party may desire such examination. But nothing herein shall require the defendants to produce any books, &c., or answer any question not necessary to show the transactions, accounts and profits of said business, and the amount due to the plaintiff on account of his intestate's interest therein.

On the 10th day of September 1860, Chieves, Osborne and Broocks, entered into an agreement under seal, by which, after reciting the reference of the cause to a commissioner to take the account, and that John Mann, one of the commissioners of the court, had issued his notice to the defendants to produce the books, &c., which they had done, proceeds: And whereas the said John Mann being desirous of effecting a compromise between the parties to said suit, and thus end the controversy between them after examining the papers in the cause, and making a partial examination of the books, &c., submitted to him by the defendants, of his own accord, made the following proposition to them, to wit: That he should settle the account required by the decree aforesaid, on the assumption
420 that the plaintiff's intestate, *John G. E. Gary, was an employee of the firm carried on under the name of James Chieves; and in settling the same that he should take the balance of the profits of the business of manufacturing tobacco in each year from the 1st of January 1849 to the 31st of December 1858, as shown by "factory account" and "factory balances," on the books of said firm, without computing interest on the several items in said accounts, as the true balance of said business for each year, strike the balance on the 31st day of December of each year, and carry one-fourth of the balances to the credit of John G. E. Gary. And in settling the said Gary's account with the firm, he should deduct the amount of his debits for each year without interest, from his proportion of the profits for that year: the balance due him on the 31st of December in each year to bear interest from date until paid; to which proposition the parties to the said suit agreed. Now, therefore, it is hereby agreed by the parties aforesaid, that the said Mann shall settle the accounts required by the decree aforesaid up to the 31st of December 1858 (which is as far as the same can now be settled) upon the principles proposed by him, and report the same to the court as

the basis of its decree. And that the accounts from the 31st of December 1858 to the 9th of January 1860, the day of Gary's death, shall be hereafter settled and reported on the same principles. And the said parties agree to abide by the settlement to be made on the principles aforesaid, as final and conclusive between them, and to perform the decree or decrees that may be founded thereon.

On the 6th of October 1860 Commissioner Mann returned his report. He says that after a careful examination of the papers in the cause, and a partial examination of the books, &c., produced before him by the defendants, he submitted to the parties a proposition in *writing indicating the manner in which the accounts directed by the decree should be settled; which was accepted. And he sets it out as it has been stated. He says he has settled the accounts in the manner agreed on by the parties, which embraces all the debits against Gary from the 1st of January 1849 to the 31st of December 1859, on which day the account is closed, and shows a balance due John G. E. Gary by the defendants of $55,281.50, of which $38,117.73 is principal, and $17,163.77 is interest.

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The commissioner reports further—that the profits or the business for the year 1859 are not embraced in the settlement, because the tobacco manufactured in that year has not yet been sold, and the profits are not ascertained.

On the books of the firm there is an account headed "Adventure to California," which consists of tobacco manufactured by James Chieves: it is claimed by the plaintiff that the profits of said adventure are included in the terms of the written agreement hereinbefore referred to; which is denied by the defendants. The commissioner expresses no opinion upon this subject, inasmuch as it does not practically arise; the adventure to California being yet open. It is reserved as a matter for future consideration upon such proofs and arguments as may be offered by either party.

The cause came on to be heard on the 21st of November 1860 upon the papers formerly read, the agreement of the parties and the report of the commissioner made in pursuance of said agreement, to which there was no exception; on consideration whereof the court confirmed the report, and decreed that the defendants Chieves and Osborne should pay to the plaintiff, Broocks administrator of Gary, the sum of $55,281.50, with interest *on $38,117.73, part thereof, from the 31st of December 1859 till paid.

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And the court, without then deciding anything in relation to the "California Adventure," referred to in the report of the commissioner, but reserving the same for future consideration, decreed that the defendants render before one of the commissioners of the court, upon the basis and according to the principles of the agreement of the parties aforesaid, an account of the transactions between the parties not embraced by the former report, and up to the 9th of January 1860, the day of Gary's death.

The account directed by the decree of November 21st 1860 not having been taken, the court on the 26th of November 1866 ordered that one of the commissioners of the court should proceed to take it. And for the better taking the account it was ordered that the defendants produce before the commissioner, on oath, all books &c. in their possession, that may be necessary to enable the commissioner to state and settle the account. And both plaintiff and defendants submit to be examined, &c.

In May 1868 the commissioner made his report, by which he reported the profits of the concern of Chieves on manufactured tobacco, for the year 1859, at $9,569.03; of which Gary's estate was entitled to one-fourth, $2,392.25. In his report he says on the books of the firm there is an account headed "Adventure to California," which consists of tobacco manufactured by James Chieves. It is claimed by the plaintiff that the profits in said adventure are included in the terms of the written agreement, hereinbefore referred to, which is denied by the defendants. The commissioner expresses no opinion upon the subject. He however makes a *special statement at the instance of the plaintiff's counsel, in which the right of Gary to one-fourth of the profits on the tobacco entered on the books as the California Adventure is discussed.

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As to this "California Adventure," it appears that prior to 1857 E. J. Hudson had been engaged in manufacturing tobacco and sending it to California. In July 1857 he and Chieves and Osborne entered into a written agreement, by which he sold to them his brands and marks used by him in shipments of tobacco to California, for which they were to pay him $5,000 in two annual payments of $2,500 each from the 1st of January 1858, provided the shipments to California should make a net profit of that amount. Chieves and Osborne were to keep an account of said business, their statement to be final; and of the net profits for three years and six months, if any, Hudson should receive one-third, after deducting the amount of $5,000. Chieves and Osborne for manufacture of said tobacco, were not to charge less than six nor more than seven cents per pound; and this charge to include sweetening and flavoring.

Under this contract the firm of James Chieves proceeded to manufacture and ship tobacco to California; and they kept a separate account of it on the books of James Chieves, under the title of "Adventure to California." There seems to be an entry of a small sum on account of this adventure in 1857 entered on the factory account; but that account did not show the profits of any tobacco connected with this adventure for the business of the year 1858 or 1859. And Chieves and Osborne contended that this

tobacco did not come within the terms of their agreement with Broocks.

The defendants excepted to the report; but the only material exception is to the rejection of a credit of $2,500, on account of the depreciation of the value of to-
424 bacco on *hand at the end of the year 1859. This the commissioner rejected as not sustained by the evidence. They also excepted to the special statement.

The cause came on again to be heard on the 5th of June 1868, when the court overruled the exceptions, and confirmed the report; and rendered a decree in favour of the plaintiff against the defendants for the said sum of $2,392.25, with interest thereon from the 1st of January 1861 till paid.

And the court being of opinion that Gary was entitled to one-fourth of the profits of the tobacco manufactured by the firm of James Chieves which was credited on the books of the firm to "factory accounts" for 1858 and 1859, and debited to the accounts on the books of said firm headed "Adventure to California" 1858 and 1859, decreed that the defendants render before the commissioner an account of this tobacco so as to show the profits on it. From this decree Chieves and Osborne obtained an appeal to the District court of appeals at Petersburg; when so much of the decree as directed an account of the tobacco referred to under the head of Adventure to California was reversed. And thereupon the plaintiff applied to this court for an appeal, which was allowed.

J. Alfred Jones and Mann & Stringfellow, for appellant.

John Lyon, for appellees.

Anderson J. delivered the opinion of the court.

By the admission of the appellants, in their answers to plaintiff's bill, the plaintiff's intestate, by contract with the firm of James Chieves, was entitled to receive one-fourth part of the net profit realized.
425 upon *the manufactured tobacco, for his services, in lieu of a fixed salary. And the tobacco which was manufactured for the California adventure by the firm, as shown by the entries in their books, was manufactured in the same way all the rest of their tobacco was, and by the firm, under the direction and management of the said Gary, and necessarily constitutes a part of the manufactured tobacco, in the profit upon which he was entitled to share, there being no pretence even of an agreement on his part to except it from the contract. The contract of the appellees with Edward J. Hudson, to give him one-third of the net profits on the tobacco manufactured for the California adventure, although enhancing the cost of manufacture, did not authorize them to impose other terms upon Gary, without his consent; and could not deprive him of his right to the one-fourth part of the net profits realized upon that tobacco, he never having surrendered his right thereto, or changed his contract in respect to it. Was this right surrendered by his administrator, the appellant, by his contract made with the appellees, pending this suit? This is the main question. If it was not surrendered, the intestate's estate is still entitled to one-fourth part of the profits realized by the firm on the manufactured tobacco shipped to California.

There is no express stipulation of release or surrender in the contract. And it can be implied, if at all, only from the direction to take the balances, as shown in the "factory account" and "factory balances," as the true balances. If that language restricts the commissioner to the entries made under those heads of account, and forbids the correction of any errors, either by taking from, or adding to, or changing the balances shown by those accounts, as written up, (which would be adhering very closely to the letter,) such restriction could only apply to the account for 1858 and the pre-
426 vious years. It could *not, and does not, apply to the account for 1859, which had not been closed on the books. The accounts for 1858 and the previous years, were stated and reported to the court, and the balances, as shown in "factory account" and "factory balances," were taken as true, and showed a balance in favor of the plaintiff's intestate of $55,281 and 50 cents, after deducting debits of 1859. To this report there was no exception, and the same was confirmed by the court; and the above balance was decreed the plaintiff; and the commissioner was directed to take an account of the transactions between the parties, not embraced in said report, up to the 9th of January 1860, upon the same principles which had been agreed upon for the settlement of the previous account.

Those principles were, so far as applicable to the statement of the account subsequent to 1858, that the plaintiff's intestate should be treated as an employee of the firm, entitled to one-fourth part of the profits on the tobacco manufactured, and that his debits for the year 1859, which had not been taken from the balance due on the previous account, if any, should be deducted, without interest, from his proportion of the profits, to the close of the year 1859; the balance to bear interest until paid. These were the principles upon which, by the agreement, the previous account was to be settled. And, in addition, it was stipulated that in its settlement the balances, as shown by "factory account" and "factory balances," should be taken as true. But such direction could not be applicable to the account for 1859, because confessedly the accounts for that year had not been written up, and the balance was not shown; and therefore could not be taken as true.

It was shown by "factory account" for the year 1858, that the manufactured tobacco shipped to California that year, cost the firm $29,423.38, which is credited to
427 "factory *account." But no credit is given for the profits realized on that tobacco. "Factory account" is cred-

ited with 7 cents a pound. But that entry was made in pursuance of the agreement made by the appellees with Hudson, to which Gary was no party; by which they bound themselves to keep an account of that business and of the net profits, of which Hudson was to have one-third. They also agreed that the charge for manufacturing should not be less than 6 nor more than 7 cents a pound, which should include sweetening and flavouring. The language imports that it was the estimated cost of manufacturing; and according to the weight of evidence, it does not exceed the cost. But, be that as it may, they could not limit the profits in that way, so as to impair the right of Gary, under his contract, to the one-fourth part of the actual profits, without his consent. It was binding only between them and Hudson. And this entry was necessary, and could only have been intended to carry out their contract with Hudson. Then, when they received the returns of sales, a deduction of the cost of the tobacco, as credited to "factory account," from the net proceeds of sales, would show the profit; from which one-third, which they agreed to give Hudson, should be taken, as a part of the costs to the firm; and the other two-thirds should be credited to "factory balances," or carried to "profit and loss," which is in effect the same; and out of which, as the profit on manufactured tobacco, Gary, by his admitted contract, was entitled to one-fourth.

But the factory account for 1858 did not show this balance, and the balance shown by it was to be taken as true. If no sales had been made of this year's shipments, or if the account and proceeds of sales had not been received by the close of the year 1858, no profit had been realized upon this tobacco at that time; and by the terms 428 *of the agreement with Gary, as it is set out by the appellees, he was only entitled to a share of the profits realized. And no entry of profits could be credited to "factory balances" until returns were received. Until then Gary was not entitled to be credited with his share of the net profits. "Factory accounts" is not credited with the shipments until December 1858, and it is therefore evident that the profits could not be realized in time to entitle Gary to a credit for his one-fourth part by the 31st of December 1858, when the "factory account" for the year was closed on the books. No profit having been realized, as late as the 31st of December 1858, as far as this record shows, the "factory account" showed the true balance then due Gary. But that could not preclude him from receiving his share in 1859, or subsequently, whenever the profits were realized.

But the cost of tobacco credited to "factory account" is debited to "adventure to California;" and as the returns are received, must necessarily be credited to the same. This does not show that the firm in making that entry intended to withhold from Gary his share of the net profits, or to deny his right to it. This evidently appears from the fact that the entry, upon shipment of 1857, to California, was made in the same way, and one-third of the net profits was credited to Hudson, and one-fourth of the two-thirds was credited to Gary. And if so, his administrator, in agreeing to take the balances shown by "factory account" and "factory balances" as true, if his attention had been called especially to the entry aforesaid, could not have interpreted it as an exclusion or denial of his intestate's right to the one-fourth part of the net profits on the tobacco shipped to California, when the returns were received and the profits realized. It was proper that this transaction should be kept separate from other transactions of the factory, in 429 order to ascertain *Hudson's share of the net profits. When that was deducted, the net profit of the firm which remained might be carried back to "factory balance," and thence to "profit and loss," which is the summing up of the balances of all the accounts, to show what profits there are for division; or, to avoid that circuity, it might be carried directly to "profit and loss," as seems to have been done with the profit on the shipment to California in 1857, which was afterwards divided, and one-fourth credited to John G. E. Gary, who was then living. It would be more regular, after the amount due Hudson was ascertained and deducted, especially if Gary was not a partner, and was entitled only to a share of the profit on manufactured tobacco, to carry the net profit of the firm (the two-thirds) to factory balance account, and to credit Gary, to the debit of "factory balance," with his one-fourth part of the profit, and carry the balance to "profit and loss" account, to be divided between the members of the firm. And the administrator, when making this agreement, if his attention had been called to this matter at all, may well have concluded that, when the profits on the shipments of 1858 to California were realized, they would be credited to "factory," on "factory balance" account. However that may be, there is nothing in the terms of his agreement, or in any fair inference therefrom, to inhibit it. Nor does it appear that it was the intention of the administrator by this contract to surrender his intestate's undoubted right to share in the profits realized from a part of the tobacco, and a very large portion of it, manufactured in 1858 and 1859. Nor is such the effect of his contract.

But, if the clause of the contract, which we have been considering, could be construed as restricting the plaintiff to the balance due on the 31st of December 1858, as shown by "factory account," and as 430 excluding him from *a share of the profits on the manufactured tobacco shipped to California prior to that date, we think, from the conduct of the appellees and all the circumstances disclosed by the record, that it was a deception practiced upon the administrator; and that in consenting to said contract, he was not aware that it was liable to such a construction, or

that he was surrendering the right of his intestate to one-fourth part of the profit realized upon any part of the tobacco manufactured by the firm under his direction and management.

Mr. Osborne, in his answer, had sworn that the firm "opened and kept upon their books a 'factory account,' which shows, correctly and compactly, for every year, the net profits realized upon manufactured tobacco, to one-fourth part of which Gary was entitled, in lieu of a fixed and stated salary, as compensation for his services." Upon the recommendation of the commissioner, which was doubtless influenced by this asservation of Osborne in his answer—(for he says he had carefully examined the papers in the cause before he recommended to the parties the terms of adjustment—though he had only partially examined the books &c. of the firm)—the said recommendation of the commissioner, and also the representation of Osborne, (which was not true, if it excluded the profits on the manufactured tobacco shipped to California,) the administrator acceded to the recommendation of the commissioner.

The administrator was entitled to a full and truthful disclosure from the appellees; and they were bound by the sacred obligations of trust to a dead man's estate, to make a truthful disclosure. It was made under the sanctity of an oath; and the plaintiff, upon the faith of it, accepted the terms which were recommended. It will be remembered that the want of candor in other representations and disclosures was
431 not then known. The *plaintiff's intestate had died suddenly, and left no trace or evidence of his relation to the business of James Chieves, or of his just demands against the firm. They refused to allow the plaintiff access to their books, correspondence, &c., to obtain information; but undertook to give him, personally, such information as they chose. And he had to file his bill in chancery against them. Mr. Osborne, with his answer, filed an account as an exhibit, showing a balance of $23,999.72, of which he says: "This respondent avers that said account is a true abstract of said Gary's account on the books of the firm, and respectfully submits that the plaintiff is not entitled to any further account, and certainly is not entitled to the production of any of the books and papers of said firm, unless he can by proof or affidavit lay the foundation for the belief that said books and papers would, if produced, establish said account to be erroneous." Of this account Mr. Chieves says: "The account filed with the answer of the defendant Osborne is made up from the books, and is a true and correct account of the credits to which Gary is entitled, and of the sums of money with which he should be charged, and shows truly the balance due him, and is adopted as part of this answer." Yet the commissioner, in stating an account from their books, shows a balance of $55,281.50, which he reports to the court, and which is confirmed by the court, without an exception. Afterwards, in the statement of the subsequent accounts, Mr. Chieves exhibits an account of the transactions of 1859, showing no profit, but a loss of $1,721.68 for that year. Yet the commissioner reports a profit of $9,569.03, exclusive of the profit on the tobacco shipped to California, which is confirmed by the court; and we think correctly.

If these exposures had been made before the agreement in question was entered into by the plaintiff, they would
432 *have been sufficient to throw him upon his guard. But they were not; and he having no evidence in his possession, and relying upon the appellees for information, if they misled him into a contract, by uncandid disclosures, to the wrong and injury of his intestate's estate, the court is of opinion that they should not, in conscience and equity, be allowed to take advantage of it.

The court is therefore of opinion that there is no error in the decree of the Circuit court, and that the decree of the District court, so far as it reverses it, is erroneous. Let the decree of the District court, so far as it reverses the decree of the Circuit court, be reversed; and the decree of the Circuit court be affirmed; and the cause be remanded to the Circuit court of Petersburg, for further proceedings to be had therein, in conformity with this opinion.

Decree of District court of appeals reversed.

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433 *Wrightsman v. Bowyer & al.

March Term, 1874, Richmond.

1. **Bonds.***—By bond dated July 7th 1863, B promises to pay to W, three years after date, $2,000 without interest, in funds current in the State of Virginia, being money borrowed. HELD:
   1. **Same—Parol Evidence.**—Parol evidence is admissible to prove the consideration of the bond and the character of the contract.
   2. **Same—Same.**†—The evidence showing that it was a contract of hazard, and that the parties contemplated the possibility, though not the probability, of the failure of the Confederacy, and intended that the bond should be discharged in the currency in use when it fell due, W is entitled to recover the value of $2,000 in the United States currency then in use in Virginia on the day it fell due, with interest from that date, and no more.

The case is sufficiently stated by Anderson J. in his opinion.

Strouse & Marshall and Skeen for the appellant.

Figgatt for the appellees.

Anderson, J. This was an action of covenant, brought upon an obligation in these words:

***Bonds—Parol Evidence.**—See Ruckman v. Lightner's Ex'or, 24 Gratt. 19, and *note*.

†**Bonds—Confederate Currency.**—See Rives v. Farish's Adm'r, 24 Gratt. 125, and *note*, and Effinger v. Kenney, 24 Gratt. 116, and *note*.

"Three years after date we bind ourselves, our heirs, &c., to pay to Samuel S. Wrightman the sum of two thousand dollars, without interest, in funds current in the State of Virginia, being money borrowed by us on joint account.

434 *"As witness our hands and seals this 7th day of July, one thousand eight hundred and sixty-three.

(Signed) "H. W. Bowyer. [Seal.]
"Sam'l M. Carper." [Seal.]

The court gave judgment for $277.77, with interest thereon from the 7th of July 1866. To which judgment the plaintiff obtained a supersedeas from one of the judges of this court.

Several errors are assigned in the petition. First, setting aside the verdict of the jury of the 9th of September 1871, and granting a new trial; second, setting aside the verdict of the jury of the 6th of April 1872, and granting a new trial; and third, in sustaining the demurrer to the evidence. The grounds of the two first assignments of error will be noticed in considering the last—the demurrer to the evidence.

The court does not seem to have sustained the demurrer. On the contrary it gave judgment for the lowest alternative assessment of damages by the jury. The question as to the plaintiff's right of recovery was not submitted to the jury, but only the assessment of damages, in case the court should determine the law in favor of the plaintiff. Upon the demurrer the court was the judge both of the law and the facts, and it was only the province of the jury to assess the damages. Accordingly the jury found the damages to be $2,000, with interest, &c., on one construction of the contract, if the court should so construe it upon the evidence; upon another construction of the contract, if the court should so construe it, they assessed the damages at $277.77, with interest, &c.; and upon another construction of the contract, if the court should so construe it, they assessed the damages at $1,360.50, with interest thereon from the 7th of July 1866 till

435 payment. This verdict seems *to have covered the whole ground of contention, and to have ascertained what should be the plaintiff's recovery in damages in either aspect in which the case might be viewed by the court. And the court being of opinion, from the evidence, that the contract was entered into with reference to Confederate States treasury notes as a standard of value, and was to be fulfilled and performed in such notes, gave the plaintiff judgment for $277.77, with interest, according to the finding of the jury in such case. And it now devolves upon this court to determine whether, upon the evidence certified, there is error in that judgment.

If the bond was the only evidence in the record, it being for a loan of money at a time when Confederate money, as is judicially known, was the only currency; and when contracts were almost universally made with reference to that currency as a standard of value, I think the fair presumption would be that the lending of Confederate money was the consideration of the obligation; that the contract was made with reference to it as the standard of value, and that it was payable in the same kind of currency. (See Dearing & Rucker; Miller and Franklin v. The City of Lynchburg; Meredith v. Salmon; Walker's ex'or v. Page & al.; Hilb. v. Peytons; and Calbraith v. The Porcelain Earthenware Co.) And if that were so, I should not be disposed to disturb the judgment of the Circuit court. But I think the parol evidence repels that presumption. It shows that the consideration of the obligation for $2,000, payable in three years, without interest, was $2,500 in Confederate treasury notes; from which it would seem that Confederate treasury notes were not the standard of value to which reference was had in the contract. It is also further proved that it was the in-

436 tention of the parties to fix the *day of payment so remote that it would not fall due until after the war; and that the parties considered the probabilities whether it would be payable in Confederate currency or not. The borrowers calculated that the war would result in favor of the Confederate States, and that, although it would be payable in a better currency, it would be Confederate; but that if it did not result in favor of the Confederacy, the bond would have to be discharged in United States currency. This they did not think probable, and therefore, as they were getting $2,500 for $2,000 without interest for three years, they were willing to run the risk. It is evident, from their own testimony, that they were aware of this risk, and that it entered into their calculations; and that they contemplated that this contingency might arise, in which the obligation they were assuming might have to be discharged in United States currency. Thus they made a contract of hazard to pay $2,000, in three years, without interest, not in gold, but in funds current at the maturity of the bond, whether those funds were Confederate or Federal depending upon the result of the war. Such I think is evident from the testimony of the obligors themselves; and it accords with the testimony of the obligee. He did not know what would be current funds after the war, whether Confederate or Federal; but he was willing to run the risk, and to take $2,000 in whatever funds were current when the bond fell due. So that I am obliged to regard it as a contract of hazard, the risk being the contingency, which was in the contemplation of both parties, whether the war would result for or against their country. Whether such a contract was lawful and could be enforced, whatever might be my opinion if it were an open question, I deem it unnecessary to say, as, since the decision of Boulware

437 v. *Newton, it has not been regarded as an open question, that decision having been followed in subsequent cases, but with the declaration that the principle should not be extended in its application:

which I understand to mean that unless it clearly appears that the parties contracted with reference to a contingency that the war should result in the overthrow of the Confederacy and the destruction of its currency, and the substitution of United States currency instead, and that it was contemplated and intended by the parties that in such event the contract should be solvable in United States currency, the principle of Boulware v. Newton should not be applied. I think it is evident in this case that it was in the contemplation of the parties that such a contingency might arise, and that, in that event, the obligation should be discharged in the funds which were then current, though it should be United States currency.

But even in Boulware v. Newton it was not held that the obligor should pay the face of the bond. Judge Rives, in whose opinion the other judges concurred, says: "It would be scarcely proper at this time to anticipate and prejudge a question that may hereafter arise out of the obligation to pay in 'current funds.' This is a grave question, which may not arise, and should not be decided except in a proper case, and upon the fullest consideration." Then Boulware v. Newton does not go so far as to hold that upon a contract payable in "current funds" the obligee was entitled to recover the face of the bond. The question is raised in this case pointedly by the verdict of the jury. And we come now to its consideration. It can hardly be regarded as an open question. It has been raised and decided by this court in two cases, and in both decided the same way: in Beirne &c. v. Dunlap, 8 Leigh 514; and in
438 the recent case of *Dungan v. Henderlite, 21 Gratt. 149. The former case was an action of debt upon an obligation, dated June 12, 1833, to pay on the 1st of September 1834 "the sum of $813.79, in notes of the United States bank or either of the Virginia banks." There was a demurrer to the declaration, on the ground that debt would not lie. This court held that debt would not lie upon the obligation, and that the demurrer was well taken. Judge Parker said that a contract "to pay $813.79 in bonds or bank paper means bonds or notes calling for that sum." "Paper," he says, "may rise or depreciate in value before the day of payment; and if the day passes when the contract is to be fulfilled, the measure of the obligee's rights and of the obligor's liabilities, is the value of the notes on that day, to be ascertained by the verdict of a jury, and awarded in damages." Again: "Where the named sum is to be paid in any determinate quantity of a collateral article, subject to fluctuation in its market price, (and what was more so than "current funds" at the period of the maturity of this obligation and since, except Confederate currency prior to the overthrow of the Confederacy?) the value of that article is the thing due; and as it may be more or less than the named sum for which the creditor is willing to take the article, it must be estimated in damages by a jury." Again he says: "It is bank paper the obligors engage to pay and the obligee to receive; and if it is not paid at the day, it is its value then which may be claimed in damages." In the same case Judge Tucker says: "It cannot be questioned that they might, at the day, discharge the note by the tender of notes of the specified banks to the nominal amount, however depreciated they might be. And although the day be past, yet the creditor can only demand that to which he is entitled by the con-
439 tract. What was the contract? *To pay so much in bank notes (in this case in 'current funds'). Suppose them depreciated one-half. Then, if they had been paid at the day, he would have received the value, only $406.89. And if so, the failure to pay then was an injury to him of that amount, and no more." What is meant by the phrase "current funds" in this obligation? I think it means, obviously, the paper circulation, whatever it might be, as contradistinguished from specie. Judge Staples, in Meredith & als. v. Salmon, says: "A contract of this sort is substantially the same as a contract to pay in Confederate States notes. 21 Gratt. 762–768. The written contract, or obligation in that case, was to pay in "current funds."

In Dungan v. Henderlite, supra, the obligation was for $800, payable twelve months after date in the "currency of Virginia and North Carolina money." Judge Christian, who delivered the opinion, in which all the other judges concurred, says: "It was substantially a contract to pay Virginia and North Carolina bank notes to a certain specified amount, expressed in words as appropriate as any other, to signify how much bank paper was to be paid, and is equivalent to an engagement to pay bank notes amounting to $800, or so many bank notes as on their face will nominally make that sum." In that case the whole court held that an action of debt could not be maintained on the obligation. And the principle decided in Beirne v. Dunlap, which is much relied on in the opinion, is reaffirmed. Judge Christian further says: "I am of opinion that in this case the obligation of the defendant was to pay, and of the plaintiff was to receive, Virginia and North Carolina State bank notes, and the commodity being of a determinate quantity, subject to fluctuation in its market price, the value of that currency is the thing that is due, and that can only be estimated in damages by a jury."

440 *It seems to me that under these two decisions of this court the principle ought no longer to be questioned, and that it should be regarded as res adjudicata. To hold that the obligee is entitled to recover the face of the bond in this case would be to go beyond what was held in Boulware v. Newton, and to overturn the decisions of this court in the two cases which I have cited. If the principle of those cases is applied to this, the obligee was entitled to recover only the value of $2,000 in funds

current at the maturity of the obligation; and the verdict of the jury has ascertained that to be $1,360.54. The value of that currency has been fluctuating from that day to this, but has been appreciating until it approximates the gold standard. To give a judgment now for the face of the bond, though it might be satisfied in legal tenders, would be to give the obligee more than his contract entitled him to, and would impose a heavier liability on the obligors than their contract imposes; because on the day when this obligation fell due "current funds,"—that is, United States currency, which was current funds in Virginia,—legal tenders and all were at such a depreciation that $2,000 in such currency, according to the verdict of the jury, was worth only $1,360.54. And if $2,000 in currency was not paid at the day, in the language of Judge Parker, "it is its value then which may be claimed in damages,"—which, we have seen, is $1,360.54. And in the language of Judge Tucker, in the same case, "the failure to pay then was an injury to him (the obligee) of that amount, and no more;" which is reiterated by Judge Christian, for the whole court, in Dungan v. Henderlite, supra. I am of opinion, therefore, both upon reason and authority, that the judgment should have been for $1,360.54.

For the same reasons I think there
441 was no error in *the judgment of the court, setting aside the two previous verdicts and granting the defendants new trials.

Upon the whole I am of opinion to reverse the judgment of the Circuit court, and to give judgment for the plaintiff for $1,360.54, to be discharged in gold or its equivalent in United States currency constituting a legal tender for payment of debts, with interest from the 7th day of July 1866 till payment.

Moncure, P., and Christian, J., concurred with Anderson, J., in reversing the judgment; but they would have given a judgment for the whole amount.

Staples and Bouldin, Js., concurred in the opinion of Anderson, J.

The judgment was as follows:

The court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the judgment of the said Circuit court is erroneous: Therefore it is considered that the same be reversed and annulled, and that the plaintiff in error recover against the defendants in error his costs by him expended in the prosecution of his writ of error and supersedeas aforesaid here; and this court proceeding to render such judgment as the said Circuit court ought to have rendered, it is further considered, that the plaintiff recover against the defendants thirteen hundred and sixty dollars and fifty-four cents, with interest thereon, to be computed after the rate of six per centum per annum, from the 7th day of July 1866 till payment; to be dis-
442 charged in gold or its equivalent *in United States currency constituting a legal tender for the payment of debts, and his costs by him about his suit in this behalf expended in the said Circuit court.

Judgment reversed.

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443 *Burwell's Ex'or v. Lumsden & als.

March Term, 1874. Richmond.

[18 Am. Rep. 648.]

Absent, BOULDIN, J.*

1. **Dower Relinquished—Consideration.**†—It is settled law in this State—that if a married woman relinquishes her claim for dower on the faith of a settlement or other property made by her husband, or even if she make a relinquishment under a mere promise that other property shall be settled upon her as a compensation, in either case such settlement in her favour will be held good to the extent of a just compensation for the interest so relinquished.
2. **Same—Same.**—If the value of the property exceeds the value of the dower or other interest relinquished by the wife, the deed will be vacated as to the excess, and supported as to the residue.
3. **Same—Same.**—In the absence of fraud, the settlement will not be disturbed unless it manifestly appears to be grossly excessive.

In 1844 John S. Burwell, of Franklin county, was largely indebted, and among other debts he owed there was a note discounted at a bank in Danville for about $10,000, on which there were a number of endorsers. On the 2d of October of that year he made a deed, by which he conveyed a large tract of land on which he lived, some slaves and other personal property, to Moses G. Carper, in trust to secure these endorsers. And on the same day, in consideration that his wife, Eliza M.
444 *Burwell, joined him in the deed, he conveyed to A. L. Burwell and E. W. Burwell four slaves, several horses, all the crops growing, his household furniture, farming implements, cattle and sheep, and the interest of Mrs. Burwell in her father's estate, in trust for her separate use. When these deeds were made, all the endorsers on said note but Joseph Rives were present, having been requested to be present by Mr. Burwell; and they appear to have approved the provision made for Mrs. Burwell.

The trustee Carper proceeded to sell the property conveyed to him, when the land sold for $11,761.54. Of this sum $5,993.03 was applied to satisfy a previous lien on the property to Wm. W. Burwell, leaving the sum of $5,993.03 to be applied to pay the debt to the bank. Whether or not this prior lien had preference to Mrs. Burwell's right

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*He had been counsel in the cause.

†**Dower Relinquished—Consideration.**—See Taylor v. Moore, 2 Rand. 563; Harvey v. Alexander, 1 Rand. 219; Quarles v. Lacy, 4 Munf. 251; Blanton v. Taylor, Gilmer 209; Lee v. Bank U. S., 9 Leigh 200; Harrison v. Carroll, 11 Leigh 484; W. & M. College v. Powell, 12 Gratt. 372; Davis v. Davis, 25 Gratt. 590.

of dower in the land seems to have been doubtful, and there is nothing in the record to settle the doubt.

In April and May 1853 two suits were instituted in the circuit court of Franklin county; one of them by John W. Lumsden and the other by Joseph Rives, against John S. Burwell, Mrs. Burwell, and her trustees and others, in which the plaintiffs claimed as creditors of John S. Burwell, and insisted that the settlement upon Mrs. Burwell was excessive; and they asked that the excess over a fair settlement might be ascertained and subjected to satisfy their debts.

The parties answered; and in October 1857 the court made a decree directing a commissioner to take an account of the value of the property settled on Mrs. Burwell by the deed of October 2d 1844 at the date of said deed; and also the value of her contingent right of dower in the land conveyed to Carper at the same date.

There were a number of witnesses
445 introduced by the *plaintiffs to prove the value of the property settled on Mrs. Burwell, and what would be a reasonable rent of the land; and G. W. Burwell was examined by the defendants. The character of this testimony is sufficiently stated in the opinion of Judge Staples. The commissioner, Hugh Nelson, made his report, in which he fixed the value of the property settled on Mrs. Burwell at $1,515; and if the lien on the land in favour of Wm. W. Burwell had priority to Mrs. Burwell's right of dower, he estimated her contingent right of dower at $1,026.78; but if it did not have priority, her right of dower at the date of the deed was $2,093.52.

The plaintiffs filed exceptions to the report, some of which were sustained by the court, and a statement made according to the directions of the court fixed the value of the property settled upon Mrs. Burwell at $4,027.75.

The cause coming on to be heard on the 18th of May 1869, the court held that as to the excess of the value of the property settled upon Mrs. Burwell above the value of her contingent right dower, it was liable to satisfy the debts due to the plaintiffs, and being more than sufficient for this purpose, a decree was rendered in their favour against the administrator of Mrs. Burwell, for the amount due them.

Whilst these cases were going on, there was an injunction by Mrs. Burwell against the service of an execution upon certain slaves in her possession, issued by Rives, and a cross-bill by Rives. They are sufficiently stated in the opinion of Judge Staples.

Upon the application of Mrs. Burwell's administrator an appeal from the decree was awarded.

Early, for the appellant.

Jones & Bouldin, for the appellees.

446 *Staples, J. The principal question in this case for our determination is as to the validity of the settlement made by John S. Burwell in favor of his wife under the deed of the 2d of October 1844. It is insisted that this settlement was excessive; that the property conveyed for Mrs. Burwell's benefit was far beyond the value of the dower interest relinquished by her; and to that extent at least is fraudulent and void. I do not understand it is seriously maintained that any actual fraud was perpetrated in the execution of the deed; but that Mrs. Burwell received largely more than an equivalent for her contingent interest in her husband's estate, and that to the extent of this excess she or her estate is liable to the creditors of her husband.

Before examining the evidence upon this point it may be proper to consider very briefly the principles of law applicable to settlements of this character.

It may be regarded as well settled in this State, that if a married woman relinquishes her claim for dower on the faith of a settlement of other property made by her husband, or even if she make a relinquishment under a mere promise that other property shall be settled upon her as a compensation, in either case such settlement in her favor will be held good to the extent of a just compensation for the interest so relinquished. If the value of the property settled exceeds the value of the dower or other interest relinquished by the wife, the deed will be vacated as to the excess and supported as to the residue. Taylor v. Moore, 2 Rand. 563; William and Mary College v. Powell, 12 Gratt. 372-'85. In considering what is a proper provision for the wife in such cases, a court of equity will not enter into a strict calculation of the value of the settlement as compared with the property or interests relinquished. It is sufficient that the provision does not appear to be unreasonably excessive.

447 *In Ward v. Shallet, 2 Vesey sr. 16, Lord Hardwicke said, the settlement would be good against the husband's creditors, unless proved vastly to exceed the consideration, so that from the inadequacy a collusion or fraud was intended. In 1 Roper's "Husband and Wife," 327, the rule is thus expressed: "What is a reasonable proportion or value between the thing given or paid and that settled in consideration of it by the husband, is a calculation and result dependent upon each case in connection with collateral circumstances. The question is incapable of a general definite answer. * * * * This alone can be affirmed, that if the settlement be just in general, the court does not weigh with exactness the particular advantage gained on the one side or the other; but that if the disproportion be so great as would strike any man of common sense with the inadequacy between the settlement and the price given for it, then such circumstance will raise a presumption of fraud so violent as to vitiate the transaction and let in the creditors."

In Taylor v. Moore Judge Green said, if there was no ground to impute fraud, the

transaction might be favored so far as not to weigh nicely the respective values of the things given and received, unless the inequality was so great as in itself to amount to evidence of fraud. Judge Coalter expressed the opinion that, in view of the loss and sacrifice attending sales of real estate subject to the wife's claim for dower, the husband can well afford to give a full price for the relinquishment, and a jury or a commissioner, as the case may be, ought to do the same.

What is the value of the wife's contingent right of dower, the husband being still alive, is difficult to determine with anything like accuracy in any case. It must depend upon the condition and qualities of the estate; the ages of the husband and wife respectively—their health and expectancy of life. No fixed rule can be laid 448 *down on the subject. The most that can be said is, that in the absence of fraud the settlement will not be disturbed unless it manifestly appear to be grossly excessive.

In the present case the question of actual fraud may be thrown out of view. There is not the slightest ground for imputing it to either of the parties concerned in the transaction. Let us see, then, whether there was any such gross inequality in the settlement as to call for the interference of a court of equity in behalf of the creditors.

The settlement was made in October 1844. Mrs. Burwell was then fifty-four years old, and Mr. Burwell about sixty-eight. His death occurred in 1854, hers in 1869; so that she survived him about fifteen years. Her dower interest in the lands sold for the benefit of the creditors is estimated by the commissioner at a fraction less than two thousand dollars. The property settled upon her by way of compensation for this interest consisted of three slaves: one of them, an old man, with a fractured skull, proved to be an incumbrance; a small girl of very little value; and a woman not estimated by any one as worth more than four or five hundred dollars. There was also a lot of farming implements and household furniture, very much used and obviously worth but little; a number of old and worthless horses, besides sheep and cattle; and a small supply of farm products for the use of the family. If this property, instead of being conveyed to Mrs. Burwell, had been sold under execution for the benefit of the creditors, it is more than probable it would not have realized the estimate placed upon it by the commissioner. That officer, a very intelligent lawyer, and afterwards judge of the County court of Franklin, having all the witnesses before him, and perfectly competent to form a correct estimate 449 of their *capacity and intelligence, came to the conclusion that the settlement was not excessive.

There is another circumstance which strongly shows the value placed upon the property at the time by persons interested to know and competent to form a correct conclusion upon this subject. The entire arrangement was made with the knowledge and consent of Mr. Burwell's securities, bound for him to a large amount—much larger than his estate was ever expected to pay. They were present, with one exception, when the relinquishment by Mrs. Burwell took place and the settlement was made for her benefit. They were invited to attend on that occasion. The entire transaction was conceived and consummated in their interests and for their advantage; and it is very difficult to believe they would ever have assented to it if the settlement was so grossly excessive as is now represented.

The arrangement was not only sanctioned by the securities, but it seems that the creditors did not interpose any objection—at least none of them made any complaint until nearly ten years after, when these suits were instituted. The witnesses were examined in 1856 or 1857, more than twelve years after the date of the transaction. They were called on to testify as to matters about which they could not, in the nature of things, be very accurately informed—the value of property the greater portion of which had perished or had been long before consumed.

I think the commissioner was entirely correct in declaring that the witnesses for the plaintiff did not show such a knowledge of the property as entitled their testimony to much weight. In view of all the circumstances, wthout attempting to discuss in detail the testimony of the witnesses or to reconcile their conflicting views, I am satisfied the evidence is not sufficient to 450 impeach the *settlement of 1844, either as fraudulent or as being grossly in excess of the interest surrendered by Mrs. Burwell.

In regard to the distributive interest of Mrs. Burwell in her father's estate, also included in the deed of settlement, it consisted of two very infirm slaves, proved to be worth about five hundred dollars. If this interest could be regarded as a part of Mr. Burwell's estate at the time the deed was made, it is very questionable, to say the least, whether, with the other property, it would render the settlement so excessive as to justify the interposition of the courts. But, throwing this out of view, it is clear that at the time of the execution of the deed these slaves had not been reduced into the possession of Mr. Burwell, and it was very doubtful if they ever would be. They were then under the control of the administrator for the purpose of paying the debts of his intestate with their hires, and no distribution ever in fact took place until 1852; eight years after the settlement.

It is very obvious that these negroes could not, in any view, have constituted an adequate provision for Mrs. Burwell; and a court of equity would not only not have aided the creditors in getting possession of them, but, considering the old age of Mr. Burwell and his insolvent condition, it would have interfered in the wife's behalf and required their settlement upon her and for her exclusive use and benefit.

For these reasons they are not to be treated as belonging to Mr. Burwell's estate, and ought not to be taken into consideration in estimating the value of the property received by Mrs. Burwell under the deed of settlement.

It only remains to bestow a very brief consideration upon the cross bill of the 451 appellee, Rives. A statement *of facts is, however, first necessary to a proper understanding of the matter. Mr. Burwell, in the deed executed by him for the benefit of his sureties, included two slaves. These slaves were sold by the trustee in 1845, purchased by Wiley P. Woods, and left by him with the family of Mr. Burwell. In 1851 he (Woods) conveyed them to trustees for Mrs. Burwell's benefit; and they remained in her possession until 1859, when the appellee, Rives, caused an execution to be levied upon one of them. Mrs. Burwell thereupon obtained an injunction to the sale. Rives filed an answer, and in October 1860 exhibited his cross bill impeaching Mrs. Burwell's title, and claiming that while these slaves were nominally purchased by Wiley P. Woods, they were paid for with money furnished by Mr. John S. Burwell. No process was ever issued upon this bill, no answer was ever filed, and indeed nothing was ever done to mature it for a hearing; and yet the judge of the Circuit court, by his decree of October 1869, dissolves Mrs. Burwell's injunction and dismisses her bill with costs, and also awards to Rives's estate the costs of the cross bill. The decree is erroneous in both respects.

It must be remembered that Mrs. Burwell was in possession of these slaves from the year 1848 to the year 1859; and neither Rives nor Lumsden, so far as this record discloses, ever suggested fraud in the purchase under which he claimed. No reference is made to the matter in either of the bills filed by them in 1853, although they appear to have investigated and impeached every transaction relating to property or money with which Mrs. Burwell was in any manner even remotely connected. The excuse given by Rives for his delay is altogether insufficient. It is impossible he could have supposed the slaves were the property of Wiley Woods; because they were never in the 452 possession of the latter; *and the deed on record for eight years previously, made it manifest they were claimed by Mrs. Burwell as her property exclusively. Strange to say, after Rives, according to his own showing, had obtained all necessary information upon the subject, he never moved to dissolve the injunction; nor did he ever take the first step in the prosecution of his cross suit.

Both of these cases seem to have been forgotten and abandoned, as nothing was ever done in either of them until they were brought into the decree of 1869. The only solution of this conduct is, that Rives was probably satisfied he could not maintain his pretension, and that he could more safely attack the settlement.

I am satisfied that these slaves were not paid for by John S. Burwell. He was at that time utterly insolvent; he had fairly devoted all his property to his creditors, and it is difficult to see how he could have raised the necessary means to make the purchase. The explanation made by one of the witnesses is probably the more correct account; and that is, that the money was furnished by Mrs. Burwell's relatives. Whether this be true or not, there is not a scintilla of opposing evidence; and I do not see how we can impute fraud when there is nothing in the testimony or in the nature of the transaction to establish it.

My opinion then is, without considering the question of the effect of the statute of limitations, that the Circuit court erred in decreeing against Mrs. Burwell's representatives on account of the property embraced in the deed of settlement; and erred in dissolving the injunction and in awarding costs upon the cross bill. That decree must, therefore, be reversed, and a decree entered dismissing the original bill of Lumsden and Rives respectively, with costs; dismissing the cross bill without costs; 453 *no appearance having been entered thereto, and perpetuating the injunction of Mrs. Burwell.

The other judges concurred in the opinion of Staples, J.

Decree reversed.

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454 ***Briscoe v. Ashby & als.**

March Term, 1874, Richmond.

Trustee—Sale.*—In 1847 A conveyed to C a tract of land in Fauquier county in trust for his wife for life, and at her death to be sold and the proceeds divided among their children. In 1854 A died; and his son J having qualified as guardian of the younger children, in his own right and as such guardian, filed a bill in the Circuit court of Fauquier for a sale of the land, and investment of the proceeds in other land. In 1855 there was a decree for a sale, and a sale, which was confirmed. Afterwards Mrs. A and her children filed a petition in the suit, stating that J had purchased a tract of land in Culpeper, for the benefit of the parties to the trust, and asking the court to approve the investment and direct the proceeds of the Fauquier land to be applied to pay for it. This the court did; and appointing J the sole trustee, decreed that when the whole purchase money was paid, J should take a conveyance to himself of the Culpeper land, upon the trusts declared in the deed of A. The land in Culpeper had been sold under a decree of the Circuit court of that county, and J purchased in his own name, and there was nothing in the record in that case to show it was intended to be for the *cestuis que trust* of A's deed; but the proceeds of the sale of the Fauquier land were applied to pay for it, and all the purchase money was paid, except less than $100; but no deed was ever directed or made to J. In 1859 Mrs. A and J covenanted that she should convey to him her life estate in said

*Trustee—Sale—Registry.—See Trout's Adm'r v. Warwick, 77 Va. 737; Braxton v. Bell, 92 Va. 236, 23 S. E. Rep. 289; Donnell v. King's Heirs, 7 Leigh 393.

land, on terms stated, but which he did not comply with in any respect. In 1863 J sold and conveyed the land to T, and T afterwards sold it to B. In 1866 Mrs. A and her children filed their petition and cross bill in the Culpeper suit, stating the facts and claiming the land, and made J, T, and B parties. T and B claimed to be purchasers for value without notice. HELD:

455 *1. **Same—Same—Registry.***—Mrs. A and her children claiming under the decree of the Circuit court of Fauquier, the case does not come within the operation of the registry act, Code of 1860, ch. 119, §§ 4 and 5; and the decree not necessary to be recorded in Culpeper to protect them against the claim of T and B, claiming to be purchasers for value without notice.

2. **Same—Same—Same.**—Nor is the decree of the Fauquier court such a decree as is required to be recorded by the 1st and 8th sections of ch. 186, Code of 1860.

3. **Same—Same—Lis Pendens.**†—Nor does the 5th section of said ch. 186, which requires a *lis pendens* to be recorded, apply to the decree in the Fauquier suit.

4. **Same—Same—Bona Fide Purchaser.**—The equity of Mrs. A and her children being prior in time to that of T and B, A &c. are entitled to the Culpeper land, as against them, though they purchased *bona fide* for value, and without any notice of A's equity.

5. For the principles applicable to the doctrine of purchaser for value without notice, see the opinion of CHRISTIAN, J.

The case is fully stated by Judge Christian in his opinion.

Lucas and J. W. Green, for the appellant.

Field & Gray, for the appellees.

Christian, J. This is a supersedeas to a decree of the Circuit court of Culpeper county.

***Same—Same—Same—Bona Fide Purchaser.**—As to *bona fide* purchaser, see Young v. Devries, 31 Gratt. 304, and *note*; Beverley v. Brooke, 2 Leigh 446; Doswell v. Buchanan's Ex'ors, 3 Leigh 381; Mutual Assurance Soc. v. Stone, 3 Leigh 235. But a purchaser for value, without notice, actual or constructive, having obtained a conveyance, will not be affected by a latent equity, whether by lien, encumbrance, trust, fraud, or any other claim. See Carter v. Allan, 21 Gratt. 241; National Bank v. Harman, 75 Va. 604; Cox v. Romine, 9 Gratt. 27; Evans v. Bank, 95 Va. 294, 28 S. E. Rep. 323; Davis v. Tebbs, 81 Va. 600.

The strictness of the rule that a *bona fide* purchaser must have paid on the purchase money and taken a conveyance has been much relaxed, and a *bona fide* purchaser is now held to be one who has paid the purchase money, and who, though he has not received a conveyance of the legal title, is entitled to call for it. Preston's Adm'r v. Nash, 75 Va. 949; Lamar's Ex'or v. Hale, 79 Va. 156. See Gregory v. Peoples, 80 Va. 357, and Pillow v. Improvement Co., 92 Va. 144, 23 S. E. Rep. 32; Mineral Co. v. Chase, 95 Va. 50, 27 S. E. Rep. 826; Watson v. Coast, 35 W. Va. 463, 14 S. E. Rep. 249; Marshall's Ex'or v. Hall, 42 W. Va. 641, 26 S. E. Rep. 300.

†**Sale—Lis Pendens.**—See French v. Loyal Co., 5 Leigh 671; French v. Successors of Loyal Co., 5 Leigh 627; Mutual Assurance Soc. v. Stone, 3 Leigh 218; Newman v. Chapman, 2 Rand. 102.

The record discloses the following facts, which are necessary to be stated in order to a proper application of the legal questions we are called upon to consider:

On the 4th day of November, in the year 1847, Marshall Ashby, of the county of Fauquier, conveyed by deed, executed on that day, a certain tract of land lying in that county, containing three hundred and twenty-nine acres, to Wellington W. Cocke and Daniel F. Cocke, trustees, to be held by them 456 for the use of the *wife and children of the grantor. Under this deed the wife, Mrs. Lucy Ashby, was entitled to the rents, issues and profits of the land during her life; and at her death it was to be sold and the proceeds equally divided among his children: provided the children at that time should be of the age of twenty-one years; but if not, then the land was not to be sold until the youngest child then living should arrive at the age of twenty-one years; and in the meantime the rents and profits to be applied to the support and maintenance of the children.

In December 1854 Marshall Ashby, the grantor in the above-mentioned deed, having departed this life, and John W. Ashby, one of the cestuis que trust named in said deed, having qualified as guardian of his infant brothers and sisters, the said John W. Ashby, in his own right and as guardian of said children, filed his bill in the Circuit court of Fauquier county, in which it was alleged, among other things, that since the death of Marshall Ashby his widow and her children had resided on the land conveyed by him to the Cockes as trustees; but that the proceeds of its cultivation had not been adequate to the proper maintenance and education of the children; that the expenses of the family were necessarily increasing as the children grew older, and that the same inadequacy was yearly becoming greater; that the children had no other estate or property whatever except their interest in this land; that, under these circumstances, it was the common desire of all the family to have the land sold and an investment made of the proceeds elsewhere, where land is cheaper and the costs of living less expensive; that the land lay in a neighborhood where real estate ruled high, and that, owing to the fact that John Marshall of Markham, who owned an adjoining farm, wished to enlarge his real estate, it could be then disposed of for a high 457 price; that in fact a contract *for the sale of the land had been entered into by all the parties interested and the said Marshall, by which he agreed to pay for it the sum of fifty dollars per acre, in payments partly in cash, and with interest on the deferred payments from the time possession should be delivered to him. This contract was filed with the bill, and it was insisted that the interests of the infants and all others interested would be greatly promoted by a sale and confirmation of the contract already made with Marshall.

To this bill the trustees and the other cestuis que trust were made parties defend-

ants. They all answered, and all concurred that the interests of all the parties would be promoted by a sale, and united with the plaintiffs in asking the court to confirm the contract of sale with Marshall. Such proceedings were had in this suit (which is known in the record before us as the case of Ashby v. Ashby) that on the 20th of September 1855 a decree was entered directing a special commissioner to make sale of said land at public auction upon the following terms: Six thousand dollars of the purchase money to be paid in cash, $3,000 of the residue to be paid on the 1st April 1856, one-half the remainder to be paid on the 1st April 1857, and the balance on the 1st April 1858—the whole of the deferred payments to carry interest from the 1st day of October 1855. Upon these terms the land was sold by Special Commissioner Zeph. Turner to John Marshall, who fully complied with the terms of the decree.

Some time after the sale to Marshall (the exact date does not appear), there was filed in the suit of Ashby v. Ashby, in the Circuit court of Fauquier, a petition signed by Mrs. Ashby and her children (together with the husbands of those of the daughters who were married), setting forth that "since the institution of said suit John
458 *W. Ashby, acting for himself and other parties interested, had purchased a tract of land lying in Culpeper county, lately the property of John Marshall, dec'd, containing six hundred acres, at the price of $20 per acre; that the purchase was made for the benefit of all the parties interested in the said trust estate, and to be held in the same manner, upon the same conditions and limitations, and for the same purposes, said trust estate was held by the trustees Wellington and Daniel Cocke; that all the parties concerned deemed the purchase a judicious and advantageous one, and they prayed that the same should be ratified and confirmed by the court.

On the 18th September 1857 the Circuit court of Fauquier entered its decree, confirming the report of Commissioner Turner, who had made sale of the Fauquier land to John Marshall, and directing him to execute and deliver a deed to Marshall whenever the whole of the purchase money should be paid by him; also substituting John W. Ashby as sole trustee in the place of Daniel and Wellington Cocke. In said decree were the following provisions: "And it appearing to the court, from said petition and affidavits, that the purchase of said tract of land, situated in the county of Culpeper, made by the said John W. Ashby for the benefit of all the parties interested in the trust estate sold under the decree entered in this cause on the 20th day of September 1855, is a judicious and advantageous one to all concerned, doth adjudge, order and decree that the said purchase be confirmed, and that the payments made by the said John W. Ashby and the said Commissioner Zeph. Turner out of the proceeds of the real estate (sold under said decree), on account of the purchase money of said land be also confirmed. * * * And the court doth further adjudge, order and decree that the said John W. Ashby, who is hereby
459 appointed sole trustee in lieu of *the defendants Daniel F. Cocke and Wellington W. Cocke, do, when the balance of the purchase money of the said Culpeper land is paid, cause to be conveyed to him, by a proper deed of conveyance, the said land, to be held by him as such trustee, under the same trusts and limitations and for the same purposes declared and set forth in the deed of conveyance from Marshall Ashby to the said Daniel F. and Wellington W. Cocke, exhibited with plaintiff's bill."

It will thus be seen that the Culpeper land was formally accepted by the Circuit court of Fauquier as a proper investment of the trust funds arising from the sale of the Fauquier land; and the Culpeper land was to be held upon the same trusts as the Fauquier land: that is, to the sole use of the said Lucy Ashby, during her life, and at her death to be sold and the proceeds equally divided between the children of the said Marshall and Lucy Ashby, according to the terms and conditions of the deed of November 4th, 1847. Shortly after this arrangement was made, Mrs. Ashby removed with her family to the Culpeper farm, where she resided several years. John W. Ashby, her son and trustee, resided with her and had the general management and superintendence of the farm.

On the 26th April 1859, a written agreement was entered into between Mrs. Lucy Ashby and her son, the said John W. Ashby, by which she agreed to convey to him her life estate in said tract of land, upon the consideration that he should pay to her annually the sum of six hundred dollars during her natural life; and should also pay off all the debts and demands existing either against the said Lucy Ashby or the said trust estate. Appended to this agreement or endorsed thereon was a further stipulation that the said Lucy Ashby should live with the said John W. Ashby, and
460 keep with her her *unmarried daughters free from all charge for board; and if she should become dissatisfied with this arrangement she should then have the right to call upon the said John W. Ashby for the principal sum of $10,000, to be otherwise invested for her.

It appears that this agreement was never carried into effect by John W. Ashby, who neither paid the debts due from Mrs. Ashby and the trust estate, nor the annuity of $600 to Mrs. Ashby. But it appears from the record that John W. Ashby sold this Culpeper land to one Granville S. P. Triplett in 1863, and that Ashby and wife, on the 21st July 1863 executed a deed, conveying said land to Triplett, and describing it as "a tract or parcel of land lying in the county of Culpeper, sold by F. Lewis Marshall, acting as commissioner of the Circuit court of Culpeper, in the cause of "F. Lewis Marshall, guardian of the infant children of John Marshall, dec'd, v. Ann G. Marshall and others," to the said John

W. Ashby, and now in possession of said Ashby, containing 635½ acres, in consideration of the sum of $60 per acre, &c. Triplett afterwards sold the same land to Briscoe, the appellant in this suit.

It becomes necessary to refer here to the proceedings in the suit of Marshall v. Marshall, referred to in the above deed. It seems that there were certain proceedings in the Circuit court of Culpeper, in which F. Lewis Marshall, who filed the bill as guardian of the infant children of John Marshall, was directed, as commissioner of the court, to sell at public auction the tract of land in the bill and proceedings mentioned. He accordingly made sale of the same, and John W. Ashby, being the highest bidder, became the purchaser. He complied with the terms of the sale, paid down the cash payment, and executed his bonds, with Lucy Ashby as security, for the deferred payments. The sale was re-
461 ported to *the Circuit court of Culpeper and confirmed by that court, and the commissioner directed to collect the bonds as they became due. He did collect the whole of the purchase money, except the sum of $98.96, and a full statement of his account was reported to the court without exception. This report was returned on the 10th November 1858. It seems that no further proceeding was taken in this cause until 15th June 1866, when the petition of Lucy Ashby was filed, to be noticed hereafter.

It is a conceded fact in the cause, that the purchase thus made by John W. Ashby was the same which was reported to the Circuit court of Fauquier as having been made for Mrs. Ashby and her children, and with the trust fund arising from the sale of the Fauquier land. It is also a conceded fact that John W. Ashby was not known to Commissioner Marshall, or to the Circuit court of Culpeper, as dealing in that purchase with trust funds. There is nothing in the suit of Marshall v. Marshall, in the Circuit court of Culpeper, to show that John W. Ashby was making the purchase with funds that did not belong to him, or that the money which he paid was not his. He, not as trustee, but in his own right, was reported to the court as purchaser, and the sale was regarded; both by the commissioner and the court, as made to him. The purchase money, with the exception of the comparatively small sum of $98.96, was all paid by him as the purchaser recognized by the commissioner and the court; and no doubt if he had paid the whole of the purchase money the court would have directed a deed to be made to him. But it must also be taken, as before observed, as a conceded fact in the case, that not a dollar paid by John W. Ashby was his money, but was the trust money belonging to Mrs. Ashby and her children; and that the purchase
462 thus made by him was, in fact, *reported to the Circuit court of Fauquier as the disposition made of the trust fund, and was accepted by the court as a valid investment of the fund arising from the Fauquier land.

The further proceedings necessary to be referred to in the suits of "Ashby v. Ashby" and "Marshall v. Marshall" were had after the close of the late war. The case of Ashby v. Ashby was removed to the Circuit court of Culpeper, and the two cases then heard together.

On the 15th November 1866 Mrs. Lucy Ashby filed her petition, setting forth the execution of the trust deed by her husband Marshall Ashby, by which the property therein conveyed was settled upon her and her children, the sale of that property through the proceedings referred to in the suit of Ashby and Ashby in the Circuit court of Fauquier, the investment of the purchase money in the Culpeper land, the contract which she entered into with her son John W. Ashby, the failure of John W. Ashby to comply with its terms in any particular. She further alleges that she has been informed that John W. Ashby sold the land during the war to one Triplett, and that Triplett sold the same to one Briscoe, who now holds possession of the same. She insists, in her petition, that her rights are not affected by the sale of John W. Ashby to Triplett nor by Triplett's sale to Briscoe, Ashby never having any title to said land. She asks that Ashby, Triplett and Briscoe may be required to answer her petition, and that the contract between her and Ashby may be set aside and the possession of the land returned to her; and asks for an account of rents and profits of the land since it his been out of her possession.

Before any proceedings were had under this petition John W. Ashby filed his amended bill in the Circuit court of Culpeper, to which the suit of "Ashby v. Ashby" had been removed, setting forth the
463 former proceedings *in that suit, the sale of the trust property, and the investment of the proceeds in the Culpeper land, and averred further "that some time in the year 1863 he sold and conveyed the said Culpeper land to one Granville S. P. Triplett and placed him in possession of said land; which sale he felt authorized to make under a contract between himself and the said Lucy Ashby." He exhibits with his bill the contract referred to, and asks that Triplett, and the purchaser from him, Briscoe, may be made parties defendant, "in order that the rights of all the parties may be ascertained and properly adjusted."

In May 1867 Mrs. Lucy Ashby and her children filed in the same cause a cross bill, in which they set out with much particularity all the proceedings in the two suits of "Ashby v. Ashby" and Marshall v. Marshall, above referred to. After setting out the agreement between John W. Ashby and Mrs. Lucy Ashby, the cross bill proceeds: "Your complainants further show that up to the time of this agreement (26th April 1859) the said John W. Ashby lived with his mother upon the same farm, as the superintendent of the business of the farm; but after the agreement he exercised control over it and used it as his own, and lived upon it until after the commencement of the

late war, in 1861, the said Lucy Ashby residing with him for a short time. But after the war commenced the said John W. Ashby entered the military service of the Confederate States; and the said Lucy Ashby had to seek board and a home elsewhere. Your complainants further show, that the said John W. Ashby has never paid one cent of the annuity, nor one debt against the said Lucy Ashby or the said trust fund, and has not furnished board for the said Lucy Ashby and her unmarried daughters; that he is now totally insolvent, unable to pay a dollar of the annuity, or in anyway
464 *fulfill his part of said contract; that the property he had was all lost during the war. Your complainants further show, that the said Lucy Ashby has no means of support except her interest in said tract of land, and has for the last four or five years been living upon the bounty of her sons-in-law."

After setting out the sale of the land by John W. Ashby to Triplett, and by Triplett to Briscoe, they proceed: "Your complainants insist that as they purchased with the knowledge that John W. Ashby and no legal title and could convey none, they must be held to such title only as John W. Ashby had." After making Ashby, Triplett and Briscoe parties defendants to this cross bill, they pray "that the said contract between John W. Ashby and Lucy Ashby may be set aside, and that the said tract of land may be restored to the possession of the said Lucy Ashby, and be held subject to the provisions of the deed from Marshall Ashby to W. D. and D. F. Cocke, and as soon as the purchase money is fully paid may be conveyed, as required by the decree of the Circuit court of Fauquier made in September 1857."

This cross bill was answered by John W. Ashby, Triplett and Briscoe. Ashby admits all the allegations of the cross bill; admits that he has not complied in any particular with his contract with his mother; that he has paid no part of the annuity he agreed to pay, nor has paid any of the debts against her, or the trust fund, nor furnished board and maintenance to her and her unmarried daughters, as he agreed to do. He says: "This respondent thought at the time (he entered into the contract with his mother) that his pecuniary circumstances were such as to enable him to pay the annuity to the said Lucy Ashby, and to buy out the interest of her children in said land, and thus perfect the title of the
465 said Triplett. *The results of the war reduced this respondent to poverty, and he can neither fulfill his obligation to Mrs. Lucy Ashby or perfect the title to Triplett."

Triplett and Briscoe both answer, and claim that they are purchasers for valuable consideration without notice. They both deny that they ever heard of any claim of Mrs. Ashby and her children; that they had neither actual not constructive notice that the land was subject to any trust or incumbrance in favor of Mrs. Ashby and her children. Triplett, with much detail, avers that he used the greatest diligence to ascertain the state of the title; that he employed counsel for that purpose, who informed him that the proceedings in the suit of "Marshall v. Marshall" were all regular, and that all the purchase money except a small sum (less than a hundred dollars) had been paid, and that the purchaser, John W. Ashby, was entitled to a deed as soon as the balance was paid; that there was nothing in the papers in that suit to put him on enquiry as to any outstanding equitable title or other incumbrance. Both plant themselves upon the position of bona fide purchasers without notice, and claim the protection of a court of equity.

The two causes of "Ashby v. Ashby" and "Marshall v. Marshall" came on to be heard together on the 13th November 1868, when the court, disposing of the whole controversy, among other things decreed that "within thirty days after being served with a copy of this decree the said William D. Briscoe" (the last purchaser and now in possession of said tract of land) "may elect to hold the said land for and during the life of Mrs. Lucy Ashby, provided he will assume and take upon himself all the obligations entered into by John W. Ashby in the agreement aforesaid of the 26th April 1859, and the addition thereto of the 2d May 1859, so far as the same have not been fulfilled and performed by the said John
466 *W. Ashby. And if the said Briscoe shall fail to make such election within the time aforesaid, then the said Triplett, within thirty days after he has been served with a copy of said decree, may elect to hold the land for the time, in the manner and upon the terms prescribed in respect to the defendant Briscoe." It was further decreed "that if the said Triplett and Briscoe shall both decline to make the election aforesaid, or shall fail to make it, in the mode and within the time prescribed for them respectively, then, immediately after the expiration of the time within which the said Triplett is authorized to make such election the said Briscoe shall surrender possession of said land to Mrs. Lucy Ashby or her authorized agent; and if on demand made the said Briscoe shall fail or refuse to do so, then the sheriff of the county is directed to give such possession of said land to the said Lucy Ashby or her agent."

The court further directs (in the failure to make an election) an account of rents and profits, and reserves the question as to the right of either Triplett or Briscoe to claim compensation for permanent improvements.

From this decree an appeal was allowed to this court.

The case has been argued in this court very elaborately, and with much learning and ability on both sides.

The counsel for Mrs. Ashby and her children have rested the claims of the appellees mainly on the ground that as Triplett purchased confessedly only an equitable title, he therefore purchased subject to the prior

equity of Mrs. Ashby and her children, according to the maxim, "que prior est in tempore, potior est in jure." The counsel for the appellant reply to this view, that, as against subsequent purchasers for valuable consideration without notice, the registry acts of this State avoid all unrecorded contracts or deeds selling or conveying
467 the equitable as *well as those which purport to sell or convey the legal title.

The appellant therefore insists that he (with Triplett under whom he claims) occupies the high position, always a favorite of a court of equity, of a purchaser for valuable consideration without notice.

The first question we are to consider is, whether the case made by the record is one which comes within the meaning of the registry act.

The 4th and 5th sections of ch. 117, Code of 1860, are as follows:

"§ 4. Any contract in writing made in respect to real estate or goods and chattels, in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein for more than five years, shall from the time it is duly admitted to record be, as against creditors and purchasers, as valid as if the contract was a deed conveying the estate or interest embraced in the contract.

"§ 5. Every such contract, every deed conveying any such estate or term, and every deed of gift or deed of trust or mortgage conveying real estate or goods and chattels, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such a contract or deed may be."

Now, as between John W. Ashby (who was substituted trustee in the place of the Cockes, the original trustees) and the cestuis que trust, (the appellees,) it cannot be said there was any such contract as is referred to in the sections above quoted, nor any deed or deed of trust or mortgage respecting real estate. The title of the cestuis que trust was founded on the deed conveying certain real estate to the Cockes,
468 as trustees, by the husband and *father, Marshall Ashby, the subsequent sale of that real estate by regular proceedings in the Circuit court of Fauquier county, and the decree of said court directing that the proceeds of sale should be invested by the commissioner of said court in certain lands lying in Culpeper county. The same decree directed that whenever the whole of the purchase money of the Culpeper land was paid, then John W. Ashby, the substituted trustee, "should cause to be conveyed to him by proper deed of conveyance, the said land to be held by him as such trustee, under the same trusts and limitations and for the same purposes declared and set forth" in the deed from Marshall Ashby to the Cockes. But the whole of the purchase money never was paid, a balance being still due to this day, and consequently no deed was ever made, or could be made, to John W. Ashby. What was there, then, to be recorded?—what contract in writing, what deed or other evidence of title, legal or equitable, which could have been put on record in the county of Culpeper? John W. Ashby had received no conveyance; he did not have in fact the legal title, and no semblance of a legal title. All he had was an apparent equitable title founded on the fact that he appeared, in the record in the suit in Culpeper, to have paid nearly all the purchase money. But the legal title was outstanding, and could only vest in him when the whole of the purchase money was paid; and then only for the purposes of the trusts created by the deed from Marshall Ashby to the Cockes.

What evidence of title was there in the cestuis que trust which is required to be or could be made a matter of record under the registry act? Certainly there was no "contract in writing respecting real estate;" nor was there any deed of gift or deed of trust or mortgage conveying real estate, out of which the title of the
469 appellees *arose, and which, under the registry acts, is required to be recorded.

Their title to the Culpeper land arose out of none of these, but out of the regular proceedings of a court of equity having jurisdiction of the subject matter and the parties.

That court held in its hands funds belonging for the most part to infants and married women. These funds were derived from a sale of trust property, being real estate lying in the county of Fauquier, which funds the court had directed its commissioner to invest in lands lying in Culpeper; and when the whole of the purchase money was paid the said land was to be held by a trustee for the appellees upon certain trusts and conditions. I repeat, the title of the appellees was founded upon these proceedings of a court of chancery. Does the registry act require that these proceedings shall be made matter of record in any county where the commissioner of the court may purchase land for an investment of this fund—if so, what part of these proceedings? The decrees only, or the bill, answer, exhibits and depositions?—all of which are necessary to show the title of the appellees. Must these all be spread on the deed books of Culpeper? The title of the appellees is not within the terms of the registry act, and is not such a title as is required to be recorded by that act.

Nor do the 1st and 8th sections of chapter 186, Code 1860, which declare that "a decree for land shall have the effect of a judgment, and that no judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice unless it be docketed," apply to the case before us. None of the decrees in the suit of "Ashby v. Ashby" can be said to be "decrees for land" within the meaning of the statute. They were decrees directing
470 the sale of land held in *trust, and

the investment of the fund arising from such sale in other lands, to be held upon the same trusts when the purchase money was fully paid. It was not a suit settling a controversy inter partes and decreeing the land to one of them; but it was a suit to sell land about which there was no controversy as to the title, and to reinvest the fund in other land about which there was no controversy. The decrees simply first directed a sale of the one tract, and confirmed the investment made by the court's commissioner in another tract as judicious and proper, and directed how it should be held when the purchase money was paid. While these decrees were certainly decrees respecting land, they cannot be said to be decrees for land within the meaning of the statute.

In my opinion this case does not come either within the provisions of the act requiring a registry of titles, nor of that requiring a judgment to be docketed. But the appellant's counsel invoke the aid of the statute in reference to the record of a lis pendens, and insist that they are protected as purchasers of the Culpeper land by the failure of the appellees to follow the provisions of the 5th section of chapter 186, Code of 1860, in not recording a memorandum of the Fauquier suit in the clerk's office of the County court of Culpeper.

That section provides that "no lis pendens or attachment against the estate of a non-resident shall bind or affect a purchaser of real estate without actual notice thereof unless and until a memorandum setting forth the title of the cause, the general object thereof, the court in which it is pending, a description of the land, and the name of the person whose estate is intended to be affected thereby, shall be left with the clerk of the court of the county or corporation in which the land is situate, who shall forthwith record the said memorandum
471 *in the deed book, and index the same by the name of the person aforesaid."

Now, what was the lis pendens of the Fauquier case? Certainly not the Culpeper land. That was not the corpus or subject of controversy. The title to that land was not embraced in "the general object" of the Fauquier suit. That general object was the sale of land in Fauquier and the investment of the proceeds in other lands. And who were the "person or persons whose estate is intended to be affected thereby?" No one residing in Culpeper, or in any way connected with the Culpeper land, but the cestuis que trust, the Ashbys, and no one else. They were the persons whose "estate was intended to be affected" by that suit; and the sale of their land lying in Fauquier county was the subject of the suit. Suppose they had complied literally with the requirements of the 5th section, and put upon record the lis pendens of the Fauquier case. That record would simply have been as follows: "Name of parties: 'Ashby v. Ashby;' general object of the suit: sale of the real estate conveyed by Marshall Ashby to trustees for the benefit of Mrs. Lucy Ashby and her children, and the investment of the proceeds in other real estate; persons whose estate is to be affected thereby: Mrs. Lucy Ashby and her children." Now, how could such a memorandum (a literal compliance with the 5th section) have given any information to any human being of the claim of the Ashbys to the Culpeper land? This very statement shows that the doctrine of lis pendens has no application to such a case.

"The rule as to the effect of a lis pendens," as was said by Judge Green in Newman v. Chapman, 2 Rand., 102, "is founded upon the necessity of such a rule to give effect to the proceedings of courts of justice. Without it the administration of justice might in all cases be frustrated
472 *by successive alienations of property which was the object of litigation pending the suit, so that every judgment or decree would be abortive where the recovery of specific property was the object."

Its whole object is to keep the subjects in controversy within the power of the court until the decree is entered, and to prevent further suits for the same subjects. Judge Brooke, in French v. Loyal Co., 5 Leigh, 671. It enables the court to hold in its hand the corpus or subject of controversy, and prevent its alienation until it can be disposed of, and it can only affect a purchaser of the subject in controversy from a party to the suit. French v. Loyal Co., 5 Leigh, 627.

In no possible view of the case can it be held that the Culpeper land (purchased by Triplett and afterwards by Briscoe) was the subject of controversy in the Fauquier suit, or that the title to that land was in any way connected with the "general object" of that suit. There was therefore no obligation on the Ashbys to file with the clerk of the County court of Culpeper the lis pendens of the Fauquier suit, and if it had been filed it would not have given notice to any purchaser of the Culpeper land, because that land was not the subject of controversy in the Fauquier suit.

But it is argued that the Ashbys ought to have given notice of their equitable claim to the Culpeper land by filing their petition in the suit of "Marshall v. Marshall," asking that the deed be made to them, as their money had been paid for the land; and that if this had been done everybody would have been notified that the land was purchased with their funds, and this would have prevented the purchase of Triplett from John W. Ashby, who had no title.

Why should they file such petition? The decree in the Fauquier suit had already directed that when all the purchase
473 *money was paid for the Culpeper land, a conveyance of the land should be taken by John W. Ashby, as trustee, to be held by him upon the same trusts as were set out in the original deed creating a trust estate from Marshall Ashby to the Cockes. What is there in the record to show that there was any reason to suspect, upon the part of these cestuis que trust, (most of

whom were married women and infants,) that this decree would not be carried out in accordance with its terms? But if there was any obligation on them to file such petition, when was it to be filed? Was it not their privilege to file it at any time before the money was all paid and a conveyance ordered? If that was their privilege (as I certainly think it was) they have complied with every reasonable requirement, by the proceedings which they took in the Culpeper court before the purchase money was fully paid, and before a conveyance of the land was directed by that court.

The appellant in this case can only succeed by maintaining this high ground, that he and Triplett, under whom he claims, are purchasers for valuable consideration without notice. No party can occupy a higher ground than that in a court of equity; and if he can maintain that position his title is established and his position impregnable. But let us now trace the source of his title. From whom did Triplett purchase? And what title did his vendor have or pretend to convey? He bought of John W. Ashby. It is conceded Ashby never had the legal title; nor did he have the equitable title. He had only an apparent equitable title. That is, he (Ashby) appeared on the record of the suit of "Marshall v. Marshall" as the purchaser, who had paid nearly all the purchase money of the land sold by decree of the court in that suit. Triplett, therefore, succeeded to the rights of Ashby, his vendor, he taking nothing more, 474 nothing *less, than was in Ashby.

Now, suppose this was a controversy between these cestuis que trust and Ashby, is it possible that the Culpeper court would, after the facts had been known, decree a conveyance to him? Those facts were, that every dollar of the purchase money he had paid was trust funds which a father and husband had been careful to secure to his wife and children. It must be conceded that the court could not and would not have decreed a conveyance to John W. Ashby. Now, can his unwarranted sale to Triplett prevent the court from decreeing a conveyance to the parties justly and equitably entitled to receive it? Triplett and Briscoe must stand in the shoes of John W. Ashby. Admit that they knew nothing of the relation between John W. Ashby and the appellees; that there was nothing in the record of the case of Marshall v. Marshall to inform them of that relation, or that John W. Ashby had paid for the land with trust funds and not his own, or even to put them upon enquiry as to the real state of the title. Conceding all this, yet there was one thing they did know: They knew the legal title was outstanding. They knew they were purchasing only an equitable title; they knew they were purchasing a title under the control of a court of equity, and took upon themselves the risks and hazards which always attend such a title. The purchaser of such a title cannot occupy the position of a bona fide purchaser without notice. The fact that the legal title is outstanding is of itself notice to him of the risks which he assumes by becoming the purchaser of a mere equity, and he takes only what his vendor can convey himself or that which he (the vendor) can call upon a court of equity to convey to him; and his rights are governed by the maxim "nemo plus juris in alienum transferre potest quam ipse habet."

Now, it must also be conceded that 475 while John W. *Ashby appeared on the record of the suit of "Marshall v. Marshall" as the purchaser of the land sold under a decree of the court, the moment it was known to the court that he was not the real purchaser, but that the funds he had paid belonged to his cestuis que trust, that court would have decreed a conveyance of this land to them and not to him. How does the transfer of a pretended title from him affect the rights of the parties, or control in any way the power of the court in ordering a conveyance to the cestuis que trust, when, before the purchase money is all paid, and before the time comes when it is necessary and proper to order a conveyance, it appears that in point of fact the purchase money is paid by him in trust funds secured to the appellees?

If the contest here was between John W. Ashby and the cestuis que trust, the former could not stand for one moment in a court of equity. His vendor is in no better situation. He stands in his shoes. He gets the title of his vendor and nothing more. If his vendor has neither the legal nor equitable title, his deed conveys nothing. If he has the apparent equitable title only, and no right to call for the legal title, his vendee has no such right, and he must stand or fall by the title of his vendor, which he knew when he purchased it was dependent upon a court of chancery to convey the title. He buys subject to the power of the court, and holds whatever title he gets "subject to the equities upon it in the hands of his vendor, and has no better standing in a court of equity." 3 Sugden on Vendors, 350-51 and note.

The appellant in this case cannot put himself in the high position of a purchaser for valuable consideration without notice. This court has settled that question against him. In the case of Mutual Assurance Society v. Stone and others, 3 Leigh, 476 218, 236, President Tucker *says: "The rule is unquestionable, that he who would protect himself as a purchaser without notice must show himself to be a complete purchaser. If, therefore, either his purchase money remains unpaid, or he has not completed his title by obtaining a conveyance before he has received notice, the notice will affect him; for if he receive that notice before both of those acts are perfected, he ought to stop until the equity is enquired into, or he will be bound by it. Thus, although he has paid every cent of his purchase money, and the hopeless insolvency of his vendor would prevent his ever recovering it back, yet, if he has not completed his title by getting a conveyance prior to his notice of the prior equity he

must stop, and will not be permitted to go on to secure himself by obtaining the legal title from the common vendor. And this is in strict consonance with justice and in strict analogy with equitable principles. It rests upon the maxim, which prevails in equity as well as at law, Qui prior est in tempore potior est in jure, where two equities are equal the prior equity shall prevail."

In Vattier v. Hinde, 7 Peters' R., 252, 271, Chief Justice Marshall said: "The rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate and pays the purchase money without knowledge of an outstanding equity. They apply fully only to the purchaser of the legal estate. The purchaser of an equity is bound to take notice of any prior equity."

So Mr. Justice Story, in speaking of the defence of a bona fide purchaser without notice, says (1 Eq. Juris., sec. 64, c. 1st): "The purchaser, however, must in all cases hold a legal title or be entitled to call for it in order to give him a full protection of his defence; for if his title be merely equitable then he must yield to a legal and equitable title in the adverse party." So also
477 in sec. *1502, 2d Story Eq., the same author says: "To entitle himself to this protection the purchaser must not only be bona fide and without notice and for a valuable consideration, but he must have paid the purchase money. So he must have purchased the legal title, and not be a mere purchaser without a semblance of title; for even the purchaser of an equity is bound to take notice of and is bound by a prior equity, and between equities the established rule is that he who has the prior equity in point of time is entitled to the like priority in point of right."

In Adams' Equity (6th Amer. ed.), p. 340, note 1, in which are collected numerous authorities, it is said: "The prevailing doctrine in the United States is, that the purchaser of an equitable title takes it subject to all prior equities." See also 4 Dessan R., 274; 3 Ired. Eq. R., 117; 7 Cranch R., 48; 7 Peters' R., 252; 10 Peters' R., 177; 10 How. U. S. R., 185; 11 Serg. & Rawle, 389; 7 Penn. St. R., 165; id., 347. And the same author, referring to the leading case of Bassett v. Nosworthy, says, p. 34: "It appears to be clear, upon the authorities both in this country and in England, that among equal equities the prior in time, whether it be original or intermediate, is the prior in right."

The reason of the distinction between the purchaser of a legal and equitable interest seems to be that the protection accorded to bona fide purchasers is a departure from the general rule of jurisprudence, which holds that no man can transfer a greater right than he possesses, and regards the vendee as standing in the same position as the vendor under whom he claims. This exception was made by equity against the rights and remedies which it had called into being, and in favor of purchasers who bought in good faith, and under the impression that they were acquiring a good legal title. But when the purchase is
478 of a mere equity which owes *its existence to a court of chancery, and cannot be enforced without its assistance, the reasons for departing from the general maxim "nemo plus juris in alium transferre potest quam ipse habet," is at an end, and the right acquired by the vendee is necessarily limited to that of the vendor. When, therefore, a purchaser buys an equitable estate or interest with a knowledge of its real character, and without obtaining a legal title, he can found no claim on the mere fact of the purchase, and must stand or fall by the title of the vendor. 2 Lead. Ca. in Eq., 95, and cases there cited. So it was declared in the most unequivocal manner by Ch. J. Marshall, in Shines v. Craig, 7 Cranch R., 34-48, that the purchaser of an equitable title takes it subject to all existing equities; and he relied on this doctrine in the subsequent case of Vattier v. Hinde, 7 Peters' R., 252, above quoted, as a reason for refusing to protect the defendant as a bona fide purchaser for value. In Chew v. Barnett, 11 Serg. & Rawle, 389, Ch. J. Gibson said: "When it is asserted that a purchaser for valuable consideration takes the title free of every trust or equity of which he has no notice, it is intended of a title perfect on its face; for every purchaser of an imperfect title takes it with all its imperfection on its head. It is his own fault that he confides in a title which appears defective to his own eyes, and he does so at his peril. Now, every equitable title is incomplete on its face. It is in truth nothing more than a title to go into chancery to have the legal estate conveyed, and therefore every purchaser of a mere equity takes it subject to every clog that may lie on it, whether he has had notice or not. But the purchaser of a legal title takes it discharged of every trust or equity which does not appear on the face of the conveyance, and of which he has not had notice, either actual or constructive."

In addition to the cases above cited I
479 will only refer to *two recent English decisions which seem strongly to affirm the principles announced in the numerous cases above referred to. In Phillips v. Phillips, decided in 1862 and reported in Law Journal 1862 (Vol. XL Equity) p. 321-325, the Lord Chancellor says: "Now, I take it to be a clear proposition, that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled in equity passes only that which he is entitled to in equity, and nothing more. If, therefore, a person seized of an equitable estate, the legal estate being outstanding, makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can only grant to the purchaser that which he has, namely the estate, subject to the annuity or mortgage, and no more. The subsequent grantee takes only that which is left in the grantor. Hence,

grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies qui prior est in tempore potior est in jure. The first grantee is potior, that is potentior. He has a better and superior, because a prior equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time they took their securities and paid their money had notice of the first incumbrance or not."

Another English case decided in 1863 is very apposite, and the reasoning of Lord Justice Turner applies with much force to the case before us. He says: "Questions of priority between equitable incumbrancers are in general governed by the rule qui prior est tempore potior est jure; and in determining cases depending on the rule we must of course look at the principle on which the rule is founded. It is founded, I conceive, on this principle, that the declaration of a trust vests an estate and interest in the subject matter of the trust in the per-
480 son *in whose favor the trust is created or declared. When, therefore, it is sought to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. A vested estate or interest ought not to be displaced on any light grounds. The case which is here alleged is this," (and in this respect much resembles the case before us,) "that the defendant Thomas Eyers, acting for himself and other members of his family, trusted everything to Sadlim, permitted him to deal with the mortgage and the moneys secured by it as he thought fit, and created and recognized an apparent ownership in him, and that they ought not, therefore, to be allowed to claim against third parties who dealt with him bona fide upon the faith of his apparent title. But upon the ground that there was no proof that the defendants were in any way privy to or cognizant of the dealings of their trustee, it was held that their equity was not to be postponed to those who dealt with him bona fide upon the faith of his apparent title."

It was urged in that case as in this, that the cestuis que trust must be presumed to know the acts and conduct of their trustee. But, replying to this view Lord Justice Turner says: "The very first principle of courts is, that the cestuis que trust places confidence in his trustee; and if it is to be held that a cestuis que trust is to be postponed upon the mere ground that he did not enquire into the acts or conduct of his trustee, that principle would be in a great measure if not wholly destroyed."

Upon this review of the cases (both American and English) I think it is clear that in this contest between holders of mere equities, that which is prior in time is prior in right, and must prevail.

But it is insisted by the learned counsel for the appellant that this rule applies only between equal equities, and if the junior claimant has a superior equity, or if
481 he *has the better right to call for the legal title, he must prevail, and the case of Cox v. Romine, 9 Gratt., 28, and cases cited in the opinion of Judge Samuels, are relied on. In that case it is said: "It may be laid down as a general rule that between mere equities equal in all other respects, the elder shall prevail. If, however, the junior claimant shall have an advantage at law, or superior equity, such party shall prevail." Within this exception to the rule, qui prior est tempore potior est jure, which is an exception well established, it is sought to place the appellant and his vendee Triplett. It is insisted that by the negligence and omission of the appellees, Triplett and his vendee were misled in paying their purchase money while there was a secret trust in favor of the appellees, of which it was their duty to give notice.

It has already been shown that the title of the appellees was not such a title as the registry acts required to be recorded, and that therefore there was no obligation on them under those acts to make such record in any form in the county of Fauquier. The purchaser can, therefore, only claim a superior equity under that rule which declares that "the equity of a party who has been misled is superior to his who has wilfully misled him." The meaning of this rule is, that if a person interested in an estate knowingly misleads another into dealing with the estate as if he were not interested, he will be postponed to the party misled, and compelled to make his representation specifically good. In order to the introduction of this equity it is essential that there be intentional deceit, or at all events that degree of gross negligence which amounts to evidence of an intent to deceive. Adams' Eq., 6th Am. ed., 317, 319.

Now, it cannot be said, looking to this record, that this widow and her chil-
482 dren, who were mostly married *women and infants, by any act or omission of theirs, knowingly misled the purchasers in dealing with the estate in which they were interested. There is nothing in the evidence to show that they ever knew of the sale by John W. Ashby to Triplett, and by Triplett to Briscoe. They were certainly not active in any of these transactions. They were entirely passive, and their position warranted them in being so. They had submitted their rights into the hands of a court of chancery. That court had in its hands the trust funds of these cestuis que trust, and ordered its commissioner to invest these funds in the Culpeper lands; and by its decree directed that when all the purchase money was paid, the trustee, John W. Ashby, should take to himself a conveyance of that land to be held upon the same trusts as those by which the husband and father of the cestuis que trust had been careful to secure this fund to them.

They had every reason to believe that this decree would be carried out. They had every reason and right to presume that their trustee would carry out the order of the court. There was no rule of law or equity

which required them to take a further step in the cause after that decree was rendered. There was certainly neither any necessity or propriety in taking any action towards the assertion of their rights until the time came when the court in Culpeper was to decree a conveyance of the land. That time was when all the purchase money was paid. Before that time they filed their petition asserting their claim, which was duly respected by that court. That court did not err in preferring their claim to that of the appellant and his vendor. They were purchasers of a mere equity; they purchased from a vendor who had neither the legal nor equitable title. They knew the legal title was outstanding; and, in the language of Ch. J. Gibson, in Chew v. Barnett, 483 (supra,) "in truth they *purchased nothing more than a title to go into a court of chancery to have the legal estate conveyed to them;" and when they come into that court, they find they are seeking to acquire title to an estate they now know belongs to another. In the expressive language of Judge Tucker, in a case above cited, they ought to be stopped, and not permitted to proceed further in pursuit of the legal title.

I am of opinion that the decree of the Circuit court of Culpeper should be affirmed.

Anderson, Staples and Bouldin, Js., concurred in the opinion of Christian, J.

Moncure, P., concurred in the results.

Decree affirmed.

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484 *Stearns v. Mason.

March Term, 1874, Richmond.

1. **Bonds—Confederate Currency.***—Though in a sale of real estate in October 1862, the price is fixed with reference to Confederate States treasury notes, it may be shown by parol evidence that the deferred payments were not to be discharged in that currency.
2. **Same—Same.**—In such case the bonds for the deferred payments say they are to be paid "in current money of Virginia." It being shown that they were not to be paid in gold, nor in Confederate currency, they are to be scaled as of the value of Confederate currency at the time of the contract.
3. **Same—Same—Tender.**—The purchaser claiming that the bonds were to be paid in Confederate currency, a few days after the first bond fell due tendered the amount in that currency, and on the day the second bond fell due he tendered the amount of both bonds in that currency, and the vendor refused to receive it. As it was uncertain what amount, or if any, was due upon the bonds, interest will not be allowed except from the date of the decree.

*__Bonds—Confederate Currency.__—See on this subject Wrightsman v. Bowyer, 24 Gratt. 433, and *note*; Miller v. Fletcher, 27 Gratt. 403, and *note*. See also, Compton v. Major, 30 Gratt. 180, and Merewether v. Dowdy, 25 Gratt. 232, citing the principal case and also, Bierne v. Brown's Adm'r, 10 W. Va. 748 and Gilkeson v. Smith, 15 W. Va. 44.

In October 1862 Franklin Stearns sold to C. R. Mason certain real estate near the city of Richmond known as Stearns' distillery, for the price of $60,000. Of this sum $35,000 was paid at the time of the purchase in Confederate States treasury notes; and Mason executed to Stearns his two bonds dated the 24th of October 1862, each for the sum of $12,000, payable, one in one and the other in two years, "in current money of Virginia," with legal interest from the date. The property was 485 *conveyed by Stearns and wife to Mason by deed of same date; and on the same day Mason conveyed it to Nance & Williams in trust to secure the unpaid purchase money.

In August 1865 Stearns having directed the trustees to sell the property for the payment of the purchase money, Mason filed his bill and obtained an injunction to the sale, and he afterwards filed an amended bill. The grounds on which he rested his application for an injunction are, that the bonds were payable in such currency as was in use when they fell due; that when they fell due Confederate States treasury notes were then the only currency; that a few days after the first bond fell due he tendered the amount to Stearns, who refused to receive it; and on the day when the second bond fell due he tendered to Stearns the amount of both bonds, which Stearns refused to accept; and plaintiff had kept the money ready to be paid to Stearns.

Stearns answered the bills, and denied emphatically every allegation of the bill as to the kind of currency in which the bonds were to be paid; says he refused positively to receive any further payment in Confederate currency, though Mason offered to make a larger payment in that currency at the time of the contract; that the currency was then depreciating, and he did not doubt that it would continue to depreciate. He averred that the price of $60,000 was not more than the property had cost him before the war; and he denies that the price agreed to be paid for it was judged by him and the plaintiff to be its value in Confederate treasury notes.

The facts in the case are sufficiently stated in the opinion of Judge Anderson.

The cause came on to be heard on the 28th of November 1871, when the court held that the bonds were payable in the currency in use when they fell due, and they were to be scaled as of that day; and made a de- 486 cree that *upon the plaintiff paying to the defendant Stearns $892.86, with interest from the 24th of October 1863, and $471.70, with interest from the 17th of August 1865, and the costs of the suit, Stearns should deliver up to the plaintiff his bonds, and that the administrator of the surviving trustee should reconvey the property to the plaintiff. From this decree Stearns applied to this court for an appeal, which was allowed.

Steger, for the appellant.

Lyons, Dunlop and H. H. Robertson, for the appellee.

Anderson, J. The appellant Stearns, in October 1862, sold and conveyed to the appellee, Mason, two parcels of land near the city of Richmond, upon which was situated an extensive and very valuable distillery. The price was sixty thousand dollars; of which thirty-five thousand was paid in cash, in Confederate currency. For the balance, the appellee executed two bonds, payable in one and two years, with a deed of trust upon the property as security. The present controversy is as to the measure of the appellee's liability upon these bonds. And that depends upon what was the true understanding and agreement of the parties in respect to the kind of currency in which the contract was to be fulfilled or performed, or with reference to which, as a standard of value, it was made or entered into.

The court is of opinion that, upon the facts shown by the record, the contract in this case was made with reference to Confederate currency, at its date, as the standard of value. But it does not follow necessarily that the deferred instalments were solvable in that currency. In Myers v. Whitfield, 22 Gratt., 780, the contract was made with reference to Confed-
487 erate currency as the standard *of value; but the court held that the deferred instalments were not solvable in that kind of currency, and that a tender of it in payment at the maturity of the bond, when it had become greatly depreciated, was not good; and that the obligee had a right to refuse it. It is true that, in the absence of any evidence to rebut it, the presumption would be that it was solvable in the same currency with reference to which as a standard of value it was entered into. But in this case that presumption is repelled. The appellant was not willing to bind himself to receive Confederate currency in payment of the bonds; and the appellee did not insist on it.

The plaintiff's allegations in his bills, original and amended, are to the contrary. But those allegations, in all their different shapes and phases, whether inferential or positive, by direct averment or by inuendo, are positively and responsively denied by the defendant in his answer. He denies the allegation "that the parties intended that the bonds should be payable in such currency as was used, circulated, and current as money in Virginia at the time when the bonds should respectively fall due. He denies that he understood and expected that the bonds would be paid as they became due in such kind of money as should then be the common currency in Richmond and its neighborhood." He also "denies the allegation that the agreement was, that the credit instalments should be paid in Confederate States treasury notes, if they continued to be the common currency in Virginia at the times the bonds respectively fell due, and if not, then in whatever else should be the common currency at those periods." And that his answer is, and was intended to be, a denial of the allegations of the bills, not only in their letter, but also in substance, is shown by his repeating his previous averment, that at the time of sale he refused to receive a cent more in
488 Confederate *treasury notes; and "that the credit payments were to be in such money as the law of Virginia authorized in payment of debts."

No direct evidence is adduced by the plaintiff in support of the allegations of his bills, thus positively and responsively denied by the answer, except his own testimony, and that falls short of proving the agreement as alleged. If it were fully up to the mark, if he had fully testified to what is alleged in his bills, and it were held that the testimony of the plaintiff himself meets the requisition of the principle of courts of equity, which requires two credible witnesses or one witness and corroborating circumstances to overthrow the answer, (a question which it is unnecessary to decide now,) we think the circumstances do not corroborate, but rather repel the aforesaid allegations.

I think these facts are established by the record: First, that the appellant refused to receive any more than $35,000 in Confederate currency at the time of the sale, though the appellee desired and proposed to pay more. And second, that it was the confident belief of the appellant that Confederate States treasury notes would continue to depreciate. These facts are admitted by the appellee in his testimony. It is also proved by other witnesses that it was the confirmed belief and conviction of the appellant, at that time, that said currency never would be redeemed, and therefore would become worthless. The inference from these facts is irresistible. If he was not willing to receive more of it at the date of the contract, it is not probable that he would have bound himself to receive it at maturity. And if he refused, for the reason the appellee says he assigned, that he could not use it immediately, the case is stronger; for it shows that he was not willing to take it to keep, even until he could meet with an opportunity of investment and run
489 *the risk of its further depreciation. If this be so, it is hardly possible that he would be willing to bind himself to receive it in payment of the deferred instalments, not maturing for the period of twelve months and two years. In having the bonds, the deed of conveyance and the deed of trust prepared, to complete the contract, the bill alleges that he made no provision for payment in currency. Why would he have had them so prepared, if he had agreed or intended to contract for their payment in Confederate currency? The plaintiff avers that he objected to execute the bonds in that form, lest he might be bound to pay in specie, and proposed to appellant to insert the words "in current money of Virginia;" to which he acceded, and had the bonds so drawn; and they were then executed by the appellee.

Why did the appellant accede to this proposition? Because their insertion, in his opinion, would not materially change the legal effect of the bond, and therefore it was, it may be presumed, he accepted it. He says in his answer, "This respondent had positively refused to receive another cent of treasury notes, and in consenting to accept bonds payable in 'current money of Virginia,' he meant to receive what these bonds legally import, namely: such money as is authorized by the laws of Virginia to be paid in discharge of debts or liabilities." "Current money of Virginia" may import a currency made money by the laws of Virginia, just as current money of the Confederacy imports a currency created by the government of the Confederacy. They were distinguishable; and a citizen of Virginia, at the date of this contract, may well be supposed to have had more confidence in the former than the latter, especially if he were not very hopeful of a favorable result of the war. If that proved disastrous the Confederacy must be inevitably overthrown, and its currency must perish with it.

490 *But the States having an antecedent existence, and being indestructible, it was a reasonable conclusion that a currency created by their governments would survive the wreck of the Confederacy, and such we believe was the opinion of many. The meaning of the terms "current money of Virginia" may be controlled by the connection in which they are used. When used in contradistinction to Confederate currency as well as specie, as I think they were in this instance, their import is such as I have indicated. And in that sense the appellant seems to have understood them.

I do not think that he understood or intended their insertion to give to the bonds the effect of specie obligations. And he expressly disclaims in his answer an intention to demand specie. It is true that the State of Virginia could not legislate that any currency, except gold and silver coin, should be received in payment of debts and liabilities. The appellant seems not to have been aware of this constitutional inhibition. He seems to have believed, which is perhaps a general popular error, that it was competent for a State to make bank notes, or other paper currency, receivable in payment of debts and liabilities. I think it is evident that he did not understand the words to import specie. He must have supposed that the appellee understood that the change he proposed would exclude the idea of an obligation to pay specie.

It is equally evident, I think, that he did not understand the words to mean Confederate currency; or that the appellee so understood them. When he accepted the proposition of the appellee, to insert those words in the bonds, he would of course have understood them to mean something different from Confederate currency; which the appellee knew he was not willing to receive beyond $35,000, because he had no

491 immediate use for it, *and was not willing to receive any amount of it, to keep on hand, on account of its rapid depreciation and his total want of confidence in its ultimate redeemability; and consequently would not bind himself to receive it in payment of the deferred instalments, a year or two years hence. He had no reason to believe, then, that the words proposed to be inserted were intended to include that currency; and he may well have understood them to mean Virginia bank notes, or other currency which Virginia might make receivable in payment of debts or liabilities. And if the appellee knew that the words were so understood by him, then, upon reason and authority, such would have been the agreement. 2 Coldwell R., 591 (citing Chitty on Cont., p. 62), the court says: "One party is bound, as well by the rule of moral right as by law, to keep or perform his contract with another, in the sense in which he knew at the time of entering into it the other understood the contract." But such a stipulation would be void, because of the impossibility of its performance—the incompetency of the State to create such a currency. And the stipulation as to the kind of currency in which the contract was solvable would be void; and the contract would stand just as if there had been no stipulation on that subject, except that any presumption that it was solvable in Confederate currency, arising from the fact that the contract was made with reference to that currency as the standard of value, would be repelled by the facts; which, though they do not evidence a valid contract, yet show that the parties did not intend to make a contract solvable in Confederate currency, as they provided for its performance, though ineffectually, in a different medium. It is evident, I think, that the appellant did not understand the change made in the bonds as binding him to receive payment in Confederate

492 *currency, nor as giving them the effect of specie obligations.

How did the appellee understand it? His objection to executing the bonds as first drawn, lest they might bind him to pay specie, conclusively shows that he did not intend the insertion of the words which he proposed to give them the effect of specie obligations. And it is almost equally certain that he did not intend his proposition to be understood by the appellant as binding him to receive payment in Confederate treasury notes in the event that they continued to be the currency at the maturity of the bonds. If such had been his intention there is no reason why he did not propose to insert "Confederate currency," or the currency in common use at the maturity of the bonds, which would include Confederate currency. If such had been his proposition I think there can hardly be a doubt that the appellant would have instantly rejected it. The circumstances tend strongly to show that the appellee was aware of it, and therefore did not propose it.

It is easier to understand what the parties did not mean by the words inserted, than to ascertain what they did mean. The

words themselves are equivocal, and men might honestly differ as to their construction. The appellant and the appellee seem to have differed widely as to what they respectively understood them to mean. And whatever may be their legal effect, if the appellee, at the time of executing the bonds, understood them to mean one thing and the appellant another, and neither knew how they were understood by the other, there was really no agreement between them as to the medium of payment. Consequently, there was no obligation on the appellant to receive payment in a greatly depreciated currency of the Confederate States at
493 the time the tenders *were made. It was a Confederate contract with reference to the standard of value at the time it was entered into; but there being no contract, express or implied, that the deferred instalments should be payable in Confederate States treasury notes, the appellant was not bound to receive them, so greatly depreciated as they were, when tendered in discharge of the appellee's obligations. But the contract having been made with reference to Confederate States treasury notes as the standard of value, it must be scaled as of the date of the contract.

This is our conclusion from the facts and law of this case. That conclusion is the result of mature deliberation, and the best consideration we could give to it, with the assistance of able arguments on both sides, and we think it is not unjust to the appellee. He got a valuable property from the appellant, which they estimated to be worth, in the currency in general circualtion at the time, sixty thousand dollars, and I think the evidence shows that it was not a hard bargain. He paid $35,000 down in Confederate currency, and on the 24th day of October 1864 tendered twenty-eight thousand dollars as a full payment of the balance, which the appellant refused to receive. According to the evidence in the record it was worth only $1,054.33 at the time of the tender, whilst, according to the contract, the balance of purchase money unpaid was worth in gold, at the date of the contract, ten thousand dollars, upon the one-half of which the appellant was entitled to one year's interest, and two years' interest on the other moiety. The money tendered was lost. We think the law throws that loss upon the appellee; and it is not so great a hardship on him to lose the value of that tender as it would be upon the appellant to lose his $10,000—a result which we think would have been flagrantly unjust to him, as we are clearly of opinion that the evidence
494 *does not show that either party intended a contract of hazard, depending upon the kind of currency in common use at the maturity of the bonds.

Upon the only remaining point, the question of interest, the majority of the court are of opinion that it would be inequitable, under the circumstances of this case, to require the appellee to pay interest; and this mainly upon the ground of the uncertainty and doubt as to the amount he was owing, and whether he was owing anything. It was a question of doubt whether the tender and refusal of Confederate treasury notes to the full amount of the debt was not a discharge of his obligation. But if the obligation was not discharged, it was a question of great doubt and uncertainty what amount the appellee was owing, and could not be ascertained until determined by the court. Although bonds were executed for specified sums, the amount due upon them was as uncertain and unliquidated as an open account, or as the amount of damage before verdict for a tort. This court has repeatedly held that when accounts were unliquidated and disputed between the parties, interest ought not to be allowed. Kerr & Co. v. Love, 1 Wash., 172; McConico v. Curzen, 2 Call, 358. In Skipwith v. Clinch, 2 Call, 253, interest upon rent was refused where the amount was so uncertain that the lessors did not venture to distrain. Where an attorney-at-law had lost debts by negligence he was charged with the principal of the debts, but not with interest. Rootes v. Stone, 2 Leigh 650. A claim was presented to the Auditor, which was refused; upon an appeal to the court it was allowed. Although the claim was just it was doubtful; and it was held that in such case the court ought not to allow interest. Auditor v. Dugger, 3 Leigh 241. These cases show that the court ought not to allow interest when the
495 claim, though *just, is doubtful, or where the amount is unliquidated and uncertain.

Although a majority of the court holds in this case that the appellant was not bound by his contract to receive payment of the deferred instalments in Confederate currency, which had become greatly depreciated, yet it was a question of so much doubt that judges have differed, and this court is not unanimous after able and exhaustive argument; and therefore the parties may well have differed, honestly differed. Of one thing there seemed to be no doubt, that the appellee was not bound to pay in specie; and he promptly tendered payment of the whole amount of debt, principal and interest, which had accrued upon it, in Confederate currency. He could make payment in nothing else; there was no other currency. When refused, he kept it on special deposit in bank, to meet his obligations, until the capture of Richmond by the enemy, near the close of the war, when it perished in the general conflagration. He did all he could do to pay the debt at maturity. It was not his fault that there was no better currency. By his efforts to fulfill his contract, he has lost the whole nominal amount of the debt in such currency as we had. It was doubtful, as we have seen, whether he had not fulfilled it, and if he had not (as we have determined) it was uncertain and doubtful what amount he had to pay to that end; so uncertain that it could only be known by the final determination of the court. He has had no use of the property in the meantime by reason of its destruction by fire before the maturity of the bonds;

which it is true could not affect the question of contract, as the property was at his risk. But if he had the use and derived a profit from the property, it would have had an important bearing upon the question of interest. It is therefore the opinion of
496 the majority of the court *that under all the circumstances of this case, which is a suit in equity, the appellant is entitled to a decree for ten thousand dollars in gold, or its equivalent in legal-tender notes at the time of payment, the value of the unpaid balance of purchase money at the date of the sale, with interest thereon from the date of the decree of the Circuit court until payment. Let the decree be reversed at the appellee's costs, and the cause remanded to the circuit court of Henrico for further proceedings to be had therein in conformity with this opinion.

Moncure P. and Christian J. concurred in the opinion of Anderson J. on the first point, but dissented on the second.

Staples J. concurred in the results of the opinion of Anderson J.

Bouldin J. dissented on the first point, and concurred in the decree that interest should not be charged.

Decree reversed.

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497 *Mutual Benefit Life Ins. Co. v. Atwood's Adm'x.

[18 Am. Rep. 652.]

March Term, 1874, Richmond.

1. **Insurance Policy.***—Dr. A, then of New Hampshire, in December 1846 obtained from the M. B. Life Ins. Co. of Newark, New Jersey, a policy of insurance upon his life for $2,600, in favour of his then wife S; with the usual clauses vacating the policy for the failure to pay at the day the annual premiums, and forfeiting all previous payments. About the year 1850 Dr. A. removed to Virginia, where he lived until his death. His wife S died about two years after her marriage, leaving a child, who died an infant; and Dr. A was twice married after her death. He paid the premiums regularly up to December 1861; after his removal to Virginia paying to the agent here; and he offered to pay to the agent the premium for December 1861, but the agent declined to receive it until he could hear from the Co.; but took his note for it. Dr. A died in November 1862, and his widow qualified as his administratrix, and she as adm'x brought this suit against the Company to recover the amount of the policy. HELD:

1. **Same.**—The Company is bound to pay the amount of the policy, less the last unpaid premium.
2. **Same—Beneficiary.**—Dr. A having paid the premiums for thirteen years after the death of his wife S, his administratrix is entitled to recover the money for the benefit of his estate.
3. **Same—War.**—A policy of life insurance providing for the payment of annual premiums, under penalty of forfeiture of all payments and all interest in the policy for non-payment, is not such a contract of continuing performance as is abrogated by a state of war, when the underwriter is a citizen of one of the hostile communities and the insured is a citizen of the other. It is not abrogated, but merely suspended.

498 *4. **Same—Same.**—In such a case the non-payment of premiums by reason of the failure or refusal of the underwriter or his agent to receive the premiums in consequence of the existence of the war does not vacate the policy.

This was an action on the case in the Circuit court of the city of Richmond, brought in February 1866, by Mrs. M. S. Atwood, widow and administratrix of Dr. A. H. Atwood, deceased, against the Mutual Benefit Life Insurance Company of Newark, New Jersey, upon a policy of insurance upon the life of Dr. Atwood, for $2,600. Upon the trial the defendant demurred to the evidence; and the court rendered a judgment in favor of the plaintiff for the amount of the policy, after deducting one premium for which a note had been given, with interest; and thereupon the insurance company applied to this court for a supersedeas, which was awarded. The case is stated by Judge Bouldin in his opinion.

Ould & Carrington, Neeson and Hudnall, for the appellants.

Dooley, Sands, Leake & Carter, for the appellee.

Bouldin, J. On the application of Dr. Aaron H. Atwood, the intestate of the plaintiff, then residing in the State of New Hampshire, a policy of insurance was, on the 30th of December 1846, issued to Sarah Jane Atwood, then the wife of Dr. Atwood, by the plaintiff in error, an insurance company chartered by the State of New Jersey, and having its principal office in Newark in that State, insuring the life of Dr. Atwood in the sum of $2,600 for the term of life. The annual premium to be paid was $50.18, and the policy contained the usual clauses vacating the policy in case of failure to pay punctually the annual premiums
499 on or before the days *specified or the payment thereof, and providing that all payments previously made and all profits should be forfeited to the company in that event.

The premiums were all regularly paid or settled for according to the regulations of the company, by Dr. Atwood, down to the 30th day of December 1861, when the last premium fell due. Prior to that time, to wit: about the year 1850, Dr. Atwood removed to the State of Virginia, where he resided until his death, a portion of the time in the city of Richmond, and the residue thereof in the county of Amelia; and during the whole time of his residence in Virginia he paid or settled for the annual premiums aforesaid to B. W. Knowles, agent of the plaintiff in error in this State, until the 30th day of December 1861. At and before that date war had broken out and was then raging between the United

*Insurance Policy.—See on this subject, monographic *note* on "Life Insurance" appended to McLean v. Piedmont, etc., Ins. Co., 29 Gratt. 361.

States, of which the State of New Jersey was a member, and the Confederate States, of which Virginia was a member, and in consequence thereof Knowles, the agent of the insurance company, declined to receive payment of the premium falling due on the day last mentioned; but he took a note or bond therefor, subject to the approval of his company. Before the next premium fell due, viz: on the 29th of November 1862, Dr. Atwood died in Amelia county, Virginia; so that at his death every premium, except the last, had been settled for by him. His widow, the defendant in error, was appointed and qualified as his administratrix.

Mrs. Sarah Jane Atwood, first wife of Dr. Atwood, to whom the policy was issued, died about two years after her marriage, leaving an only child, who survived her but a short time, dying in infancy. Dr. Atwood married a second wife, who died in 1858, leaving three children who are still living; and in November 1859 he married the defendant in error. After the war
500 was over the *defendant in error called at the office of the company's agency in Richmond to ascertain what the company proposed to do; at which time she offered to pay in gold, if required, the amount of her deceased husband's note for the premium of December 1861. She was informed that if the company should decide to pay the insurance money "the amount of the note could be deducted from it." This conversation was not with Knowles in person, but with his partner, Walford. Very soon afterwards she received a letter from Walford, in which she is informed that Knowles requires, on behalf of the company, the usual proofs of the death of Dr. Atwood, which were promptly furnished; but no satisfactory settlement being offered by the company, the defendant in error, as administratrix of Dr. Atwood, instituted this suit in the Circuit court of the city of Richmond to recover the amount of insurance money, less the dues on the policy.

The material facts proved on the trial were substantially as above stated; and the defendant below demurred to the evidence. The plaintiff joined in the demurrer, and the jury assessed the plaintiff's damage to $2,361.15, with interest from the 1st of December 1865 till paid, subject to the opinion of the court upon the demurrer. The court gave judgment on the demurrer for the plaintiff; and the case comes before this court on a writ of error to that judgment. The case has been ably argued on both sides, and presents on its merits a question of grave interest and importance, viz: the effect of the late war on policies of life insurance, when the underwriters on the one hand, and the assured and insured on the other reside respectively in hostile States. This question has been very recently fully considered by this court, in a case differing in no material aspect from the case now under consideration, and in my judgment has been definitely settled. I allude to the case of The Manhattan Life
501 *Insurance Company v. Warwick, 20 Gratt. 614. The syllabus of the case, as stated by the reporter, is as follows: "In July 1847 W of Richmond obtains from the M. Ins. Co. of New York, through their agent in Richmond, a policy of insurance for the life of S his debtor, forfeited if premiums not paid on the day. An endorsement on the policy says, no payment of premiums binding on the company unless the same is acknowledged by a printed receipt signed by an officer of the company. Payments of the premium are made and such receipts given, signed by an officer in New York, countersigned by the agent here, to whom the money is paid, until 1861, when the premium is paid to the agent, but only the receipt of the agent here is given for it, and the company does not receive it. In July 1862 W offers to pay the premium to the agent here, but he declines to receive it, the company having directed him that the premiums must be paid in New York. S dies in November 1862. The M. Ins. Co. is liable to W for the amount of the insurance, less the last premium, which he had not paid."

This was a judgment of a majority of a full court, after elaborate argument and careful consideration, two judges dissenting; it was therefore the deliberate judgment of this court in a full court. It is true that two of the majority seemed unwilling to yield their assent to all the reasoning of the learned judge who prepared the opinion on that side; but it is very evident that they differed from him only in non-essentials, as they both concurred in the results —in the judgment of the court. That judgment necessarily established the following propositions:

1. That a policy of life insurance, providing for the payment of annual premiums under penalty of forfeiture of all payments and all interest in the policy for non-
502 payment, *is not such a contract of continuing performance as is abrogated by a state of war, when the underwriter is a citizen of one of the hostile communities and the assured and insured are citizens of the other. It is not abrogated, but suspended merely.

2. In such case the non-payment of premiums by reason of the failure or refusal of the underwriter or his agent to receive the premiums in consequence of the existence of war does not vacate the policy.

These propositions of law were both involved in that case, and it was absolutely necessary to establish them both before the judgment could be affirmed. That judgment having been affirmed by a majority of a full court after able and elaborate argument and grave deliberation on the very points, the decision will be regarded by me as settling the law of Virginia on those questions.

In declaring what the law is, we have been taught that it is essential, "for the sake of obtaining uniformity, consistency and certainty," to apply to the case in judgment the rules of law which have been established by the wise, learned and just

who have preceded us, to adhere to precedent unless manifestly unjust and erroneous. In the language of Parke, J., I would say "it appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science." The judicial rule, stare decisis, I have always regarded as sound and conservative, and obligatory on courts, but in the present case it addresses itself to my judgment with peculiar force, occupying as I do a seat on the bench of this court recently filled by one of the majority in the case referred to—the learned and lamented Judge Joynes. Under such circumstances it would be unseemly in
503 me to attempt to weaken the *force of that judgment, for I fully concur with Lord Kenyon, that "mischievous indeed to the public" would it be if "that which was supposed to be law by the wisdom of our" predecessors should be swept away "in consequence of new lights occurring to new judges." It will not be done in this case through my aid. I should feel bound, under the circumstances, to follow that decision, even were I doubtful of its propriety; but it is proper that I should say that I entertain no doubt whatever of its propriety. It commands my hearty concurrence and approbation. The reasoning on which it is based is, in my judgment, unanswerable, and I have been gratified to find that although the ground was then unexplored, the judgment of the court has been abundantly sustained by other and subsequent decisions. There are in fact but two cases known to me contra. One is the decision of Emmons, J., in the case of Tait, &c., v. The New York Life Insurance Company, in the Circuit court of the U. S. for the western district of Tennessee. Against this, and overthrowing it, we have the more satisfactory decisions of Judge Blatchford, U. S. Circuit court for the southern district of New York, in the case of Hamilton, &c. v. Mutual Life Insurance Company of New York, 9 Blatchford, 234, and of Bond, J., of the Circuit court of U. S. for the eastern district of Virginia, in the recent case of Hancock and wife v. The New York Life Insurance Company, reported 2 Ins. Law Journal, No. 12, p. 903, and also in 13 Am. L. Reg., No. 2, p. 103. Both of these decisions are in accord with The Manhattan Co. v. Warwick. As authority they are each equal at least to that of Judge Emmons. In number, and as I think, in reason, they overthrow it. The next and only other case in conflict with The Manhattan Company v. Warwick, is the case of Dillard v. Manhattan Life Ins. Co., decided by the Supreme court of Georgia, July term
504 1871. In that case the *ground and only ground of the decision was that the payment of premiums was strictly a condition precedent to the obligation on the part of the company, and being so, neither illegality nor impossibility of performance would excuse it. The opinion is very short, and the question whether the condition was not, in its nature and effects, a subsequent condition divesting an estate instead of a condition precedent; or if precedent its performance was not necessarily suspended with the entire contract during the war, seems not to have discussed at the bar. It seems to have been treated, without opposition by counsel, as strictly a condition precedent, and not as a condition forfeiting a previously vested estate or right. Had the court taken the latter view of the condition it is evident the decision would have been different. The judge says, "were this a case of forfeiture for the failure, we should hold that the forfeiture was prevented by the illegality of the performance of the condition." Such he thought was not the case. But was not that precisely the character of the condition? I will answer in the language of Judge Robertson, of the Supreme court of Kentucky, in the case of New York Life Insurance Company v. Clopton, &c., 7 Bush's R., 179, decided in August 1870, but not cited in the Georgia case. Speaking of the same condition, the learned judge says, p. 188:

"However lawful the condition of avoidance, as prescribed in this case, may be admitted to be, it is in effect a forfeiture which ought not to be favored. To subject to forfeiture all the premiums paid, as well as the five thousand dollars for the loss of life, would be harshly and unreasonably penal, for no better cause than the inevitable non-precise payment of another instalment of premium, which the law prevented the appellant from a right to receive. None of the parties can be presumed to
505 *have contemplated such a disabling war, or to have intended by the condition of avoidance more than voluntary failure to pay, when there was legal ability to receive the premiums."

"Then, as according to principle and consistent authority, the contract was not dissolved by the war, how can this court, consistently with the spirit of the literal condition and the facts of the case, adjudge the policy avoided by the inevitable non-payment of premiums? Such a decision would seem to be as unreasonable as unjust."

This was the first case on the subject in point of time, having been decided in August 1870; but it was not reported until after March 1871, and was not before this court when the case of Manhattan Co. v. Warwick was decided. They may both be regarded, therefore, as cases of the first impression; and there is a remarkable and instructive concurrence, both in the reasoning and results of the opinions of Judge Robertson in the former case and of Judge Anderson in the latter. Judge Anderson regards the rights acquired by the assured, under the policy, by previous payment of premiums, as vested rights in an entire contract, subject to defeasance or forfeiture by a failure to continue the payment of the annual premiums; that this payment was necessary to be made under the contract, "in the performance of a condition, to prevent a for-

feiture;" and that it would be revolting to our every sense of right—would be "unreasonable, arbitrary and immoral," either to hold such a contract abrogated by the war, or by the non-performance of a condition which by reason of war became illegal and impracticable of performance. The supreme court of New York take precisely the same view of the contract and condition. Judge Peckham, delivering the opinion
506 *of the court in the subsequent case of Sands v. New York Life Ins. Co., 50 New York R., 626, 631-2, says:

"It is against sound principle, and at war with the lights of the age, that the debts of individuals should be impaired by national differences; debts, be it understood, that existed by contracts made prior to the war. Clarke v. Morey, 10 J. R., 73. This contract of the parties I do not think was nullified by the war. What was it? As presented in the complaint and found by the referee it is a contract of insurance by defendant for the life of the insured, for the consideration of so much money received and the annual payment of $160 during the continuance of the policy. It was a valid policy 'for the life of the insured,' to become void by the omission to pay the agreed annuity. In principle I do not see why it is not like a lease or grant of land in fee, reserving rent, to become void if the rent be not paid, if the condition subsequent be not complied with. I do not say that it would bar the plaintiff's recovery if the contract were as the defendant insists it is. It is enough to say that such is not this contract. The agreement is to insure for the life of the assured. Subsequent failure to pay the annuity when due defeats the policy. It is a condition subsequent, not precedent."

The supreme courts of the States of Mississippi and New Jersey have also followed and sustained the decision in The Manhattan Company v. Warwick; and it has been very recently reaffirmed by the unanimous judgment of our own Special Court of Appeals, in the case of The New York Life Insurance Company v. White, in a carefully-considered and well-reasoned opinion by Judge Wingfield. Had these cases been before the Supreme Court of Georgia when the case of Dillard v. The Manhattan Company was decided we think it reason-
507 able *to conclude that the decision would have been different. But, however that may be, there is certainly no apparent reason why we should disregard and repudiate the well-considered decision of our own Supreme court, and follow the unsatisfactory and unsupported decision of the Supreme Court of Georgia. And especially is there little reason to do so, when we consider that the Virginia decision is not only just and reasonable in itself, but is sustained by the unanimous judgment of our own Special Court of Appeals and by the supreme courts of four at least of the other States, being, so far as I am informed, the only other States, besides Georgia, in which the question has been adjudicated.

In support of the decision of this court in the case of The Manhattan Company v. Warwick, we have, then, the decisions of Judges Blatchford and Bond of the Federal courts above referred to, the decision of the Supreme court of Kentucky in New York Life Insurance Company v. Clopton, 7 Bush, 179; the decisions of the Supreme court of New York in Cohen v. New York Life Insurance Company, 50 N. Y. R., 610, and Sands v. same company, Ibid., 626; the decision of the Supreme court of New Jersey in the case of Hillyard v. The Mutual Benefit Insurance Company, reported in the second and third numbers of the Insurance, vol. 2, pp. 137 and 175; the decision of the Supreme court of Mississippi in the case of Statham v. New York Life Insurance Company, 45 Miss. R., 58, and the decision of our own Special Court of Appeals above mentioned: Contra, Judge Emmons of U. S. Circuit court and the Georgia case alone.

Without prolonging this opinion by a comment in detail on these cases, some of which have gone farther in the same direction than the case of The Manhattan Company v. Warwick, and without repeating what is better said in those cases, I feel justified in saying that the proposi-
508 tions *of law above deduced from the decision of this court, in the case of The Manhattan Company v. Warwick, must be regarded as "res adjudicata," whether the payment of premiums be treated as in the nature of conditions precedent or not; for, the contract being lawful and merely suspended, but not abrogated by the war, the performance of the condition, which is part of the contract, is suspended also or excused. The language of the Supreme court of New York on this subject in the case of Sands v. New York Life Insurance Co., 50 N. Y. R., above cited, is pertinent and striking. They say, p. 637, "it is equally a condition precedent to a right to recover on a policy that the action shall be brought within the time specified in the policy. The parties have an undoubted right by contract to fix a short statute of limitations obligatory in the given case. Yet war annuls that limitation if necessary, and the action, may be brought wholly irrespective of that provision of the policy. So held in Semmes v. Hartford Insurance Company, 13 Wall. U. S. R., 158, where that was the sole point of the case. If such be its effect upon that provision there is no reason why it shall not save from forfeiture this condition of payment of the premium when due. It is the fault of neither party that it is not paid, and war suspends contracts like this, but does not destroy them." The opinion of our Special Court of Appeals in N. Y. Life Ins. Co. v. White is to the same effect. I concur in these views and am of opinion that the contract in this case was suspended but not abrogated by the war, and that the rights of the assured under the policy were not forfeited by a failure to perform to the letter the condition of payment of the last premium when due. The performance of that condition was also

suspended or excused. But it has been earnestly contended that the judgment is erroneous and should be reversed, be-
509 cause Dr. Atwood was *neither beneficiary nor contracting party under the policy in question, and there is, therefore, no right of action in his personal representative. That the only child of the marriage having survived his mother, became, by the express terms of the policy, sole beneficiary, and that his personal representative alone could maintain the suit.

The objection struck me at first as presenting a grave difficulty; but upon a more careful consideration I am satisfied that it is not valid. I think, on the facts of this case, that the husband, Dr. Atwood, must be deemed in law the contracting party; and, as distributee of his deceased son, he had long been the sole beneficiary. The policy, it is true, on its face purports to be issued to Sarah Jane Atwood, wife of Dr. Atwood, and expresses that the premium was paid by her; but it is apparent on the record that she was not the acting party, and that no consideration, in point of fact, moved from her. She lived only two years after her marriage, and consequently not less than thirteen of the fifteen premiums settled by Dr. Atwood must have been settled after her death. It is proved by a witness of the plaintiff in error that the policy was issued on "Aaron H. Atwood's application," and it is abundantly shown by the same witness and the other proofs in the cause that the premiums were in fact all settled for by him. A contract nominally with the wife, for such consideration and under such circumstances, is in law a contract with the husband, on which ordinarily he may sue in his own name, even in the lifetime of the wife; and of course the right of action survives to him at her death. In May v. Boisseau, 12 Leigh, 512, all the judges were of opinion that an acknowledgment of debt to a wife would at once enure to the husband, and not survive to the wife, unless it appeared on the face of the
510 contract, or *otherwise, or by legal intendment, that the consideration moved from her—that she was the meritorious cause of the contract; but they held in that case that the court might so intend from the acknowledgment alone, if nothing should appear to the contrary.

In this case it is evident, as I have already said, that no consideration moved from the wife. The payments were evidently made by Dr. Atwood, thirteen of them after his wife's death. In such case my opinion is that it is Dr. Atwood's contract, on which, without the concurrence of his wife, he could, even if an ordinary contract, sue alone. But if not so, the most that could be said is, that it was a contract which both could sue jointly, and Dr. Atwood having survived his wife, he became sole contractor, and the legal right to enforce the contract by suit, in either view, was in him, and devolved on his personal representatives.

It is insisted, however, that under the 2d section of chap. 116, Code of 1860, p. 558, a right to sue in his own name vested in the child and passed at his death to his personal representatives; and therefore the suit was improperly brought in the name of Dr. Atwood's representative.

Without considering the question argued at the bar, whether on the facts of this case any such right existed in the child, under the statute referred to, as is claimed by the counsel for the plaintiff in error, but conceding the claim, I am still of opinion that such right was cumulative merely; that, like the case of an assigned bond or note, the original right to sue in the name of the contracting party is not destroyed by the new remedy allowed by statute, but on the contrary remains in full force.

It is proper to add, that in considering this question I have been governed by
511 the principles of the common *law as enforced in Virginia, there being nothing in the record to show that different rules of law are applicable to the contract in question.

My opinion is, that the judgment be affirmed, with costs and damages to the defendant in error.

Anderson and Staples Js. concurred in the opinion of Bouldin J.

Moncure P. and Christian J., whilst they still were of the opinion expressed by them in the Manhattan Insurance Company v. Warwick, yet upon the maxim of stare decisis, they concurred in affirming the judgment in this case.

Judgment affirmed.

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512 *Twyman, Trustee, v. Hawley.

[18 Am. Rep. 661.]

March Term, 1874, Richmond.

Sale—Purchase Money—Ejectment—Notice.*—T sells land to H, and puts him in possession of it, but does not convey it to him. H having failed to pay any part of the purchase money, T brings ejectment against him to recover the land, without giving T notice to surrender it. The notice was essential to sustain the action; and T must therefore fail in his action.

This was an action of ejectment in the Circuit court of Culpeper county, brought in October 1867 by T. J. Twyman, trustee of Eliza W. Flint, against Charles M. Hawley, to recover a tract of nineteen acres of land. The cause came on to be tried in December 1869, when the defendant demurred to the evidence, and the court sustained the demurrer, and rendered a judgment in his favor. And Twyman thereupon applied to this court for a writ of error and supersedeas, which was awarded.

***Sale—Purchase Money—Ejectment—Notice.**—See as to notice, Williamson v. Paxton, 18 Gratt. 491; Pettit v. Cowherd, 83 Va. 25, 1 S. E. Rep. 392, citing the principal case; Messick v. Thomas, 84 Va. 891, 6 S. E. Rep. 482; Jones v. Temple, 87 Va. 213, 12, S. E. Rep. 404; Howell v. Behler, 41 W. Va. 610, 24 S. E. Rep. 646.

It appears that Twyman, as trustee of Eliza W. Flint, being owner of the land in controversy, on the 9th of February 1862 entered into a written contract with Hawley, by which he sold the land to Hawley for $3,000, of which $1,000 was to be paid in cash, $1,000 on the 1st of January 1864, and $1,000 on the 1st of January 1865, to bear interest from the date, to be secured by a deed of trust on the premises, and Twyman bound himself to make a deed forthwith, and Hawley was put in possession of the land.

513 *It appears further that Hawley had never paid any part of the purchase money, and no deed had been made to him. But it did not appear that Twyman had given any notice to Hawley to surrender possession of the land before instituting the suit; and whether such notice was necessary is in fact the only question in the case.

Field & Gray, for the appellant.

J. W. Green and Williams, for the appellee.

Staples, J. This record presents but a single question for adjudication; and that is, whether a person placed in possession of land under an agreement for a purchase, but who is in default in the payment of the purchase money, is liable to be turned out of possession by ejectment, without previous demand or notice by the vendor.

This question has been very recently considered and decided by the Supreme court of the United States in Burnett v. Caldwell, 9 Wall. U. S. R., 290. It was held in that case, that where the purchaser fails to comply with the terms of the contract under which he obtained possession the vendor may treat the contract as rescinded, and regain the possession by ejectment, without previous demand or notice. It must not be forgotten, however, that this decision was placed avowedly, upon the ground that this was the law as established in Georgia, where the case originated; and by that law the Supreme court felt itself controlled in adjudicating the rights of the parties. The rule recognized in Georgia has, no doubt, been adopted in other States. In England, however, a different doctrine has long been established; and it has been there uniformly held, that the vendor having placed

514 the vendee *in possession, he cannot, without a demand of the possession and a refusal by the vendee, or some wrongful act by him to determine such possession, treat the vendee as a wrong-doer and trespasser, as he must assume him to be in instituting an action of ejectment. Right v. Beard, 13 East's R., 210; Newby v. Jackson, 1 Barn. & Cress., 448; Roe, ex dem., v. Street, 2 Ad. & El., 329.

This doctrine received the sanction of this court in Williamson, trustee, v. Paxton, 18 Gratt., 475-505. It is said, however, this precise point did not directly arise in the case; and the decision is not, therefore, a binding authority for this court. Whether it is or not, it is not important now to enquire; as we are all of opinion the rule there announced is a sound and just one and should be adhered to by the courts. A demand of possession before suit brought can rarely subject the vendor to any expense or inconvenience. To the purchaser, in many cases, it is an act of simple justice. If his failure to pay is the result of an inability to comply with his contract, he may prefer to surrender the possession without incurring the costs of an action. If it is the result of misapprehension or inadvertence, as is often the case, a reasonable demand or notification will in general insure an immediate compliance with the obligations of the contract.

This is the more important under our statutes, which permit the purchaser in possession under a writing stating the terms of the agreement to defend himself in a court of law by showing a payment or performance of what was contracted to be paid or performed. Justice and sound policy alike demand that he should not be ejected from the possession and compelled to resort to a court of equity without some notification on the part of the vendor of his purpose to rescind the contract, and

515 *without some reasonable opportunity of completing the payment of the purchase money.

Conceding that the purchaser is a mere licensee, having no interest in the estate recognizable at law, still his possession is lawful, because with the consent of the vendor; and he cannot be treated as a wrong-doer until his right is determined by the election of the vendor to revoke the license. What is a reasonable demand or notice does not appear to have been settled. The better rule would seem to be, to treat the purchaser who is in default as a quasi tenant at will, subject to the duties and entitled to all the privileges, so far as demand and notice are concerned, applicable to that class of tenancies. 1 Lomax Digest, 189; 2 Smith Lead. Cases, 119; Taylor, Landlord and Tenant, sec. 25.

For these reasons I am of opinion the judgment of the Circuit court is correct and should be affirmed.

The other judges concurred in the opinion of Staples J.

Judgment affirmed.

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516 *Hawley v. Twyman, Trustee.

March Term, 1874, Richmond.

Ejectment.—In ejectment by T against H, the declaration states that plaintiff has title in fee simple to the land, and describes it by quantity, and bounded by certain roads and coterminous owners. The issue is upon the plea of not guilty, and the verdict of the jury is, we &c., "upon the issue joined, find that the defendant is guilty in manner and form as the plaintiff in his declaration hath complained." The judgment is "that the plaintiff recover the lands and tenements in the declaration mentioned," &c. HELD:

1. **Same—Verdict.***—The verdict finds the title in fee in the plaintiff as alleged in the declaration, and is sufficient, though informal.
2. **Same—Same.**—The judgment gives to the plaintiff the land in fee.
3. **Same—Same.**—The description of the land in the declaration is sufficient.

In May 1870 T. J. Twyman, trustee of Eliza W. Flint, brought an action of ejectment in the Circuit court of Culpeper against Charles M. Hawley, to recover a tract of land in the county. The declaration states that the plaintiff was possessed in fee simple, as trustee as aforesaid, of a certain tract or parcel of land, &c., and describes it as bounded by certain roads, describing them, and by the lands of certain named persons, and as containing nineteen acres and eight poles. And the said plaintiff being so possessed thereof, the 517 said defendant *afterwards, to-wit, &c., entered upon the premises and unlawfully withholds, &c.

Issue was made up on the plea of "not guilty," and the cause came on to be tried in June 1871, when the jury returned the following verdict: "We, the jury, upon the issue joined, find that the defendant is guilty in manner and form as the plaintiff in his declaration hath complained." And the defendant thereupon moved the court to arrest the judgment, because it does not find any land for the plaintiff; because it does not specify the estate found in the plaintiff; and further, because said verdict is in other respects vague and uncertain, and not in accordance with the provisions of the statute. But the court overruled the motion, and rendered a judgment "that the plaintiff recover of the defendant the lands and tenements in the declaration mentioned, and his costs," &c. And Hawley applied to this court for a supersedeas, which was allowed.

J. W. Green and Williams, for the appellant.

Field & Gray, for the appellee.

Staples J. It is objected that the verdict in this case does not specify the estate found in the plaintiff, whether it be in fee, or for life, or for a term of years. The declaration claims an estate in fee, and the plea is not guilty, as in the declaration alleged. The verdict responds to the issue as follows: "We, the jury, upon the issue joined, find that the defendant is guilty in manner and form as the plaintiff in his declaration has complained." It will be perceived that the verdict does not expressly find an estate in fee in the plaintiff; but it is very clear that the jury intended so to do, and in fact they have substantially 518 found such an estate in him. *The declaration avers that the plaintiff was possessed of an estate in fee; that the defendant entered upon this estate and unlawfully withholds the possession from the plaintiff. The defendant's plea put the plaintiff upon proof of every material allegation in the declaration, and the verdict necessarily responds to every material averment put in issue by the pleadings, which may be said to include the estate of the plaintiff, the entry and unlawful withholding of the possession by the defendant. The jury, by a general verdict of guilty in manner and form as in the declaration alleged, may and do find all the matters thus included in the issue. When a less or different estate from that stated in the declaration is ascertained to be in the plaintiff, it is very important that the verdict should, in express words, express what the estate is. When, however, the plaintiff properly sets forth his estate or interest in his declaration, as for example an estate in fee, I can see no reason why the verdict may not refer to the declaration for the description of the estate. This may be done by a finding for the plaintiff the premises as claimed in the declaration, or indeed by a verdict of guilty upon the issue joined in manner and form as in the declaration alleged.

It must be admitted a finding of that sort is not a literal compliance with the statute, and it is only by a somewhat strained construction of its language that this verdict can be sustained at all. This the court feels warranted in adopting purely from a strong conviction that it is absolutely necessary in the interests of justice. This is the second suit for a small tract of land—trust property to which the plaintiff has an unquestionable title. The defendant does not pretend to have any claim to it, legal or equitable. The first suit failed for the want of a preliminary notice, which the plaintiff ought to have given. And now the 519 second is very near sharing the *same fate, because the jury were not instructed as to the form of their verdict, although it is presented by the statute, and is of the simplest character. This court, although unwilling to visit upon the plaintiff the consequences of a mere mistake in form, in no way affecting the merits of the case, deems it proper to express its disapproval of the loose and unjustifiable practice pursued in the conduct of the cause.

The third and fourth grounds of error are equally untenable. A judgment that the plaintiff recover the lands and tenements in the declaration mentioned amounts to the same thing as a judgment that he recover the possession of the premises. In either case the judgment is followed by a delivery of the possession. If the verdict ascertained an estate in fee in the plaintiff, a general, unqualified judgment for the plaintiff is in effect a recovery of the fee simple estate, and is therefore according to the verdict. If, however, there is any irregularity in the form of the judgment or in the manner of entering it, it is not to the prejudice of the defendant, and the defect might be cured by an amendment and affirmance.

*Ejectment—Verdict.—See Myers v. Ford, 9 W. Va. 188; Board of Ed. v. Crawford, 14 W. Va. 790; Moore v. Douglass, 14 W. Va. 724; Low v. Settle, 22 W. Va. 397; Oney v. Clendenin, 28 W. Va. 44; Williams v. Ewart, 29 W. Va. 659, 2 S. E. Rep. 881.

No such amendment is, however, necessary.

The last objection is, that the description of the land in the declaration is too vague and uncertain to render judgment upon it, and the description is not aided by the verdict.

The statute merely requires that the premises shall be described with convenient certainty, so that from such description possession may be delivered. The description here is plainly sufficient for that purpose. It points out the locality of the tract by reference to the lands of coterminous owners and the public highways passing it; a form of description equally satisfactory and certain as a statement of the metes and bounds ordinarily contained in deeds of conveyance.

520 *For these reasons I am of opinion there is no error in the judgment of the Circuit court, and the same should therefore be affirmed.

Moncure, P., and Anderson and Bouldin, Js., concurred in the opinion of Staples, J.

Christian, J., dissented, on the ground that the verdict was too vague.

Judgment affirmed.

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521 *Willoughby v. Thomas.

March Term, 1874, Richmond.

Absent, CHRISTIAN, J.

1. **Contract for Services—Breach—Damages.***—W contracts with T to hire his services for a year for a fixed sum. In the course of the year W dismisses T from his employment without sufficient cause for the dismissal. It is error to hold that T, if entitled to recover at all upon the contract, is entitled to recover the hire or wages for the whole year. His right of recovery, in case of a discharge without cause, should be limited to the amount of damages actually sustained by such illegal discharge.

2. **Same—Same—Arbitration.**†—If an arbitrator, intending to decide the questions submitted to him according to law, states inihis award two propositions of law, one of which is erroneous, and the other is correct upon the facts as he may consider them to be, a court, in passing upon the validity of the award, will presume that his award is based upon the latter; and the court cannot enquire whether he took a correct view of the facts.

3. **Same—Same—Same.**—An award held to cover all the matters submitted.

On the 18th of February 1869 Snowden C. Hall, S. S. Fahnestock and William Thomas entered into an agreement under seal, by which Hall sold to the other parties a tract of land in the county of Stafford, containing sixteen hundred acres, upon terms stated in the agreement. On the 13th of March 1869 the said Snowden C. Hall

522 *and Westel Willoughby entered into an agreement under seal, by which Hall sold to Willoughby the same tract of land. And at the foot of the agreement is a statement by Thomas, that he consents to the above. And on the same day Willoughby entered into an agreement with Gilbert S. Miner, by which he agrees to sell to Miner one undivided half of his interest in said land. And again on the same day Thomas, Willoughby and Miner entered into another agreement under seal, by which Thomas bound himself to take charge of and carry on the farm Willoughby and Miner had purchased of Hall, to cut wood and timber and cultivate the farm in all proper crops to the best of his ability, according to their directions, for and during the then present year. And Willoughby and Miner bound themselves to pay to Thomas for his services as above named, $1,050, as follows: $262 to be paid on the 30th of June 1869, $262 on the 30th of August, $262 on the 30th of November; and $264 on the 1st of January 1870. And further to allow to Thomas the entire use and benefit of the house, garden and lots on which the house stands, and the lot east of the house, and the tobacco patch in front, and all that he may raise or grow on the same, and to allow the said Thomas the milk of a first-rate cow. And Thomas bound himself to buy a horse for his own riding during the year.

On the 24th of April 1869 Willoughby and Miner presented to the judge of the Circuit court of Stafford county their bill, in which they set out their agreement with Thomas. They say that in pursuance of this agreement they had procured teams, &c., and seed, and put the same in possession of said Thomas, and directed him to proceed at once to said farm and commence plowing, &c.; that he had neglected to commence any farming operations up to the 6th

523 of April. They charge that *Thomas failed in the promises he made to them of employing hands to work on the farm, which he had said he could do at ten dollars a month; and that on the 23d of April he had advertised for hands at sixteen dollars a month. They charge that he did not attend to the farm, and they gave him notice that the agreement having been procured by his false and fraudulent representations of his ability to procure hands and perform the work on the farm, it was null and void, and that he must leave the farm at once, &c.

They further say that notwithstanding Thomas had been directed to leave the premises, and notified not to interfere in any manner therewith or with anything thereon, he still continues to occupy the houses, and is cultivating a portion of the lots named in said contract, and threatens to gather the crops thereon, and to convert to his own use the fruit, and he has interfered with

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***Contract for Services — Breach — Damages.** — See monographic *note* on "Damages" appended to Norfolk & P. R. Co. v. Ormsby, 27 Gratt. 455.

†**Same — Same — Arbitration.** — On the subject of arbitration and award, see Moore v. Luckess, 23 Gratt. 160; City of Portsmouth v. Norfolk County, 31 Gratt. 727, and *note*; Mills v. N. & W. R. R. Co., 90 Va. 523, 19 S. E. Rep. 171; N. & W. R. R. Co. v. Mills, 91 Va. 640, 22 S. E. Rep. 556; Rison v. Moon, 91 Va. 384, 22 S. E. Rep. 165.

and threatens to interfere with the future management of the said farm with the property thereon, to the plaintiff's great damage; for which they would have no remedy as he is insolvent, having recently taken the benefit of the bankrupt law. They therefore pray for an injunction to restrain the said Thomas from interfering with their farm, from intermeddling with any portion of their cattle, horses, or personal property on said farm; from using the fruit growing upon the farm, and from interfering with any persons on said farm in the employment of complainants, &c., &c.

The injunction was granted; but the bond was not executed until the 25th of June; and then the process was issued.

In September 1869 Willoughby applied to the judge of the Circuit court of Stafford, for a rule upon Thomas to show cause why he should not be attached for disobedience to the injunction, in gathering and
524 using the fruit *and injuring the animals on the farm, and why a receiver should not be appointed to take charge of said fruit, &c., and other crops and property in dispute. The rule was issued; and then Thomas filed his answer to the bill. He says he and Fahnestock were, on the 13th of March 1869, in possession of the land when they made the contract with Hall for the purchase of it. He denies that plaintiffs purchased the land of Hall, and avers that their contract was made with him; and Hall only confirmed it at his request. He says that Willoughby bought only one-half the land, and Miner and himself made the arrangement by which Miner was to have the other half; and he sets out the arrangement. He avers that Miner had acted fraudulently in carrying out the arrangement, and he should be held bound to pay him for said moiety. And he then proceeds to answer the charges of the bill as to his conduct under the contract by which he was to cultivate the farm.

The case came on to be heard on the rule, when the court discharged the rule for the contempt, but appointed a receiver, to take charge of the house and lot occupied by Thomas and the lots adjoining, until the first of January 1870, when the premises should be turned over to the plaintiffs. And the receiver was directed to take charge of all the produce on the premises; but Thomas was to be allowed to use sufficient of them for the use of his family, on his paying to the receiver the value thereof, &c., or giving security sufficient for the payment thereof; and the balance thereof was to be sold. And Thomas was to be allowed to occupy the said premises upon his paying to said receiver the sum of five dollars monthly in advance.

From this order Thomas took an appeal to the District court of appeals at Fredericksburg; where the same was affirmed.
525 *Whilst this chancery suit was proceeding Willoughby and Miner commenced a proceeding of unlawful detainer against Thomas to recover possession of the premises in his possession: and after the decision of the District court of appeals affirming the order of the Circuit court, they brought a suit upon the appeal bond against Touson the surety. In the meantime Thomas had brought an action of covenant against Willoughby and Miner to recover the wages contracted to be paid to him by them; and also an action of slander.

In October 1870 the death of Miner was suggested; and then, with the consent of Willoughby and Thomas, it was ordered that the matters in controversy in this cause between the said Willoughby and the said Thomas, be submitted to the arbitration of Lawrence B. Taylor, whose award should be entered as the decree of the court. The legal evidence heretofore taken by depositions, or such other evidence as is material, to be adduced and considered. It is also agreed that the suits now depending in the courts of Stafford between them, and the claim of said Willoughby against James E. Touson as the security of the said Thomas in an appeal which is now depending in this court, shall also be adjusted in said arbitration.

On the 2d of February 1871, Mr. Taylor made his award in the case. After stating the matters submitted to him, the first of which is the matter involved in the chancery suit aforesaid, he says, I fully concur with Judge Willoughby in the position assumed by him in his argument, that there is substantially only one question to be determined, which is, whether the said contract of hiring (the contract dated the 13th of March 1869,) is to be enforced against the complainant Willoughby; and that the decision of this question will determine
526 all, or nearly all, *the other questions arising in all the suits, both in chancery and at law.

Why, then, should not the contract entered into on the 13th of March 1869 between Willoughby & Miner, the plaintiffs, and Thomas the defendant in the injunction suit, be enforced?

The grounds relied on by Judge Willoughby are two:

1st. Because there was fraud or misrepresentation on the part of Thomas in the procurement of the contract.

2d. Such misconduct on the part of Thomas subsequent to the contract, as authorized Willoughby & Miner to abrogate the contract and discharged Thomas from their service.

The arbitrator considers both of these grounds and holds that they are not sustained by the evidence. He then proceeds:

I am therefore of the opinion that the contract entered into between Thomas and Willoughby & Miner, dated March 13th 1869, is a good subsisting and valid contract, and binding upon the parties.

This being so, the next question is, to what extent and to what amount is Judge Willoughby bound and responsible by that contract. There can be no question that the contract is an "entire contract;" that the hiring was an entire hiring for the then current year of 1869, and that Thomas, if

entitled to recover at all upon that contract, is entitled to recover the hire or wages for the whole year. It is true, according to the authorities to which I am referred by Judge Willoughby, Chitty on Contracts, 5th American edition, p. 578, et sequitur, "that if a servant misconduct himself, as by willfully disobeying orders, &c., he may be discharged without warning before the expiration of the period for which he was hired, and is not entitled to wages," &c.; but on page 580 it is laid *down as the law, that "in order to justify the immediate discharge of a yearly servant there must be proved against him moral misconduct, pecuniary or otherwise, willful disobedience or habitual neglect." As I have already said, there is no such proof in this case. In note 1, p. 579, same book, reference is made to the case of Byrd v. Boyd, 4 McCord, 246, in which it was decided that "where a planter, without cause, turns away his overseer at a season of the year when it is impracticable to get employment, &c., the overseer is entitled to the stipulated wages for the whole time." I have no doubt, therefore, that Thomas is entitled to the full amount stipulated to be paid him by the contract; but the question arises, should Judge Willoughby be compelled to pay the whole, or only one-half, leaving Thomas to proceed against Miner's estate for the balance. I think he is liable for the whole. He and Miner were joint contractors, and jointly engaged in working and carrying on the farm which Thomas was employed to oversee and manage. Willoughby, as survivor, has the control and management of the farm, stock, horses, cattle, farming implements, crops, &c., &c.; he, as such survivor, is legally bound to Thomas for the whole amount of his wages, and having the whole estate in his hands or under his control, it would operate no hardship upon him, as he has the means of reimbursing himself in his own hands.

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Now, therefore, I, Lawrence B. Taylor, having taken upon myself the burthen of the said arbitration, and having heard and duly and maturely weighed and considered the several allegations, vouchers and proofs brought before me by and in behalf of the said Westel Willoughby and Wileman Thomas respectively, in pursuance of the said reference, do make and publish this my award in writing of and concerning the said premises following. That is to say, I do award:

*1. That the said Westel Willoughby do and shall pay to the said Wileman Thomas one thousand and fifty dollars, the sum stipulated in the contract or agreement entered into by them and Gilbert S. Miner on the 13th day of March 1869, with interest on $262, part thereof, from the 30th day of June 1869; on $262, another part thereof, from the 30th day of August 1869; on $262, another part thereof, from the 30th day of November 1869; and on $264, the residue thereof, from the 1st day of January 1870, in accordance with the terms of the said contract.

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2. That the receiver appointed by the decree of the 27th day of September, 1869, to take charge of the house and lot occupied by the said Wileman Thomas, and other property, &c., in the said decree specified, shall account for and pay over to the said Thomas, the proceeds of sale of all the products of said premises not taken for the use of the family of the said Thomas; that said Thomas be released from all liability on account of said products so taken; that all money paid by him to said receiver, if any, be refunded to him; that said Thomas be released and discharged from all liability for rent of said premises, and that said receiver do refund to him all money paid on account of said rent, if any; and that the said Westel Willoughby do pay to the said Wileman Thomas the farther sum of twenty dollars, as an equivalent for the use of a first-rate milch cow, from the 27th day of September 1869, the time when the receiver was appointed, to the 1st day of January 1870, when the contract expired. The evidence would probably justify a larger allowance on this behalf, but Thomas, in his answer, admits that he had the use of two indifferent cows, and I can therefore make no allowance to him on this account, except from the time of the appointment of the receiver, and twenty dollars I consider as a full and fair equivalent *for the use of a cow from that time to January 1, 1870, when the contract expired.

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3. That the said Westel Willoughby be, and he is hereby allowed, as a set-off against the amount awarded as above to the said Wileman Thomas, the costs of the injunction suit under the decree in which this award is made, including the costs in the District court of appeals, and that said injunction suit, having now served its purpose, be dismissed. I doubt whether, sitting as a chancellor, I would have awarded the injunction, and should certainly have dissolved it on the hearing; but this I consider as "res adjudicata," and do not suppose that it was intended, by this reference, to confer upon me authority to reverse and annul the decision of the District court of appeals, under and by virtue of which Judge Willoughby is entitled to an execution for his costs, &c. This also disposes of the matter of the appeal bond, and I therefore award and determine that the parties to said bond, Wileman Thomas as principal, and James E. Touson as surety, be released and discharged from all liability on said bond, and that the same be annulled and cancelled.

4. That the said Westel Willoughby do pay the costs of the action of covenant in the court of Stafford (Thomas v. Willoughby & Miner), and upon said payment that said action be dismissed.

5. That the writ of unlawful detainer (Willoughby & Miner v. Thomas) in the court of Stafford be dismissed at the costs of the plaintiffs.

6. That the action of slander (Thomas v. Willoughby) in the court of Stafford be dismissed at the costs of the plaintiff.

Given under my hand this the 2d day of February, A. D. 1871.

Lawrence B. Taylor.

530 *Upon the return of this award, Willoughby moved the court to set it aside on the grounds:

1st. Of errors of law and fact on the face of the award.

2nd. For partiality in the arbitrator.

3d. Said award is not final as to the matters submitted to the arbitrator, and is not in pursuance of the decree by which said arbitrator was appointed.

The case came on to be heard on the 23d of June 1871, when the court overruled the exceptions and confirmed the award, and made a decree that it be entered as the decree of the court, and the receiver was directed to settle his account before one of the commissioners of the court. Willoughby thereupon applied to one of the judges of this court for an appeal; which was allowed.

Willoughby and Beach, for the appellant.

H. Y. Thomas, for the appellee.

Bouldin J. delivered the opinion of the court.

The appellant's objections to the decree of the Circuit court sustaining the award of the arbitrator, although presented in various forms, are in effect but two.

1. That there was a mistake of law by the arbitrator apparent on the face of the award.

2. That the award was not final between the parties, because it did not dispose of the claim of the appellee Thomas to an interest in the land.

Awards which are in substance and effect judgments of a tribunal of "the parties' own selection," are always favored in law as tending to the repose of society and the suppression of litigation. "Expedit Respublicæ ut sit finis litium." It is therefore only in cases of plain and 531 *palpable mistake of law or fact that courts will interfere with an award otherwise regular. Indeed, on questions of law courts will not interfere with the award unless it be made to appear in some proper manner, that the arbitrator intended to decide according to law, and has plainly mistaken it. In what manner that fact shall be made to appear it is not necessary in this case to decide. Judge Staples, delivering the opinion of this court in the most recent case on the subject, Moore v. Luckess, to be reported 23 Gratt., 160, said, p. 164: "It may be considered as well-settled, that arbitrators being judges of the parties' own selection, have rightfully the power to decide and finally adjudicate the law and facts of the case submitted to them. They may disregard the law entirely and decide upon principles of equity and good conscience exclusively. If, however, they mean to conform to the law, and they plainly mistake it, such mistake is sufficient to invalidate it."

Invoking the latter proposition of law, the appellant contends that the arbitrator in this case plainly intended to decide according to law, and manifestly mistook the law, in this: that holding the contract in the case to be an "entire contract," and the hiring an entire hiring for the year, he laid down as a rule of law to control his decision, "that Thomas, if entitled to recover at all upon that contract, is entitled to recover the hire or wages for the whole year;" whereas his right of recovery, in case of discharge without cause, should be limited to the amount of damages actually sustained by such illegal discharge. We think the proposition contended for by appellant, and not that laid down by the arbitrator, correctly propounds the law of the case; and if we were satisfied that the arbitrator was controlled in his award by the rule of law thus assumed by him, we should be disposed to set the award aside for 532 manifest mistake of *law; for we hold that if Thomas had been discharged the day after he was employed, without fault on his part, but on the next day obtained as good or better employment for the year, although he would be entitled to a recovery against his employers for breach of contract on their part, he certainly would not be entitled to full wages for the year as the measure of damages. The arbitrator evidently thought otherwise, and laid down the law as above stated; but it is equally evident from the face of the award, that he did not deem it necessary to rely on that rule of law to sustain his award. In noticing the argument and authorities of the appellant he quotes from Chitty on Contracts, p. 580, as follows: "In order to justify the immediate discharge of a yearly servant, there must be proved against him moral misconduct, pecuniary or otherwise, willful disobedience or habitual neglect;" and he goes on to say: "As I have already said, there is no such proof in this case. In note 1, p. 579, same book, reference is made to the case of Byrd v. Byrd, 4 McCord, 246, in which it was decided that 'where a planter without cause turns away his overseer at a season of the year when it is impracticable to get employment, &c., &c., the overseer is entitled to the stipulated wages for the whole time.' I have no doubt, therefore, that Thomas is entitled to the full amount stipulated to be paid him by the contract."

We think it evident, from what we have thus quoted from the award, that the arbitrator did not base his decision on the principle first announced as law; but, taking the rule established by the case in McCord to be law, he was of opinion that Thomas was, even in that view, entitled to full wages. He held that Thomas had been discharged without misconduct on his part, when the year was nearly half gone, and he evidently was of opinion that it was then "impracticable to get employment;" 533 *and, "therefore," on the principles of the case of Byrd v. Byrd, independently of his first proposition of law,

he regarded Thomas as "entitled to the full amount stipulated to be paid him by the contract." Taking the view which the arbitrator evidently did of the facts, he regarded Thomas as entitled to his wages under either rule of law referred to by him; and if the award can be sustained under either view, then the objection must fall. Taking, then, the same view of the facts with the arbitrator, as we are compelled to do in this case, we think the rule of law extracted by him from the case of Byrd v. Byrd, rightly propounded the law of the case; and the award not being in conflict, but in accord therewith, we cannot say that it was made under misapprehension of the law.

Whether the judgment of the arbitrator on the facts of the case was or was not right, is not for us to decide. If the record contains all the facts, we might be inclined to differ widely from him; but the weight and effect of the testimony was submitted to him, and we feel bound by his judgment thereon.

The next and only other question necessary to be considered is, whether the award was final? Whether it disposed of all matters submitted to the arbitrator? It is insisted that it did not dispose of Thomas' claim to the land—that this claim was a matter of controversy in the chancery cause, and not being disposed of, that the award was not final—was incomplete and void.

The chancery suit was brought by Willoughby & Miner, but abated as to Miner by his death; and the submission was of "the matters in controversy in this cause between the said Willoughby and the said Thomas." These were matters of controversy with Willoughby, as survivor of Willoughby & Miner, by whom the suit was brought, and for whose benefit it was
534 prosecuted. The *claim of Thomas was not that he had title to the land. That he never had; and any equity he might once have asserted to a portion of it under the contract of himself and Fahnestock with Hall was abandoned when he consented in writing to the conveyance of the entire tract by Hall to Willoughby, under whom Miner claimed. Thomas' claim was not, in point of fact, to the land, nor to any part thereof, nor was it a claim against the plaintiffs in the chancery cause, nor against Willoughby alone as survivor. It was not therefore a matter properly in controversy between Willoughby and Thomas. It seems to have been a claim against Miner alone, upon an alleged contract with him, which, if made at all, was secretly made in fraud of Willoughby, and for which Thomas seems from the evidence to have been fully satisfied by Miner. It is doubtful, therefore, to say the least of it, whether, although in fact relied on in his answer, Thomas' claim under this alleged contract was, or could have been, an issue in the cause. It amounted in effect to a charge of fraud against Miner alone, sounding in damages against him, but not involving the title of Willoughby & Miner to the land, nor affecting the merits of the controversy.

But if it was a claim to an interest in the land, and was submitted to the arbitrator as such, we think it was definitely disaffirmed by the award. That award gave to Thomas all he claimed under the contract of the 13th of March 1869, with Willoughby & Miner; thus, according to him, in our judgment, the very utmost extent of his rights, and necessarily disaffirming any claim on his part to the land in question. The arbitrator evidently regarded this as "res adjudicata" by the decree of the 27th of September 1869, by which a receiver was appointed to take charge of the premises held and occupied by Thomas, until
535 the 1st day of January 1870, *"when the said premises shall be turned over to the plaintiffs in the case." After providing that the receiver might allow Thomas to occupy the premises for the balance of the year on rent, the decree concludes as follows: "But said Thomas shall not occupy said premises longer than the first day of January 1870." This decree was affirmed on appeal, by the District court, 4th judicial circuit, on the 27th January 1870, and the matters involved were treated by the arbitrator, and we think properly, as "res adjudicata." That decree substantially affirmed that Thomas had no claim to the land, or any part thereof, after the first day of January 1870, and gave it to the then plaintiffs, and such we understand to be also the intent and effect of the award. We are of opinion, therefore, that the award covers all matters in controversy between the parties which were submitted to the arbitrator, and that there is no such error or mistake of law or fact on his part as should vitiate his award.

The decree of the Circuit court must be affirmed, with costs and damages to the appellee.

Decree affirmed.

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536 *The New York Life Ins. Co. v. Hendren.

March Term, 1874, Richmond.

1. **Insurance Policy.***—It is now settled law in Virginia, that contracts of life insurance entered into before the late war, are not abrogated, but only suspended by the war.

2. **Same—Interest.**—In an action on a life insurance policy issued in 1856, the jury found a verdict for the whole amount of the policy, with interest from February 1870. The person insured died in August 1862, and notice of his death was given December 2d 1869. If the premiums after February 1861 were not paid, the interest on the policy from the time it should have been paid, was more than the unpaid premiums, and therefore the verdict was not excessive.

3. **Same—Amendment.**—In an action on a policy, the declaration omitted one of the conditions endorsed

*Insurance Policies.—See on this subject, monograpic *note* on "Life Insurance" appended to McLean v. Piedmont, 29 Gratt. 361.

upon it; and on the trial when the policy is offered in evidence, it is objected to for the variance. The court may allow the plaintiff to amend the declaration by inserting the omitted condition, and proceed with the trial.

4. **Same—Instructions.**—Instructions are asked by the defendant, and refused by the court. As, whether correct or not, the plaintiff was entitled to recover upon the evidence in the record, independent of that referred to in the instructions, the refusal to give them is not ground for reversing the judgment.

This was an action of assumpsit in the Corporation court of the city of Norfolk, brought in April 1870, by Henrietta Hendren, against the New York Life Insurance Company, to recover the sum of 537 $5,000, the *amount insured by the said company upon the life of her husband William T. Hendren, for her benefit. The defendant demurred to the declaration, and the plaintiff joined in the demurrer, and the defendant also pleaded non assumpsit, and had leave to file special pleas. At the February term of the court the demurrer was overruled; and the defendant filed seven additional pleas; but it is unnecessary to state them.

Upon the trial of the cause the plaintiff offered in evidence the policy of insurance, which was objected to on the ground of variance: in this, that in stating the conditions of the policy in the declaration it omits the proviso that if the declaration of August 20th 1856 (upon the faith of which the policy was issued,) be in any respect untrue, the policy should be void, and any allegation that said declaration was true, and on other grounds apparent on the record. The plaintiff then asked leave to amend his declaration by inserting the following words, to wit: "All receipts for premiums paid at agencies are to be signed by the president or actuary;" and "that the declaration made by the said plaintiff on the 20th of August 1856, on the faith of which the said policy recites that it is made, is not in any respect untrue, but is in every particular true, and that all things on her part to be done and performed, and all conditions by her to be complied with, have been done and performed and complied with." The court allowed said amendment; and the defendant excepted. There was a second exception to the evidence of payment of the premiums to the defendant, without some evidence of receipts, signed by the president or actuary, as mentioned in the memorandum on the margin of the policy, being given for such payments.

After all the evidence had been introduced the plaintiff asked the court to give 538 one instruction to the jury, *and the defendant asked for twenty-three. They are sufficiently referred to by Judge Anderson in his opinion.

The jury then found a verdict in favor of the plaintiff for the sum of $5,000, with interest thereon from the 2d day of February 1870 until paid. The defendant thereupon moved the court for a new trial, upon the ground that the verdict was contrary to the law and the evidence. But the court overruled the motion and rendered a judgment upon the verdict, and the plaintiff again excepted, and the evidence was spread upon the record.

The New York Life Insurance Company is a corporation incorporated under the laws of the State of New York. It was a mutual assurance company making dividends of net profits, which after the year 1856 were never less than thirty per cent., and there was due Mrs. Hendren, in March 1860, $36. Previous to the year 1856 this company commenced to do business in Virginia, and their local agent in the city of Norfolk was F. F. Ferguson.

On the 25th of August 1856 the company issued a policy upon the life of Wm. T. Hendren, then living in Norfolk, for five thousand dollars in favor of his wife Henrietta Hendren, conditioned upon the payment of $120 annually in quarterly payments in August, November, February and May of each year.

There were conditions annexed to the policy, that Hendren should not, without the consent of the company, pass beyond the settled limits of the United States that lie east of the Rocky mountains, except the settled limits of the British provinces of the two Canadas, Nova Scotia and New Brunswick, or visit or reside in those parts of the United States which lie south of the southern boundaries of Virginia and Kentucky, between the first of July and the first of November; nor shall he, without like consent, enter into any military serv- 539 ice *whatever (the militia not in actual service excepted), and others which need not be stated; and it was further agreed that if the declaration made by Mrs. Hendren, upon the faith of which the agreement was made, should be found in any respect untrue, the policy was to be null and void. And on the margin of the policy it was stated that all receipts for premiums paid at agencies are to be signed by the president or actuary.

It appears that it was the practice of the company to send in advance, from its office in New York, printed receipts signed by the president or actuary, for the amount of the premiums, and with a note at the foot, "not valid unless countersigned by" the agent, naming him.

Hendren paid the premiums up to May 1858 to F. F. Ferguson, the agent at Norfolk. He then removed to Hampton, and Ferguson transferred the policy to R. H. Vaughan, who was the agent of the company at that place, and the premiums were paid to Vaughan until and including February 1861. Early in 1861 Hendren and his wife returned to Norfolk, and in the first of the year 1862 they removed from Norfolk to Richmond, and Hendren was appointed a clerk in the office of Colonel Groner, who was assistant adjutant general in the Confederate service. Hendren held no commission in the military service, and his duties were purely clerical. He died in the city

of Richmond on the 15th of August 1862, of which the defendant had notice on the 2d of December 1869.

There was evidence by Mrs. Hendren that R. H. Vaughan acknowledged payments of the premiums during the lifetime of Hendren, or undertakings by Vaughan to pay them; though there was no proof of printed receipts signed by the president or actuary of the company. And it was in proof 540 that Vaughan entered the army of *the Confederate States from the commencement of hostilities and continued therein until his death in 1864.

The defendant applied to this court for a supersedeas to the judgment; which was allowed.

Tucker & Old and T. Taylor, for the appellant.

John Howard and Richie, for the appellee.

Anderson, J., delivered the opinion of the court.

It is now settled by the decisions of this court, in Manhattan Life Insurance Company v. Warwick, 20 Gratt., 614; and in the recent case of Mutual Benefit Life Insurance Company v. Atwood's adm'x (not yet reported); and also by the decision of the Special court of appeals, in New York Life Insurance Company v. White; the Ins. L. Journal for Dec. 1873, p. 917, that contracts of life insurance entered into before the late war are not abrogated, but only suspended by the war. And with these Virginia decisions the highest judicial tribunals of the States of Kentucky, New York, New Jersey and Mississippi, and the Federal Circuit courts for the southern district of New York, J. Blatchford, and for the eastern district of Virginia, J. Bond, are in accord.

The Kentucky case was the first in order of time, but had not been reported when the Warwick Virginia case was decided. We had not then heard of that decision, and had not the benefit of the able and lucid opinion of Judge Robertson, the distinguished Chief Justice of the Court of appeals of Kentucky; though our reasoning brought us to the same conclusions. And it is a source of sincere gratification that decisions so just and so plainly enforcing the rights of destitute widows and orphans 541 *have received the sanction, commendation and approval of so many eminent courts, distinguished for their learning and wisdom.

In this case, which is an action of assumpsit, the verdict of the jury is for $5,000, the whole amount of the insurance. There was a motion for a new trial, which was overruled by the court, and judgment rendered for the amount of the verdict, to which the plaintiff in error excepted, and the evidence is certified as the facts proved in the cause.

The only open question, under the previous rulings of this court, as before recited, is as to the amount of the verdict. It is clearly shown that the assured was willing and anxious, and was prepared to pay the premiums as they fell due, and that they would have been paid if the company had had an agent here authorized to receive them. Vaughan, who was their agent before the war, and to whom the premiums had been paid up to the 25th of May 1861, upon printed receipts, signed by the president or actuary, and countersigned by the local agent in the mode prescribed, by direction attached to the policy, was not furnished with such receipts for the premium which fell due on the 25th of May 1861, or for any of the subsequent quarterly payments which fell due in the lifetime of the insured, which, in the absence of any waiver on the part of the company, or of any express instruction to receive payment, must be regarded as evidencing a withdrawal of authority from the agent to receive payment, as was held in White's case, above cited. In Warwick's case it was held that the payment made to the local agent and accepted by him was valid and binding upon the company, although they had not furnished the printed receipts. But in that case express instructions to the agent to receive payment in the kind of funds in which it was paid were proved, and 542 upon *that ground, and other circumstances in that case, the company was held to have waived the requirement that the payment should be evidenced by a printed receipt, signed by the president or secretary. And in that case the evidence was clear and unquestionable that payment was made to the agent in the kind of funds, or its equivalent, which he was instructed to receive, and that he was prepared to make the remittance to the company by draft on New York, as he had been instructed to do, of which the company had notice. There is no such evidence in this case; but the presumption may fairly be drawn from the evidence, that if the company had furnished their agent with the receipts signed by the president or actuary the premiums would have been paid. If we discard all the evidence tending to prove the agency of Vaughan, after the commencement of the war, and his declarations and admissions, the evidence in the record does not show that the five quarterly premiums which fell due on the 25th of May 1861, and subsequently, in the lifetime of the insured, amounting in all to $150, were paid, unless the company had in its own possession a sufficient amount due the assured in dividends to satisfy them. Whether the evidence is sufficient to establish such a claim on the part of the assured was properly a question for the jury, and whether the evidence warranted the jury to set off the dividends against the premiums or not, it does not appear that they did or did not. They found a verdict for $5,000, with interest from the 2d day of February 1870.

The court is of opinion that if the assured was entitled to the insurance money, she was entitled to interest upon it from an earlier period than that which is allowed by the verdict; and that the interest to which

she was entitled, and not allowed by the verdict, will more than compensate for the one hundred and fifty dollars of 543 premiums. *If we assume, then, that no payments were made through Vaughan, pendente bello, and that nothing was due the assured on account of dividends (an assumption as to the dividends not warranted by the evidence), it does not appear that the verdict is excessive. It should not therefore be disturbed on that ground.

The court is also of opinion that the court below did not err in giving the plaintiff leave to amend her declaration, and in overruling the demurrer; or in admitting the policy to be given in evidence to the jury, as set out in the first bill of exceptions. It is also of opinion that the declarations and admissions of R. H. Vaughan, as testified to by Mrs. Hendren, tending to prove his agency, or the payment of premiums during the war, as set out in the second bill of exceptions, are not necessary to support the verdict or the plaintiff's right of action; the evidence in the record, exclusive of the declarations and admissions of Vaughan, showing that the verdict is not excessive, and the payment of premiums flagrante bello, not being essential to the plaintiff's right of action. The company was bound to keep an agent here continuously, to receive premiums and to pay policies. It would be unreasonable and unjust to hold the insured to a forfeiture of his contract, and of the money he had paid on account of premiums, because he did not pay premiums which he could not pay because of the failure of the company to have an agent here, as bound by its contract, authorized to receive them. If the company was excused for the non-compliance with its contract in this particular, surely the insured would be excused for the non-payment, and could not be held to a forfeiture therefor.

The court is further of opinion, that there is no error in the instruction given, on motion of the plaintiff, set out in the defendant's third bill of exceptions; and that if the principles enunciated in in- 544 structions No. 1, 2, 3, 4, *6, 8, 9, 11, 14, 15, 16, 18, 19, 20, 21, moved by defendant, are true in the abstract, upon which we do not intimate an opinion, it was immaterial to the plaintiff's right of action whether the agency of Vaughan was continued during the war or not; and the acts, declarations, and admissions of said Vaughan were not material in maintaining the issues on the part of the plaintiff, and the verdict of the jury is well supported by the record if they are excluded; and therefore the refusal to give said instructions, even such as might be right in the abstract, has not been to the prejudice of the plaintiff in error. Nor is there error in the qualification given by the court to the 7th instruction. But the instruction, with or without the qualification, was not material upon the question of the plaintiff's right of action, nor upon the issues involved. And if it had been given without the qualification, it could not have affected the plaintiff's right of action or recovery, and is therefore an abstraction. Instruction No. 5, so far as it relates to the agency of Vaughan, falls within the principle of the class of instructions before noticed. And so far as it denies to the plaintiff her right to recover, because of her removal from Hampton to Norfolk, and thence to Richmond, is not law, and was properly overruled. The policy, by the contract, was not made to depend upon the insured remaining at Norfolk or Hampton, or his not removing to any other place in Virginia. And there is neither reason, nor law, nor justice in holding that the insurer should hold on to the money he had received from the insured, and be absolved from his obligation of insurance for the term of his life, because when the war broke out the insured did not separate himself from his kindred and friends and throw himself into the arms of their enemies. There is no such stipulation or condition in the contract. It does provide that he shall not pass, without 545 *the consent of the company, &c., beyond the settled limits of the United States that lie east of the Rocky mountains, except into the settled limits of the British provinces, &c., or visit or reside in those parts of the United States which lie south of the southern boundaries of the States of Virginia and Kentucky, between the first of July and the 1st of November, or enter into any military or naval service whatever, the militia nof in actual service excepted. He was at liberty, therefore, under the contract, to go anywhere he chose, except within the lines prohibited. And he was inhibited from engaging in active military or naval service without the consent of the company. These were the only restrictions touching the point in question, which are imposed on him by the contract. And to hold that his removal from place to place, not within the inhibited lines, or that he did not separate himself from his kindred and friends and throw himself into the arms of their enemies, subjected him to a forfeiture of his contract, not to the government, but to the defendant, would be for the court to insert a clause in the contract of the parties, which they did not put there, to make a contract for them which they did not make for themselves. We are of opinion, therefore, that the court did not err in refusing to give this instruction.

The 10th and 17th instructions are identical, and announce an abstract principle which, we think, under the terms of the act of assembly, is not law, to wit: That "the defendant could not do by an agent what it could not do by itself." The defendant, in fact, being a corporation could do nothing except by agents. But, if it is meant that this company could not do by its agent in Virginia what it could not do through its New York agent, it is not true. The prohibition of the act of assembly, which was in force at the date of this policy and 546 *ever since, is, that no person shall

act otherwise than is provided in the second section of the act, as agent for any such company, to make or renew, directly or indirectly, any contract of insurance within this State, and with any person resident therein, without complying with the requisitions of this act, or in any way contrary to the true intent and meaning thereof, under the penalty of $500. (Code of 1860, p. 241, § 32.) The section referred to requires that the company shall appoint some citizen of the commonwealth, resident therein, its attorney or agent. (§ 24, in the original act § 2.) Thus it appears that the company can only contract through its resident agent in this State, to whom, by the contract and the statute, premiums are to be paid. (For construction of statute see Warwick & Manhattan Ins. Co., 20 Gratt., supra.) When this company undertook to do business in this State, it was upon the terms of this statute. And those recited show that the company could do by its agent in Virginia what it could not do by its officers or agents of New York. The 12th instruction was given, and, whether right or wrong, cannot be complained of by the company, because given at its instance. The 13th is contrary to the decisions of this court before cited, and we think was properly rejected. The 22d and 23d, so far as they affect the question of Vaughan's agency, flagrante bello, are not material, it not being necessary to establish such agency to entitle the plaintiff to recover. And so far as it asserts that the acting of the insured, as a clerk in the office of the adjutant-general, dissolved the contract, not as an abstract proposition, but in the mode and under the circumstances proved in the cause, it is not true; for it is proved that he was subject to no military order and held no commission or position connected with the military service. We are of opinion, therefore, that these instructions were properly rejected.

547 *Upon the whole the court is of opinion that the judgment be affirmed.

Moncure, P., concurred in the results of the opinion.

Judgment affirmed.

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548 *Richmond Enquirer Co. v. Robinson & als.*

March Term, 1874, Richmond.

1. **Judgment—Relief in Equity—Negligence.**†—Equity will only relieve against a judgment at law if the omission of the defendant to avail himself of his defence at law was unmixed with any negligence in himself or his agents.

2. **Same—Same—Same—Officer.***—The negligence of an officer of a corporation, in allowing a judgment to be rendered against his corporation as garnishee when the debt had been previously assigned to another party, and notice thereof had been given to another officer, will exclude the corporation from relief in equity against the judgment.

In August 1866 R. M. and Wm. W. Smith executed to Thomas Smith their bond for $5,000, with Wm. K. Watts, G. W. Gretter and R. H. Dibrell as their sureties. The Smiths were the owners of the Richmond Enquirer establishment and publishers of that paper, and on the 13th of July, 1867, they sold out the establishment to a corporation known as the Richmond Publishing Company, for which said company, beside other considerations, was to pay to Smith & Son $5,000, with interest, in two years from the date. On the 15th of the same month Smith & Son assigned this claim of $5,000 to Watts, Gretter and Dibrell, the same when collected to be applied to pay the debt due to Thomas Smith, for which they were bound. On the 20th of the same month notice of this assignment was given to D. S. McCarthy, secretary and treasurer of the company, which was acknowledged 549 *by an endorsement upon the notice, and A. M. Bailey, the business manager of the company, was informed of the assignment at the same time, or a few days after. N. Tyler, the president of the company, had gone to New York a few days before the notice was given, and did not return until some days after.

On the 10th of August 1867 Robinson & Fairbanks recovered in the Circuit court of the city of Richmond two judgments against R. M. Smith & Son, amounting together, of principal $1,020.53, with interest from the 30th of May 1867, on which executions were issued, which were returned "no effects." And then the plaintiff's suggesting that the Richmond Publishing Company were indebted to Smith & Son, the company was summoned as a garnishee, and the process having been served on N. Tyler, the president, he appeared in answer to it, and upon his examination stated that the Richmond Publishing Company were indebted to R. M. Smith & Son in the sum of $5,000, which was evidenced by two bonds of $2,500 each, payable two years after date, with interest from date. And thereupon the court rendered a judgment that the said Richmond Publishing Company do, on the 30th of July 1869 (when the said bonds would fall due) pay to the plaintiffs the amount of their two judgments against Smith & Son. Though Tyler seems not to have heard of the assignment by Smith & Son to Watts & als. before his examination in court, upon his return from the court to the office of the company, and mentioning to Bailey what had been done in the court, he was informed of the assignment; but took no step to have the judgment set aside, or his mistake corrected.

***For monographic note on Officers and Agents of Private Corporations, see end of case.**

†**Judgment—Relief in Equity—Negligence.**—The decision as to this point is well settled. See Gentry v. Allen, 32 Gratt. 257; Ayers v. Morehead's Adm'r, 77 Va. 589; Black v. Smith, 13 W. Va. 800; Braden v. Reitzenberger, 18 W. Va. 290, all citing the principal case. See also, Crumlish's Adm'r v. Shen. Valley R. Co., 40 W. Va. 627, 22 S. E. Rep. 90.

***Same—Same—Same—Negligence of Agent.**—See on this point, monographic *note* on "Agency" appended to Silliman v. F. & C. R. Co., 27 Gratt. 119.

After these judgments had been rendered against the Richmond Publishing Company, that company sold out the establishment with all its property, to another corporation called the Richmond Enquirer
550 Company; and *this last company undertook to pay all the debts of the Richmond Publishing Company.

In November 1869, Robinson & Fairbanks having sued out executions upon their judgments against the Richmond Publishing Company, which were returned "no effects," made suggestions in their cases, that the Richmond Enquirer Company was indebted to the Richmond Publishing Company, and the Enquirer Company was summoned as a garnishee. This company admitted in its answer to the summons, that they were bound to pay $5,000; but they stated that Watts and others claimed the two bonds by assignment, and asked that they might be brought before the court to have the question as to which party should receive the money on the bonds settled; and Watts & als. were accordingly made parties.

In January 1870 Watts and his co-sureties filed their bill in the Circuit court of the city of Richmond, in which they set out the facts of the assignment to them of the debt of the Richmond Publishing Company to Smith & Son, before the issue of the executions against Smith & Son, upon the judgments recovered against them by Robinson & Fairbanks. And making Robinson & Fairbanks, The Richmond Enquirer Company, and others, defendants, they asked that Robinson & Fairbanks might be enjoined from collecting the money on the bonds, and that the Richmond Enquirer Company might be compelled to pay the amount to them or in discharge of the debt due Thomas Smith for which they were bound as sureties.

In this suit the Richmond Enquirer Company filed a cross-bill, in which they professed their readiness to pay the bonds, but insisted that they should not be required to pay them twice. The company insisted that the judgment against the Richmond Publishing Company was not valid and binding, because the summons was
551 to the corporation, *and it should have appeared under its corporate seal; that Tyler did not represent the corporation, but was examined as a witness, and having given his testimony under a mistake of fact, such mistake might be corrected in equity.

On the 30th of July 1870 the causes came on to be heard, when the court held that Watts and his co-sureties were entitled to receive the money due upon the bonds aforesaid, and to have it applied to pay the debt to Smith, for which they were bound; and made a decree against the Richmond Enquirer Company for the amount due upon them. And on the 9th of May 1871 the court made a further decree that the Richmond Enquirer Company should pay to Robinson & Fairbanks the sum of $1,020.53, with interest, &c., that being the amount of the two judgments they had recovered against Smith & Son and the Richmond Publishing Company. And thereupon the Richmond Enquirer Company applied to this court for an appeal; which was allowed.

Ould & Carrington, for the appellants.

Page & Maury, for the appellees.

Anderson, J., delivered the opinion of the court.

It is well settled that it is no ground for equitable interference that a party has not effectually availed himself of a defence at law. There are cases in which equity will relieve after verdict, although a defence might have been made at law; but only where there has been no fault or negligence on the part of the defendant or his agents. The rule, as laid down by Chancellor Kent in Foster v. Wood, 6 John. Ch. R., 89, is, "that chancery will not relieve against a judgment at law, on the ground of its
552 *being contrary to equity, unless the defendant in judgment was ignorant of the fact in question pending the suit; or it could not be received as a defence; or unless he was prevented availing himself of the defence by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part." To the same effect is the declaration of the rule by C. J. Marshall, in The Marine Insurance Company of Alexandria v. Hodgson, 7 Cranch R., 332. It must appear that the omission of the defendant to avail himself of the defence at law "was unmixed with any negligence in himself or his agents."

This rule is absolutely inflexible, and cannot be violated, even when the judgment is manifestly wrong in law or fact; or when the effect of allowing it to stand will be to compel the payment of a debt which the defendant does not owe, or which he owes to a third person. 3 Lead. Cas. in Equity, p. 467, and cases cited. It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize a court of equity to interfere; because if a matter has already been investigated in a court of competent jurisdiction, according to the ordinary rules of investigation, a court of equity cannot take it upon itself to enter into it again. Ibid, citing Bateman v. Willoe, 1 Sch. & Lef. R., 201. To the same effect is the current of Virginia decisions. Many of them are cited by J. Lee in delivering the opinion of the court in Slack v. Wood, 9 Gratt., 40.

Before Robinson & Fairbanks obtained their judgments against R. M. Smith & Son, the debt due them by the Richmond Publishing Company had been assigned to Watts, Dibrell and Gretter, for a valuable consideration. And two of the principal officers of the company were informed of this assignment. In fact, the company had been formally notified of the assign-
553 ment, as is shown by *the acknowledgment of its treasurer and secretary, endorsed on the notice, and also by his deposition in the cause. It is true that the president, Tyler, who was served wtih the process against the company, testifies that he was ignorant of the assignment,

and failed to make defence for the company; but, on the contrary, testified and acknowledged that the company was indebted to R. M. Smith & Son by the bonds aforesaid, not knowing that they had been assigned to Watts, &c. He admits that he knew that it was the intention of R. M. Smith & Son to assign the said bonds to Watts, Dibrell and Gretter; yet before he answered to the process, he did not even take pains to enquire whether that assignment had been made. He knew that he had been absent in New York, when the assignment might have been made and notice thereof given to the company, yet after being served with process, without enquiring of the other officers whether an assignment had been made and notice thereof given to them in his absence, or making any preparation for the defence of the company, he goes forward carelessly, not to say recklessly, and acknowledges the company's indebtedness to R. M. Smith & Son. And upon his acknowledgment or testimony judgment was rendered against his company in favor of Robinson & Fairbanks for the amount of their judgment debt against R. M. Smith & Son. And it is remarkable, and evidences the most extraordinary negligence on the part of this agent of the company, that on the same day the judgment was rendered against the company, he was informed that the bonds had been assigned by R. M. Smith & Son to Watts and others for a valuable consideration, of which the company had been notified prior to the judgment and execution of Robinson & Fairbanks against R. M. Smith & Son, and he did nothing to have the error in the judgment against this company 554 corrected, *which might then have been done; but, as the agent and representative of the corporation allowed the judgment to stand.

A corporation can only act through its agents, and must abide the consequences of their acts, done within the scope of their authority. This company's defence could only be made through its president or other agents; and by their fault and gross negligence it did not avail itself of its defence at law, and allowed judgment to go against it for the want of defence. It is, therefore, not in the power of a court of equity, without overturning long-established principles, to reopen the investigation, revise the judgment of the court of law, and relieve against it. The court is, therefore, of opinion to affirm the decree of the chancellor.

Decree affirmed.

OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

I. In General.
II. Election of Officers.
III. Official Bonds.
IV. Powers of Officers and Agents Generally.
V. Particular Officers.
A. Directors.
1. Powers.
2. Duties and Liabilities.
B. President.

I. IN GENERAL.

A private corporation, having only an abstract, artificial existence, is, of course, from its very nature incapable of acting except through its agents who possess only such power as the law has deemed fit to bestow upon them. Muhleman v. Nat. Ins. Co., 6 W. Va. 508.

In Burr's Ex'or v. McDonald, 3 Gratt. 215, it is held that the officers of a private corporation have no private franchise in the offices, but are the mere ministerial agents of the company, to conduct its business for the benefit, and under the authority, of such company.

II. ELECTION OF OFFICERS.

As a general rule the election of officers should conform to the directions in the charter or by-laws, yet, though the election has been irregular, the person so elected becomes an officer *de facto*, and his acts done under the authority of the company, and *colore officii*, would be binding on the company, and could not be impeached by strangers on the ground of want of authority. Burr's Ex'or v. McDonald, 3 Gratt. 217.

In Cross v. West Virginia Cent. & P. Ry. Co., 35 W. Va. 174, 12 S. E. Rep. 1071, it was held that the West Virginia Central Railway Company is subject to the state laws, which provide that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote in person or by proxy for the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to accumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit, and that this mode of electing may be enforced by *mandamus*.

In Currie's Adm'rs v. Mut. Assurance Soc., 4 H. & M. 315, where an act of incorporation provides that there shall be "three directors, out of whom a president shall be chosen," it is held sufficient if the president be elected by a legally constituted meeting, and at the same time with the other directors, without having previously been appointed a director.

A corporation may hold general meetings as often as its interest may render it necessary; and at such general meetings the stockholders may remove and appoint such officers as the welfare of the company requires; and *a fortiori* may this be done, where the officer is elected for a year and until his successor is appointed, the year having expired. Burr's Ex'or v. McDonald, 3 Gratt. 215.

III. OFFICIAL BONDS.

The rules and regulations of a corporation made for the government of the conduct of its officers, do not become terms and conditions of the bond of its officers, unless such an intention is expressed on the face of the bond. R. & P. R. Co. v. Kasey, 30 Gratt. 218.

Though the officers of a corporation upon discovering the default of a bonded employee should promptly discharge such delinquent, yet where the default is not an evidently dishonest one, amounting to the forfeiture of the bond, the failure to discharge the defaulter will not relieve the sureties on

the bond from liability. R. & P. R. Co. v. Kasey, 30 Gratt. 218.

The words "which may be prescribed," in the official bond of a cashier of a bank, conditioned for the faithful performance of "the duties of the said office of cashier, which may be prescribed by the Board of Directors," were held, under the circumstances, to mean the same as if the words had been "the duties which have been, are now, or may hereafter be prescribed by the Board of Directors." Durkin v. Exch. Bank of Va., 2 Pat. & H. 277.

The sureties of an accountant of a bank, are not liable for monies taken by him from the teller's drawer, without his knowledge or consent, it appearing that the accountant is not entrusted with, or put in possession of, any monies of the bank, as accountant. Allison v. Farmers' Bank, 6 Rand. 204.

IV. POWERS OF OFFICERS AND AGENTS GENERALLY.

It is well settled that the law of agency applies to officers and agents of a corporation. Corporations, like natural persons, are bound by the acts and contracts of their agents done and made within the scope of their authority; and persons dealing with such agents are affected with notice of the authority conferred on such agents by the constitution and by-laws of the corporation. Bocock's Ex'or v. Alleghany C. & I. Co., 82 Va. 913, 1 S. E. Rep. 325; Silliman v. F., Or. & C. R. Co., 27 Gratt. 119, and monographic *note* on "Agency" pending thereto.

To Sell Real Estate.—In Burr's Ex'or v. McDonald, 3 Gratt. 235, the court held, that it is competent for a corporation to execute a deed of trust conveying its land, by any agent duly empowered and authorized to do the act. This authority may be conferred by the resolution of the company in a general meeting, constituting an officer special agent to convey the land.

Notice to Agents.—In Bank of Virginia v. Craig, 6 Leigh 399, an injunction had been issued against the guardian of an infant to restrain him from selling his ward's stock in a bank; a subpœna with an injunction issued by the clerk to restrain the president and directors of the bank from permitting guardian to transfer the stock, is served on the president. *Held*, this process, so served, does not bind the bank; nor is it even notice to the bank, actual or constructive, of the equity asserted by the guardian's sureties in their bill, and the president is not the officer of the bank whose province it is to receive such notice.

Where one is notified of his appointment as a director without declining it, and afterwards receives a summons for the company without remonstrating, *held*, his acceptance may be presumed, and it is no defence for the company that he, in the absence of collusion, failed to deliver the summons. Danville & Western R. R. Co. v. Brown, 90 Va. 340, 18 S. E. Rep. 278.

V. PARTICULAR OFFICERS.

A. Directors.

1. Powers.—The relation between directors of a corporation and the company which they represent is similar to that between principal and agent generally; directors possess the same rights and are subject to the same duties as other agents. See monographic *note* on "Agency," appended to Silliman v. F., Or. & C. R. Co., 27 Gratt. 119; Bocock's Ex'or v. Alleghany C. & I. Co., 82 Va. 913, 1 S. E. Rep. 325.

The directors of a corporation are its officers and agents and represent the interest of that abstract legal entity, as well as the interest of its stockholders. Addison v. Lewis, 75 Va. 701.

A joint-stock corporation has power by by-law to declare that no person who is attorney against it in a suit shall be eligible as a director. Cross v. W. Va. Cent. & P. Ry. Co., 37 W. Va. 342, 16 S. E. Rep. 587.

In Hulings v. Hulings Lumber Co., 38 W. Va. 351, 18 S. E. Rep. 620, a corporation received its certificate of incorporation and organized under an act called the "Boom Law"; it was held that according to this statute the board of directors must be composed of those who are stockholders, but they are not required to be residents of the state.

Though a by-law of a corporation authorizes the directors to alter and amend the by-laws, the directors have no authority under such by-law to disregard or alter another by-law which was intended to impose a limitation upon their powers. Accordingly, the board of directors of a railroad company have no authority, without the sanction of a lawful meeting of the stockholders, to lease the road and property of the company with authority to the lessee to operate the road and charge for carrying upon it. Stevens v. Davison, 18 Gratt. 819.

The directors of a corporation occupy a fiduciary relation to such corporation and its property; hence they are bound to discharge their duty prudently, diligently, and faithfully, and apply the assets in case of insolvency, for the benefit of creditors in preference to stockholders and other persons. Planters' Bank v. Whittle, 78 Va. 737; Sweeney v. Grape-Sugar Co., 30 W. Va. 443, 4 S. E. Rep. 431; Hope v. Valley City Salt Co., 25 W. Va. 789; Hulings v. Hulings Lumber Co., 38 W. Va. 351, 18 S. E. Rep. 620.

But directors are not technically trustees, nor bound to apply the assets ratably among the general creditors. Planters' Bank v. Whittle, 78 Va. 737.

Directors of an insolvent corporation, who are also creditors of such corporation, may not only make preferences between other general creditors but may also make preferences in their own favor if they act fair and reasonable and absolutely free from fraud. Hope v. Valley City Salt Co., 25 W. Va. 789; Sweeney v. Grape-Sugar Co., 30 W. Va. 444, 4 S. E. Rep. 431; Hulings v. Hulings Lumber Co., 38 W. Va. 351, 18 S. E. Rep. 620. There is a *dictum* to the same effect in Planters' Bank v. Whittle, 78 Va. 737.

In Addison v. Lewis, 75 Va. 701, it is held that a contract between a director personally and the corporation which he represents is not absolutely void, but voidable at the election of the party whose interest has been so represented by the party claiming under it; and when a director thus becomes a party to a contract with his company, his obligation to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him.

The power of the directors to bind the company by their representations and admissions exists only while they are acting within the scope of their authority and in due course of business. Crump v. U. S. Min. Co., 7 Gratt. 352; Muhleman v. Nat. Ins. Co., 6 W. Va. 508; Silliman v. Fredericksburg, etc., R. Co., 27 Gratt. 119; Bocock's Ex'or v. Alleghany C. & I. Co., 82 Va. 913, 1 S. E. Rep. 325.

The stockholders of a corporation having directed the directors to create new stock and sell it; and the directors having instead, acquired original stock and sold it, their act may be ratified subsequently

by the stockholders, so as to render the sales valid and binding upon the purchasers. Crump v. United States Min. Co., 7 Gratt. 352.

Where the directors of a corporation have power to bind it by their contracts the majority of the directors may so bind it. Booker v. Young, 12 Gratt. 303.

Where the directors fail to declare dividends at the stated times, as directed by the charter, it is not in their power to declare a dividend to extend back over the periods during which they had failed to declare dividends. Gordon's Ex'ors v. R., F. & P. R. R. Co., 78 Va. 502. See also, monographic *note* on "Stock and Stockholders," appended to Osborne v. Osborne, 24 Gratt. 392.

2. Duties and Liabilities.—A creditor of a corporation cannot generally maintain an action at law against the directors thereof for simple non-feasance of duty to the corporation, or fraud in the management or disposition of the money or property of the corporation. But directors of such institutions, may make themselves liable in an action at law for loss and damages, for false representations made or caused to be made by them, and perhaps acts done or caused to be done by them, with intent thereby to deceive and defraud the plaintiff, and which had the designed effect, and caused loss and damage to the plaintiff, but the false representations made or caused to be made, or acts done or caused to be done by the defendants, and relied on by the plaintiff, and the intent thereby to deceive and defraud the plaintiff, must be averred or alleged in positive terms. Zinn v. Mendel, 9 W. Va. 580.

In an action by a corporation against a subscriber to enforce payment on his subscription, it is held that the false and fraudulent representations made by the agent of a corporation to the defendant at the time of his subscription, is a good defense to the action. Crump v. U. S. Min. Co., 7 Gratt. 352.

If the board of directors of an insolvent corporation declare the dividend of net profits, the directors in their individuality concurring in the act are jointly and severally liable to the corporation's creditors for the amount of the capital stock so divided; but alleged insolvency must be clearly proved. Slaymaker's Adm'r v. Jaffray, 82 Va. 346; monographic *note* on "Stock and Stockholders" appended to Osborne v. Osborne, 24 Gratt. 392.

Objection that assignments of assets made by the directors to pay debts for which they are individually bound, are void, by statute, which provides that "No member of the board shall vote on a question in which he is interested, otherwise than as a stockholder," must be made in the court below, and cannot be raised for the first time in the appellate court. Planters' Bank of Farmville v. Whittle, 78 Va. 737.

B. President.—If a corporation, which does a large amount of business, from the character of which it must often be required to bring suits and defend suits brought against it, is in its by-laws and action of its board of directors silent as to the duties of its president, and he is left thereby entirely untrammeled, he has as one of the powers inherent in the president of such a corporation authority to take charge of its litigation and to institute and carry on suits for it and in its name and to defend suits brought against it; and in so doing he may employ counsel who may bind the corporation by their action in the suit within the ordinary power of counsel. He has also the inherent power to apply for and obtain a writ of error for the corporation and in its name; and at his pleasure he may dismiss the counsel employed by him in such case as well as the writ of error, unless restrained from so doing by some action of the board of directors. Colman v. W. Va. O. & O. L. Co., 25 W. Va. 148.

A majority of the directors of a bank constitute a board to do business; and if in the election of a president a majority vote, the person receiving a majority of the votes cast is duly elected. Booker v. Young, 12 Gratt. 303.

When a vacancy occurs by death in the office of president of a corporation, the vice-president may act in his stead and perform the duties, which devolved on the president, though the law, under which the corporation was organized, did not mention the office of vice-president, but after providing for certain officers authorized the company to create other offices, and it did accordingly create the office of vice-president. Such a vice-president after the death of the president possesses all the inherent power of the president. Colman v. W. Va. O. & O. L. Co., 25 W. Va. 148.

The inherent powers of a president of a bank by virtue of his office are very limited, and it is difficult to say what powers he inherently possesses, if any other than the power to take charge of the litigation of the bank by employing counsel and otherwise. But a president of a bank may be authorized by its directors to do any act, which they are authorized by their charter to do, unless the act to be done can by the charter be done only by the directors themselves. Such authority need not be proven by showing that it was expressly conferred by the board of directors, but may be proven by showing the existence of such facts, as constitute clearly a public holding out that the particular act done or contract entered into was within the scope of his legitimate delegated authority. The inference, that such authority has been impliedly conferred, may be legitimately drawn by proving that he was in the habit of doing acts or making contracts of the same general character as the particular act or contracts which he has done or made, and that these acts or contracts, which he was in the habit of doing, though applied to different subjects, involved the same general power, except when the acts and contracts, which he was in the habit of doing or making, were so very numerous and so variant in their character as clearly to justify the inference, that he was authorized impliedly to do all acts and make all contracts, which the directors had the power to do or to make, and to confer on the president the right to do or to make. First Nat. Bank of Wellsburg v. Kimberlands, 16 W. Va. 555.

The directors of a bank may ratify any act done or contract made by the president without authority, which they could have authorized him to do or to make. The acceptance of the benefits of a contract made by the president for the bank is an implied ratification of such contract, and if money is received by its cashier for the bank under such contract, even when such receipt was unknown to the directors, it will be a confirmation of the contract, unless the money so received is returned, when its receipt becomes known to the directors. First Nat. Bank of Wellsburg v. Kimberlands, 16 W. Va. 556.

The president of a bank has no authority, *virtute officii*, to make any admissions which will release the maker of a note to the bank from his legal responsi-

bility created by the note. Hodge's Ex'or v. First Nat. Bank of Richmond, 22 Gratt. 51.

The president of a corporation is not *ex officio* the agent of the corporation to sell property which it may direct to be sold; and unless appointed the agent to sell, his representations are not binding on the corporation. Crump v. United States Min. Co., 7 Gratt. 353.

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555 ***Johnson v. Commonwealth.***

November Term, 1873, Richmond.

1. **Larceny.**—A was standing in a street in R, holding six dollars in his open hand, which he was counting, and J passing by took the money out of his hand and walked off; no force being used beyond what was necessary to withdraw the money. A asked J for it several times as she walked off, but she would not return it. This is grand larceny under the statute if done *animo furandi*. Sess. Acts 1866-'67, ch. 283, § 14.
2. **Same—Variance.**†—The indictment against J is for stealing six dollars of "United States treasury notes." Upon an exception to the refusal of the court to grant J a new trial, the certificate of facts states that A was holding "some money," &c. The facts certified do not sustain the verdict.

The case is stated by Judge Moncure in his opinion.

Cabell & Meredith, for the prisoner.

The Attorney-General, for the Commonwealth.

Moncure, P., delivered the opinion of the court.

This is a writ of error to a judgment of the Hustings court of the city of Richmond, convicting the plaintiff in error, Mahala Johnson, of grand larceny, and sentencing her to confinement in the penitentiary for five years. The offence for which she was prosecuted is declared by the Code, chapter 192, section 14, as amended and re-
556 enacted, *first by the act passed February 20, 1866, Acts of 1865-6, p. 89, chap. 23, and again by the act passed March 1, 1867, acts of 1866-67, p. 709, chap. 283, which is in these words:

"§ 14. If any person steal from the person of another money or other thing, of the value of five dollars or more, he shall be guilty of grand larceny, and be confined in the penitentiary for a period not less than five nor more than ten years."

The indictment strictly pursued the terms of the statute, and was good in form and substance. It charged the larceny of divers notes of the national currency of the United States, the same being United States treasury notes, the number and denomination of which were to the grand jurors unknown, for the payment of divers sums of money, in the whole amounting to the sum of six dollars, and of the value of six dollars; and divers other notes, &c. (describing them differently), the property and notes of one Alfred Jasper, the said sum of six dollars, &c., being then and there due and unsatisfied to the said Alfred Jasper, from the person and against the will of the said Alfred Jasper.

The jury found the accused guilty, and ascertained the term of her confinement in the penitentiary at five years. She moved the court to set aside the verdict and grant her a new trial, upon the ground that the verdict was contrary to the law and the evidence; which motion the court overruled; and she excepted to the opinion of the court.

The facts proved on the trial are certified in the bill of exceptions, and are as follows: "That Alfred Jasper was standing upon Cary street, in the city of Richmond, and was holding some money, six dollars, in his open hand, and was counting it, and that Mahala Johnson, the prisoner, came by and took the money out of his hand
557 *and walked off; he asked her for it and several times begged her to return it to him as she walked off; that no force beyond what was necessary to withdraw the money was used; and that finding she would not return the money, and wishing to keep the peace, he went immediately to the station-house near by and got a warrant for her arrest, which was shortly afterwards executed upon the prisoner."

The only error in the judgment assigned in the petition for a writ of error is, that, by the laws of Virginia, the offence of which the prisoner stands convicted cannot be considered larceny from the person. "For in this State" (she proceeds to say in her petition) "that offence is divided into two classes, viz: 'privately stealing,' and 'open and violent assault, commonly called robbery.' And your petitioner is advised that the statute under which she was indicted was not designed for such cases as the one of which she was convicted, but for the cases of those commonly known as 'pickpockets,' who properly come under the first class mentioned, i. e., 'privately stealing.'"

There is no such offence known to the law of Virginia as "private" stealing, from the person of another or otherwise. The law makes no distinction between private and public stealing, except that robbery must, of necessity, be committed publicly. But it is not pretended that the offence in this case was robbery, and therefore nothing further need be said here as to the nature of that crime. There is nothing in our law on the subject of "pickpockets." The law on which this prosecution is founded uses plain language: "If any person steal from the person of another money or other thing," &c. The charge here is in the very words of the statute, of stealing "from the person of another," and the proof corresponds literally with this charge in regard to
558 stealing from the person of *another. It is, that money to the amount and value of six dollars, belonging to the pros-

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*For monographic note on Larceny, see end of case.

†Larceny—Variance.—See as to variance, monographic *note* on "Autrefois Acquit" appended to Page v. Com., 26 Gratt. 943. See as to definition of larceny, Va. Code 1887, § 3707.

ecutor, and in his hands, was, by the prisoner, taken therefrom and carried away. Whether she did it animo furandi or not was a question which belonged to the jury, and they decided it against the prisoner, and the court below refused to set aside their verdict.

There is a similar statute to ours in Massachusetts against "stealing from the person of another," from which, probably, our statute was taken, in defining the offence. That statute was construed by the Supreme court of that State in the Commonwealth v. Dimond, 3 Cush. R., 235, in which it was held, that "to constitute the offence of larceny 'by stealing from the person,' within the Rev. Sts., c. 126, § 16, it is not necessary that the taking should be either openly or violently, or privily and fraudulently; but if it be with the knowledge, though without the dissent or resistance of the owner, the offence is equally committed, provided the taking be with an intention, on the part of the offender, to deprive the owner of his property." Shaw, C. J., delivered the opinion of the court in that case, in which "it was argued that the act of the defendant, although admitted to be a larceny, is not a stealing from the person, within the meaning of the statute, and that, to make it a stealing from the person, it must either be done openly and against the consent of the party, or privily and without his knowledge. But it must be considered," said the Chief Justice, "that the law is somewhat altered in terms in the revised statutes, from the pre-existing law in the statute of 1804, c. 143, § 8, in which the words are: 'larceny from the person of another, either openly and violently, or privily and fraudulently,' implying that the act must be the one or the other. The language of the Revised Statutes, c. 126, § 16, is simply: 'larceny by stealing from 559 the person *of another.' The case is within the letter of the present statute, and the court are of opinion that it is equally within its spirit and purpose."

That case goes further than ours in support of the view which we have presented; for there the old statute on the subject had been different in its terms, and it was argued that while the terms were altered the substance was not intended to be changed. If this case had occurred under the Massachusetts law no question would have been raised as to its coming within the statute, as the offence here was committed openly and against the consent of the party. The great question in that case was, whether the act could be said to be done against the consent of the owner, when the evidence only was that he did not express any assent or dissent.

But this very question has already, in effect, been decided by this court, in refusing a writ of error to a judgment which was rendered by the Corporation court for the city of Lynchburg on the 12th day of April 1873, in the case of the Commonwealth against Hardwicke. The accused in that case was indicted under the statute in question for grand larceny in stealing a five-dollar note, the property of John Brooks, from the person of the said John Brooks, and was found guilty. A motion was made to set aside the verdict and grant a new trial; which was overruled, and a bill of exceptions was taken to the opinion of the court. It appeared from the facts proved on the trial, which were certified in the bill, that while the said Brooks was holding in his hand a five-dollar note which he was showing to the accused, the latter seized it and ran off with it; that the said Brooks pursued the prisoner, and with the aid of a policeman, whom he happened to meet in the street, he captured the accused and recovered the money. The accused ap- 560 plied *to this court for a writ of error to the judgment; and the principal error assigned in his petition was, that the offence proved was not such a one as the statute contemplated, it being contended that the statute was intended to apply only to pickpockets or to those who steal from the person of another secretly. But this court unanimously refused to grant a writ of error in the case.

If, therefore, the error assigned in the petition were the only ground for reversing the judgment we would have to affirm it. But, after this case had been submitted to the decision of the court upon the petition, the counsel for the plaintiff in error appeared in court, and in the presence of the attorney-general, assigned, ore tenus, an additional error in the judgment, viz: that the subject charged in the indictment to have been stolen consists of United States treasury notes and National Bank notes, whereas the subject stolen, as described in the certificate of facts contained in the bill of exceptions, was money, six dollars; it not appearing from the said certificate that the said money was such money as is described in the indictment; and, therefore, the jury were not warranted by the facts proved in finding a verdict against the prisoner. We have considered this additional assignment of error, and think it ought to be sustained. It is very probable that the money referred to in the certificate of facts was not specie, but consisted of such notes as are described in the indictment; and that the omission to certify that fact proceeded from a mere oversight, arising from an idea of the court that the only object of the prisoner in taking the bill of exceptions was to bring up to this court for decision the question presented by the petition for a writ of error. However that may be, the bill of exceptions purports to contain a certificate of all the facts proved on the trial; 561 and we can look only to *that certificate to ascertain what facts were so proved. Looking to that certificate for the facts, it does not appear that the offence proved by the evidence was the same offence charged in the indictment.

We are therefore of opinion that upon that ground the court below ought to have set aside the verdict and granted a new trial, and that for not having done so the

judgment is erroneous and ought to be reversed, the verdict set aside, and the cause remanded for a new trial to be had therein.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that to constitute the offence of grand larceny in stealing from the person of another money or other thing of the value of five dollars or more, created by the Code, chapter 192, section 14, as amended and re-enacted, first by the act passed February 20, 1866 (Acts of 1865-6, p. 89, chap. 23), and again by act passed March 1, 1867 (Acts of 1866-7, p. 709, chap. 283), it is not necessary that the thing shall be stolen privately. But the court is further of opinion that as it does not appear from the facts certified in the bill of exceptions, that the subject proved to have been stolen by the plaintiff in error from the person of another in this case consisted of United States treasury notes or national bank notes, which are the subject charged in the indictment to have been stolen, there is an apparent variance between the allegata and the probata, and the judgment is, on that ground, erroneous. Therefore it is considered that the same be reversed and annulled; and it is ordered that the verdict of the jury be set aside and the cause remanded for a new trial to be had therein.

562 *Which is ordered to be certified to the said Hustings court of the city of Richmond.

Judgment reversed.

LARCENY.

I. Jurisdiction.
II. Form of Indictment.
III. Taking and Asportation.
IV. Kind of Property.
V. Owner.
VI. Evidence.
VII. Verdict.
VIII. Punishment.
IX. Appeal.

I. JURISDICTION.

Habeas Corpus.—A free negro or mulatto sentenced to the penitentiary by a court of oyer and terminer for the larceny of $20 is illegally detained and may be discharged under a writ of *habeas corpus*. According to the act passed the 15th of March 1832, the court had no jurisdiction to make such sentence. Cropper v. Com., 2 Rob. 842.

Offence Committed Outside the Commonwealth.—Under act of 1786, re-enacted in 1792, a prisoner was indicted, tried and convicted of feloniously stealing the horse of another citizen of this commonwealth, in a place beyond the limits of the same. Com. v. Gaines, 2 Va. Cas. 172.

Offence Committed in Another County.—All the writers at common law, lay it down, that, if goods be stolen in one county, and carried into another, the offender may be indicted in either, because the offence is complete in both. Com. v. Cousins, 2 Leigh 708.

Offence in Another Country.—Where goods were stolen in one country and brought by the thief into another country, the latter country, by the English common law, and in the absence of statute, has no jurisdiction. Va. Code 1887, § 3890; Strouther v. Com., 92 Va. 789, 22 S. E. Rep. 852.

Time of Examining Trial.—The requirement of five days between the commitment of the magistrate and the sitting of the examining court is satisfied by five intervening days including one of these days and excluding the other. Both days need not be excluded. And it is immaterial that one of these days is Sunday. Thompson v. Com., 2 Va. Cas. 135; Boyd v. Com., 1 Rob. 691.

Allegation of Jurisdiction.—It is error for the circuit court to refuse to set aside the verdict of the jury when there is no evidence in the record showing the offense was committed within its jurisdiction. Hoover v. State, 1 W. Va. 336; Va. Code 1887, § 3999; W. Va. Code 1899, ch. 158, § 10.

Jurisdiction of Corporation Courts.—Corporation courts, in cities or towns containing a population of five thousand, have the same jurisdiction, by act of assembly approved April 2, 1870, to try offences committed within their respective limits, that either the circuit or county courts have to try offences within their jurisdiction. Nor was this power taken away by act of April 2, 1873, to regulate jurisdiction of county and circuit courts. Dull v. Com., 25 Gratt. 965-86. (1875.)

Under 1 Rev. Code, p. 246, ch. 71, § 7, a county or corporation court had no jurisdiction to try an indictment for petit larceny which alleged a previous conviction for a similar offence. Rider v. Com., 16 Gratt. 499.

Jurisdiction of Mayors.—The mayor of Lynchburg by § 1, of the act of March 30, 1871, has concurrent jurisdiction with the corporation court of all petit larcenies, and a sentence by him of the prisoner for petit larceny is sufficient, on a second trial for a similar offence, to bring the accused within the penalty of ch. 199, § 27, of Va. Code 1849; Thomas v. Com., 22 Gratt. 912; Va. Code, 1887, § 3907; Miller v. Com., 88 Va. 618, 14 S. E. Rep. 161; Brown v. Epps, 91 Va. 726, 21 S. E. Rep. 119; Wolverton v. Com., 75 Va. 909.

Jurisdiction of Circuit Court.—A free negro was convicted of grand larceny in the corporation court under statute of 1831-2, ch. 22. *Held*, a writ of error does not lie to that court from the circuit superior court. Anderson v. Com., 5 Leigh 806 [740].

II. FORM OF INDICTMENT.

Idem Sonans.—Whether or not two or more names are *idem sonans*, may be determined by the court upon a mere comparison, where the issue is free from doubt; but the modern and approved practice is to submit the question to a jury wherever there is doubt on the question. In this case "Bolen" was held *idem sonans* with "Bolden." Pitsnogle v. Com., 91 Va. 808, 22 S. E. Rep. 351.

Consent.—An indictment for taking and removing a slave from one county to another, with intent to defraud the owner, should state that such taking and removing was without the consent of the owner. Com. v. Peas, 2 Gratt. 629.

Misjoinder.—It is not error on an indictment for larceny, to state the incidental circumstances of the crime in various ways to meet the varying phases of proof. Nor will the court in such case compel the prosecutor to elect a single count on which to try the prisoner. Dowdy v. Com., 9 Gratt. 727; Hausenfluck v. Com., 85 Va. 702, 8 S. E. Rep. 683; Anthony v. Com., 88 Va. 847, 14 S. E. Rep. 834.

Obtaining money or other property by false pretences with intent to defraud is made larceny by statute, if the property so obtained may be the subject of larceny; and it is, therefore, not misjoinder to add such a count to a count for simple larceny. Anthony v. Com., 88 Va. 847, 14 S. E. Rep. 834.

Where several articles of property are stolen at the same time and place, though the stolen goods belong to different persons, the stealing is regarded as one transaction, and, therefore, as one offence which may be charged in a single count. Alexander v. Com., 90 Va. 809, 20 S. E. Rep. 782.

It was not misjoinder for an indictment to charge in one count a conspiracy to commit larceny and in another count charge the larceny in accordance with the conspiracy. Anthony v. Com., 88 Va. 847, 14 S. E. Rep. 834.

Conclusion of Indictment.—Where the statute neither creates the offence, nor adds a new penalty, but only takes away some benefit which the common law allowed the prisoner the indictment need not conclude "*contra formam statuti.*" Certainly such omission is cured after verdict by the statute of jeofails. Chiles v. Com., 2 Va. Cas. 260; Va. Code 1887, § 3999; Va. Const., art. VI, § 26; W. Va. Const., art. II, § 8; Lemons v. State, 4 W. Va. 755.

Where the statute makes that an offence was not so at common law, the indictment therefor must conclude as prescribed by the statute. Com. v. Hays, 1 Va. Cas. 122.

False Pretences.—An indictment for obtaining money under false pretences, which by Va. Code 1860, p. 796, § 49 (Va. Code 1887, § 3722) is made larceny, may either be for larceny generally, or for the specific acts which this statute says shall be deemed larceny. Leftwich v. Com., 20 Gratt. 716; Duff v. Com., 92 Va. 769, 23 S. E. Rep. 643; Dull v. Com., 25 Gratt. 965-982; Anable v. Com., 24 Gratt. 578.

Removal of Goods Distrained.—An indictment for fraudulently removing goods which have been levied on or distrained, which by Va. Code 1887, § 3712, is made larceny, may either be for larceny generally or in terms of the statute or language equivalent thereto. Duff v. Com., 92 Va. 769, 23 S. E. Rep. 643.

Offence Felonious.—Where a felony is charged the indictment should state that the offence was committed feloniously. Barker v. Com., 2 Va. Cas. 122; Dull v. Com., 25 Gratt. 965; State v. Vest, 21 W. Va. 796.

Description of Property.—In an indictment under the statute making writings and papers of value the subject of larceny, a description of the papers by the name and designation by which they are usually known, and which properly avers the value thereof, is sufficient. Fredrick v. State, 3 W. Va. 695; Pollard's Supp. 1900, § 3994.

A description of bank notes which merely states that they were bank notes current within the United States, was held sufficient. Com. v. Moseley, 2 Va. Cas. 154.

But an indictment for obtaining "United States currency" by false pretences is not sufficient. There is no law making the stealing of "United States currency," *eo nomine*, larceny. Such an indictment is too vague. Leftwich v. Com., 20 Gratt. 716.

Under act Feb. 28, 1874, amending § 6 ch. 201, of Code of 1873, an indictment charging the larceny of "United States currency" is sufficient. Dull v. Com., 25 Gratt. 965-974; Va. Code 1887, § 3994.

In an indictment for stealing certain notes "purporting on their faces to be, and being notes of banks chartered, etc.," *held*, the words "and being notes of banks chartered" may be rejected as surplusage, and no proof of such charter is necessary. Pomeroy v. Com., 2 Va. Cas. 342.

A charge of larceny of certain paper, of the value of one hundred and ten dollars, without further description thereof is too indefinite. Robinson v. Com., 32 Gratt. 866.

Value.—Under the statute making bank notes the subject of larceny no value need be shown. The statute now provides that they shall be deemed to be of the value expressed on their face. Adams v. Com., 23 Gratt. 949; Whalen v. Com., 90 Va. 544, 19 S. E. Rep. 182; Va. Code 1887, § 3709.

The indictment need not state that the check alleged to have been stolen, remained unsatisfied or unpaid. Whalen v. Com., 90 Va. 544, 19 S. E. Rep. 182.

The substitution of the word "price" for "value" is not fatal to an indictment for larceny. The object of stating the value is merely to determine the grade of the offence, and either is sufficient to give the accused notice of the charge preferred against him State v. Sparks, 30 W. Va. 101, 3 S. E. Rep. 40.

III. TAKING AND ASPORTATION.

In any simple larceny there must be a *felonious* and complete severance of the property from the possession of the owner thereof, and the thief must have had, at least for an instant of time, complete and absolute control and possession of the stolen property; but where the property has been feloniously taken, the slightest removal, even if it be but a hair's breadth, with intent to steal the same, is sufficient. State v. Chambers, 22 W. Va. 799; Whalen v. Com., 90 Va. 544, 19 S. E. Rep. 182; Wolverton v. Com., 75 Va. 909; Barker v. Com., 2 Va. Cas. 122.

If by fraud or device the owner (not intending to part with his right) be induced to place his property in the hands of another, who acquires possession with a felonious intent to convert it to his own use, the "taking" and trespass are such as are required to complete the offence of larceny. Vaughn v. Com., 10 Gratt. 762; Starkie v. Com., 7 Leigh 752; Walker v. Com., 8 Leigh 743; Johnson v. Com., 24 Gratt. 555. See dissenting opinion in Anable v. Com., 24 Gratt. 563.

It must be shown that the original taking was felonious, but the jury has a right to infer from all the facts and circumstances of the case, the felonious intent in the original taking. Tanner v. Com., 14 Gratt. 635; Booth v. Com., 4 Gratt. 526; Blunt v. Com., 4 Leigh 689; Hall v. Com., 78 Va. 678; Perrin v. Com., 87 Va. 554, 13 S. E. Rep. 76; Dull v. Com., 25 Gratt. 965; Richards v. Com., 13 Gratt. 803; Shinn v. Com., 32 Gratt. 899.

IV. KIND OF PROPERTY.

Goods Lost.—The finder of lost property who, knowing or having reason to know the true owner, appropriates it to his own use is guilty of the larceny thereof. Tanner v. Com., 14 Gratt. 635; Perrin v. Com., 87 Va. 554, 13 S. E. Rep. 76.

Bond.—An obligor who obtains possession of his bond by fraud *lucri causa*, is guilty of the larceny thereof. And it is no defence that he did not know that his act amounted to larceny. Vaughn v. Com., 10 Gratt. 758.

Bank Notes.—Under the act of 1806, a prosecution may be had for stealing bank notes of another State. The passing of the note as genuine is *prima facie* evidence that the note is of some value. Robinson v. Com., 32 Gratt. 866; Cummings v. Com., 2 Va. Cas. 128; Com. v. Moseley, 2 Va. Cas. 154; Angel v. Com., 2

Va. Cas. 228; Pomeroy v. Com., 2 Va. Cas. 342; Moore v. Com., 2 Leigh 761 [702]; Leftwich v. Com., 20 Gratt. 716; Adams v. Com., 23 Gratt. 949; Va. Code 1887, § 3708.

Kind of Property.—Checks, kept and used for gambling contrary to the statute, can be the subject of larceny. To hold otherwise would be to run the hazard of encouraging larceny by discouraging gaming. Bales v. State, 3 W. Va. 685.

In Davenport v. Com., 1 Leigh 588, it was held that a slave was a subject of larceny. Va. Code 1887, § 3713. See Va. Code 1887, §§ 3710, 3711, 3713, 3717, 3718, and 3719.

V. OWNER.

The record of the *examining* court need not show that the goods stolen were the property of any person. An *indictment* should, however, give the name of the owner or state that the goods belong to a person or persons to the jurors unknown; and a statement defective in this respect is not cured by the statute of jeofails. Halkem v. Com., 2 Va. Cas. 4; Mabry v. Com., 2 Va. Cas. 396; Barker v. Com., 2 Va. Cas. 122; Dowdy v. Com., 9 Gratt. 727; Com. v. Moseley, 2 Va. Cas. 154.

Allegata and Probata.—If the indictment state the name of the owner, the proof at the trial must show the property stolen was the property of that person. Jones v. Com., 17 Gratt. 563; Robinson v. Com., 32 Gratt. 866.

Married Woman.—An indictment for larceny should not allege ownership in a married woman, but goods in her possession should be laid as the goods of her husband. Hughes v. Com., 17 Gratt. 565. See Va. Code, 1887, ch. 103.

Possession.—The indictment need not aver that the property was taken from the possession of the owner, or from the possession of any other person. Thompson v. Com., 2 Va. Cas. 135; Angel v. Com., 2 Va. Cas. 228.

An indictment for the larceny of a slave, of the goods and chattels of E. E. and out of the possession of the said E. E. was held not sufficient, it appearing that the slave was hired to B and at the time of the larceny in the actual possession of B. Com. v. Williams, 1 Va. Cas. 14.

Capacity of Owner.—On an indictment for larceny of property belonging to the President, Director and Co. of the Farmers' of Virginia, the court, after verdict, is bound to presume, that on the trial the capacity of this company to hold property *i. e.*, the corporate existence, was proved to the jury, or admitted by the prisoner. Lithgow v. Com., 2 Va. Cas. 297.

Evidence of Ownership.—Upon an indictment for stealing a horse, it is entirely competent for the commonwealth to establish the ownership of the animal by the son in the absence of the father from the state. Taylor v. Com., 77 Va. 692.

West Virginia Rule.—In a prosecution for stealing any personal estate it shall be sufficient to prove that when the offence was committed, the actual or constructive possession in whole, or any part of such estate was in the person alleged in the indictment to be the owner thereof. State v. Chambers, 22 W. Va. 784; Va. Code 1887, § 3996; State v. Heaton, 23 W. Va. 781; Richards v. Com., 13 Gratt. 803.

Injury to Owner.—A having $1,649 to his credit, draws warrants for an amount exceeding that sum. Warrants are paid in the order of registry. A was indicted for larceny of a check given in payment of one of the warrants. *Held*, since there was sufficient money to A's credit to pay that warrant and all registered before it, that A could not be convicted of the larceny charged. Anable v. Com., 24 Gratt. 563.

VI. EVIDENCE.

Other Offences.—On indictment for stealing a watch, proof of the theft of a clock is inadmissible. To allow it would suffer the prisoner to be taken by surprise and would tend to prejudice the jury against him. Walker v. Com., 1 Leigh 574; Robinson v. Com., 32 Gratt. 866.

Res Gestæ.—On indictment for larceny the commonwealth may prove the presence of the prisoner in the hotel on the night in question, and his acts and conduct therein, not for the purpose of establishing another distinct felony, but as a part of the whole transaction. Burr v. Com., 4 Gratt. 534.

Proof of Receiving Stolen Goods.—Under Va. Code 1886, p. 789, § 20 (Va. Code 1887, § 3714) an indictment charging the prisoner with receiving a horse, knowing it to have been feloniously stolen, is sufficient to sustain a conviction for the larceny of said animal. Price v. Com., 21 Gratt. 846; Hey v. Com., 32 Gratt. 946; See Va. Code 1887, §§ 3402, 3712; Pollard's Supp., §§ 3715, 3719a.

In Rutherford v. Com., 2 Va. Cas. 141, it was held that a bank note was not "goods" within the meaning of the act of 1792 against receiving stolen goods. Va. Code 1887, § 3714; Pollard's Supp. 1900, § 3714a.

Proof of Embezzlement.—An indictment for larceny is sustained by proof of embezzlement. Pitsnogle v. Com., 91 Va. 808, 22 S. E. Rep. 351; Va. Code 1887, § 3716; Shinn v. Com., 32 Gratt. 899, and *note*.

One who draws a check on another, with the intention of using the same for his own purpose, and not for the liquidation of the latter's indebtedness, though probably with the intent to return the same at some future day is guilty of embezzlement of the funds obtained by said check. Shinn v. Com., 32 Gratt. 899.

Proof of False Pretences.—An indictment for larceny is sustained by proof that accused obtained the money by false pretences. Anable v. Com., 24 Gratt. 563; Trogdon v. Com., 31 Gratt. 862, and *note*; Leftwich v. Com., 20 Gratt. 716; Fay v. Com., 28 Gratt. 912; State v. Halida, 28 W. Va. 499; Va. Code, 1887, § 3722; Anthony v. Com., 88 Va. 847, 14 S. E. Rep. 834.

Insanity.—On indictment for larceny the plea of "not guilty" puts the prisoner's sanity in issue. If at the time of the trial there is reasonable ground to doubt the prisoner's sanity the trial should be suspended until this question is determined. Gruber v. State, 3 W. Va. 699; Va. Code 1887, § 4031; W. Va. Code 1899, ch. 159, p. 1020.

Possession of Evidence.—The mere possession of goods which had been actually lost does not furnish any conclusive or *prima facie* proof of guilt; of itself it does not raise the suspicion of guilt. Hunt v. Com., 13 Gratt. 757; Tanner v. Com., 14 Gratt. 635; Perrin v. Com., 87 Va. 554, 13 S. E. Rep. 76.

Exclusive possession of goods recently stolen raises a presumption that the one in possession is the thief. What possession is such recent possession is a question for the jury. Price v. Com., 21 Gratt. 846; Porterfield v. Com., 91 Va. 801, 22 S. E. Rep. 352; Taliaferro v. Com., 77 Va. 411. See *contra*, State v. Heaton, 23 W. Va. 773; State v. Reece, 27 W. Va. 379.

As to presumption in case of compound larceny, see monographic *note* on "Burglary" appended to Clarke v. Com., 25 Gratt. 908.

VII. VERDICT.

Surplusage.—In Harvey v. Com., 23 Gratt. 941, the jury, though not authorized so to do, fixed the punish-

ment of the prisoner. The court sentenced him accordingly. *Held*, the jury's act was mere surplusage, the imprisonment being the act of the court. House v. Com., 8 Leigh 755.

General Verdict.—A general verdict on an indictment for a misdemeanor is not a conviction of a felony though the offence is charged to have been done "feloniously." The word "feloniously" in such case is only used to characterize the intent with which the taking and carrying away were done. Wolverton v. Com., 75 Va. 909.

If one of three subjects mentioned in an indictment, might be the subject of larceny, judgment will not be arrested. Harvey v. Com., 23 Gratt. 941.

Former Conviction of Similar Offence.—One count of an indictment charges larceny; the other count charges larceny after a former conviction of a similar offence. A verdict of guilty on both counts will not be disturbed. Stroup v. Com., 1 Rob. 754.

On indictment the prisoner was charged in one count with petit larceny; in another count with petit larceny after a previous conviction of the same offence. The jury found her guilty on both counts and fixed the punishment at five years in the penitentiary. *Held*, the verdict was not open to objection. Stroup v. Com., 1 Rob. 754; Va. Code, 1887, §§ 3905, 3907; Stover v. Com., 92 Va. 780, 22 S. E. Rep. 874.

Conviction of Lower Offence.—A conviction of petit larceny on an indictment for grand larceny is sufficient though the verdict does not ascertain what goods were stolen nor the value of said goods. Poindexter v. Com., 6 Rand. 667.

VIII. PUNISHMENT.

Grade of Offence.—When the evidence shows larceny of goods (not from the person) whose aggregate value is less than fifty dollars the offence is not a felony. Alexander v. Com., 90 Va. 809, 20 S. E. Rep. 782; Benton v. Com., 89 Va. 570, 16 S. E. Rep. 725.

Punishment for Horse Stealing.—Under acts of 1865-6, p. 88, the minimum punishment for horse stealing was five years. The jury found accused guilty of that offence and fixed his punishment at confinement for three years. In such case, on reversal of the judgment, the prisoner will not be discharged, but remanded for a new trial. Jones v. Com., 20 Gratt. 848.

The act of 1819, 1 Rev. Code, ch. 152, p. 575, in relation to horse stealing was repealed by the act of March 14th, 1848, ch. 4, § 15. Lanthrop v. Com., 6 Gratt. 671; Va. Code 1887, § 3707; Pollard's Supp. 1900, § 3707.

Punishment of Negro for Grand Larceny.—The act of February 2, 1873, ch. 32, § 3, provided that the punishment for grand larceny, in the case of a free negro or mulatto, should be that the prisoner receive stripes in the discretion of the jury and be sold into slavery. The said act was held not contrary to the constitution of the state. Com. v. Shelton, 2 Va. Cas. 384; Aldridge v. Com., 2 Va. Cas. 447.

Punishment for Two Offences.—A count for larceny may be added to a count for housebreaking with intent to steal, and in such case the jury may find the prisoner guilty on both counts and fix a several punishment for each offense. Speers v. Com., 17 Gratt. 570. See monographic *note* on "Burglary."

See monographic *note* on "Autrefois Acquit" appended to Page v. Com., 26 Gratt. 943; monographic *note* on "Continuances" appended to Harman v. Howe, 27 Gratt. 676, and Va. Code 1887, § 3889.

IX. APPEAL.

By acts 1870-71, p. 362, one tried by a justice of the peace, for petit larceny, and convicted, has an absolute right of appeal to the county court. And such person is entitled to a trial by jury. Read v. Com., 24 Gratt. 618.

In a criminal case, a writ of error lies only where there has been a conviction of a felony or misdemeanor in a circuit court, or where a conviction had in an inferior court has been affirmed by the circuit court. State v. Daugherty, 39 W. Va. 470, 19 S. E. Rep. 872; W. Va. Code 1899, ch. 159, § 7, p. 1019; Va. Code 1887, § 4026.

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563 *Anable v. Commonwealth.

November Term, 1873, Richmond.

1. **Larceny.***—Upon an indictment for larceny, proof that the accused obtained money by false pretences will sustain the indictment.
2. **Same—Evidence.**—A was the secretary of the board of supervisors of the county of H, and there was to his credit on the books of the treasurer for claims held by him against the county, $1,649. Blank warrants signed by the chairman of the board, were left with him, and he filled up and sold warrants to a considerably larger amount than the sum due to him. Warrants to near the amount due are registered, and among these one for $350, sold to W; but there were other warrants sold before the one sold to W, and if they had been registered before W's the fund would have been exhausted, and would have left nothing to be applied to W's warrant. Upon an indictment of A for larceny of the check given by W for payment of the warrants: HELD: The warrants are to be paid in the order in which they are registered, and there being sufficient to pay W's warrant, as well as all the warrants registered before it, A cannot be convicted of the larceny charged.
3. **Same—Same.**—W having bought his warrant of N, an agent of A, and having given a check payable to the order of N, and the indictment charging the larceny of the check of W endorsed by N, and the proof being that N endorsed his name after receiving the check. *Quære*, If this is a variance.

In February 1873 William J. Anable was indicted in the Hustings court of the city of Richmond for the larceny of a check drawn by J. H. White, upon the Planters National Bank, to the order of E. B. 564 Newburn, *and endorsed by Newburn. The indictment is fully set out in the opinion of Judge Christian.

Anable was the clerk of the County court of Henrico from the 1st of January 1871 to September 1872, and as such he was ex officio clerk of the board of supervisors of the county; and his father, Samuel J. Anable, was the chairman of that board. It appears that although the statute directs that no warrant shall issue except authorized by a recorded vote of the board, such

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***Larceny—Evidence of.**—See, on this point, Fay v. Com., 28 Gratt. 912, and *note*; Trogdon v. Com., 31 Gratt. 862, and *note*; Pitsnogle v. Com., 91 Va. 808, 22 S. E. Rep. 351; Anthony v. Com., 88 Va. 850, 14 S. E. Rep. 834; Mangus v. McClelland, 93 Va. 789, 22 S. E. Rep. 364, all citing the principal case. See also, Hoback v. Com., 28 Gratt. 922, and *note*, and *note* on "Autrefois Acquit" appended to Page v. Com., 26 Gratt. 943, and State v. Halida, 28 W. Va. 503.

vote had never been recorded; but it was the custom for the chairman and clerk of the board to issue warrants whenever a claim against the county had been audited and allowed by the board. There had been allowed by said board to the prisoner in the year 1871, $2,284, and at the end of that year there was still due to him on this allowance the sum of $225. There was allowed him, out of the levy of 1872, the sum of $1,424; and during the year 1872 he drew warrants on the county treasury, which were registered in the office, to the amount of $3,064. Of these warrants the two first registered, amounting to $700, had been deposited as collateral security for a loan of $500; another of $350 had been returned without being used, and destroyed. And giving the prisoner credit for $200, the difference between the $700 and $500, and for the $350 registered but not used, but destroyed, there remained enough money due to the prisoner to pay all the previously registered warrants, and also the two warrants bought by White; but it appeared further that two warrants, each for $350, had been drawn by the prisoner prior to the last warrant bought by White, though they were not registered until that warrant had been registered.

It appeared further that the prisoner placed in the hands of one Quarles five warrants, each for $350, to be sold. That Quarles put two of these into the hands of E. B. 565 *Newburn to be sold, and Newburn sold them to J. H. White, and accounted with Quarles, who accounted with the prisoner for the proceeds. It was upon the last of these warrants sold to White that the indictment was founded.

The other evidence in the cause, and the instructions asked by the prisoner, will be found sufficiently stated in the opinions of Moncure, P., and Christian, J.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at three years; and the court sentenced him accordingly. And thereupon the prisoner applied to this court for a writ of error; which was awarded.

Ro. Howard, for the prisoner.

The Attorney-General, for the Commonwealth.

Christian, J. The indictment in this case is founded upon the 49th section of chap. 192 of the Code, which is in the following words: "If a person obtain by any false pretence or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of the larceny thereof."

The indictment contained but one count, which is a simple count for larceny; and charges that "William J. Anable, on the 27th day of March, in the year one thousand eight hundred and seventy-two, at the said city (of Richmond), and within the jurisdiction of the Hustings court of the city of Richmond, a certain check, the same being an order to the Planters National Bank, dated Richmond, March 27th, 1872, for the payment of three hundred dollars to E. B. Newburn or order, and endorsed Edward B. Newburn, and of the value of three 566 hundred dollars, *signed by one J. H. White, the maker thereof, the said check, at the time of committing the felony aforesaid, being the property of said J. H. White, and the said sum of three hundred dollars, payable and secured by and upon the said check, being due and unsatisfied to the said J. H. White, the proprietor thereof, feloniously did steal, take and carry away, against the peace and dignity of the commonwealth of Virginia."

As to the question so elaborately and ably argued by the prisoner's counsel, that the statute declaring that a party who obtains money or other property, the subject of larceny, "shall be deemed guilty of the larceny thereof," should be construed as fixing the punishment of the offence, and not as changing the mode of proceeding or the form of the indictment, it is sufficient to remark, that whatever may be the view of this court upon that question, as an original proposition, it cannot now be reopened, and must be considered as res adjudicata.

The principle settled in Dowdy's case, 9 Gratt. 727, followed in Leftwich's case, 20 Gratt. 716, and recently in Pierce's case, 21 Gratt. 846, have fixed the judicial interpretation of the statute. That interpretation, accepted and acted upon by the profession since the year 1852, and the Legislature, with full knowledge of this judicial interpretation, never having amended the statute, it would be mischievous to the last degree now to change it; and the rule stare decisis must now prevail. It must, therefore, be now held as the settled law of this State, that upon an indictment simply charging larceny, the commonwealth may now show either that the subject of the larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretence.

This is sufficient to dispose of one of the grounds of error assigned and much 567 relied on by the prisoner's *counsel. The other assignments of error require more particular consideration.

First. The refusal of the court to give the first instruction asked for by the prisoner's counsel.

That instruction is as follows: "If the jury believe from the evidence, that the prisoner had sums of money audited and allowed him by the board of supervisors of Henrico county, sufficient to pay all existing legal warrants drawn by him in his own favor, and passed to and owned by other parties, which have been registered on the books of the treasurer of the county before the warrants said to have been sold to Dr. White, and also to pay the warrants of Dr. White, then they must acquit the prisoner."

I am of opinion that this instruction ought to have been given. This instruction as-

serts the proposition, that the prisoner could not be found guilty of obtaining the check of Dr. White by false pretences, if at the time the warrant was sold to him the prisoner had funds audited and allowed him by the board of supervisors sufficient to pay this warrant and all others which had been drawn by him and registered upon the books of the treasurer of the county.

Now, while the statute declares that a party obtaining money or other thing of value by false pretences "shall be deemed guilty of the larceny thereof," it is manifest that he cannot be found guilty under a simple count charging him with larceny, any more than under one charging specifically the offences of obtaining money or other property by false pretences, if there is wanting in the proof any of those elements which constitute that offence. To constitute the offence described in the statute four things must concur:

1. There must be an intent to defraud;
2. There must be an actual fraud committed;
3. *False pretences must be used for the purpose of perpetrating the fraud; and
4. The fraud must be accomplished by means of the false pretences made use of for the purpose; that is, they must be in some degree the cause, if not the controlling and decisive cause, which induced the owner to part with his property.

If any of these essential elements are wanting, the offence is not made out. But especially is the gravamen of the offence that the pretences are false; and if the prisoner can show that the representations upon which he obtained the property from the owner are true he cannot be convicted; and certainly all testimony tending to show that fact is proper to be considered by the jury.

If the hypothetical case put in the instruction offered by the prisoner's counsel, could be made out by the proof (and of this the jury must be the sole judges), then the representations made by the prisoner, in offering the warrant for sale, that he had allowed and audited in his favor a sufficient fund to meet this warrant was true and not a false pretence.

It is a well-settled rule, established by repeated decisions of this court, that if there is any evidence before a jury tending to prove a case supposed in an instruction asked for, and the instruction propounds the law correctly, it should be given. In Hopkins Brothers v. Richardson, 9 Gratt., 496, Lee, J., delivering the opinion of the court, said: "In a plain case of the total absence of evidence tending to make out the supposed case, the court may well refuse to give any instruction based upon it. But where there is such evidence, of however little weight it may appear to be to the court, or however inadequate in its opinion to make out the case supposed, it is best and safest for the court not to refuse to give the instruction asked for if it propound the law correctly."

569 *And so also in Farish & Co. v. Reigle, 11 Gratt. 719, it was held, that if there be any relevant and competent testimony, however slight, tending to prove the case supposed in the instruction, the party asking for it is entitled to have the law in that particular hypothetically expounded to the jury. There was in this case evidence strongly tending to prove the supposed facts stated in this instruction. The refusal of the court to give it might well have, and did have, the effect of bringing the minds of the jury to the conclusion that the prisoner might be convicted of obtaining the check from Dr. White under false pretences, although he could show that at the time the warrant was sold to him it was a valid and legal warrant, drawn upon a fund ample for its redemption. In other words, the effect of such refusal was to cut off from the consideration of the jury evidence tending to negative the false pretence and the intent to defraud, which are the two essential elements constituting the offence charged.

The objection taken to the instruction in this court is, that it is limited to those warrants which had been registered on the books of the treasurer; while the evidence shows that there were a number of warrants sold by the prisoner which were not registered; and that, taking all the warrants, registered and unregistered, the prisoner had disposed of warrants to an amount largely exceeding the fund to his credit, due from the county of Henrico; and that therefore it was plain that the prisoner had obtained money upon some of these warrants by falsely representing that he had funds to his credit to meet them, when in fact he had largely overdrawn on that fund.

That the prisoner had largely overdrawn on the fund due him is abundantly shown; and that somebody had been defrauded by him, upon a false pretence, is equally clear.

570 But the question is not whether he has cheated *somebody; whether he has obtained money, or other property of value, by false pretences, from somebody; but the question is, did he cheat Dr. White? Did he obtain the check (which is charged as the subject of the larceny) from Dr. White upon any "false token or false pretence?"

It was this question which was submitted to the jury in the first instruction, and they were in effect asked to be instructed that if the facts therein stated were true, there was no false pretence, and they must acquit the prisoner. In other words, the proposition submitted was simply this, that if the jury should find that at the time the warrant was sold to White the prisoner had to his credit funds sufficient to pay all outstanding warrants drawn in his favor and registered on the books of the treasurer of the county of Henrico, and also to pay the warrants sold to White, then there was no false pretence, and the prisoner could not be found guilty.

This was not an abstract proposition, but there was evidence strongly tending to sup-

port the hypothetical case stated. This evidence I propose now briefly to notice. It is important, however, first to refer to the act of assembly prescribing the mode of auditing, and registration and payment of warrants upon the county treasurers. It is sufficient for the purposes of this case to note the 10th and 11th sections of chapter 170, Sess. Acts, 1871-2, which are as follows:

"§ 10. He (the treasurer) shall keep a well-bound book in which he shall make an entry of all warrants or orders legally drawn upon him by the County or Circuit court, or the board of supervisors for the county, and presented for payment, stating correctly the date, amount, number, in whose favor drawn, and the date the same was presented; and all warrants or orders so presented
571 *shall be paid in the order presented, out of the fund drawn upon.

"§ 11. No county treasurer shall refuse the payment of any warrant or order legally drawn upon him and presented for payment, for the reason that warrants or orders of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon sufficient to pay such prior warrants or orders, and also such warrants or orders so presented; but such treasurer shall, as he shall receive money into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants or orders previously so presented, and in the order so presented," &c.

It will thus be seen that all warrants or orders on the county treasury are to be registered according to the date of their presentation, and to be paid in the order presented. Let us now look to the evidence certified by the court below. It is proved that in March 1872 there was due to the prisoner from the county of Henrico the sum of $1,649, the sum of $225 being the balance due him from the levy of 1871, and the sum of $1,424 being due him out of the levy of 1872. It is further proved that on the 16th day of March 1872, which is the date of the warrant sold to White, (which the court certifies to be the same warrant for which the check, the subject of the larceny charged was given,) there stood upon the treasurer's books warrants registered and drawn in favor of the prisoner amounting to the sum of $1,664. But of this amount, two warrants, drawn in favor of J. A. Smith for $350 each, were delivered to Smith, according to Smith's own statement, as collateral security for a note of about $500, not due until April 1872, upon the agreement that Smith would return the warrants whenever prisoner would satisfy the note when it became due. As part also of this aggregate of the amount of warrants registered,
572 *is a warrant drawn in favor of L. R. Spilman for $350, for which Spilman declined to advance the money after it had been registered in his favor. Therefore, in computing the amount of registered warrants on the treasury of Henrico county, this warrant in favor of Spilman must, of course, be deducted, as the money was never paid for it, and he, Spilman, does not claim it. As to the warrants in favor of Smith for $700, being delivered only as collateral security for a note of $500, there was left of this amount $200, which the prisoner had a perfect right to estimate as a part of the fund due him from the county of Henrico, and which he might well appropriate to other creditors. Now, deducting the warrant sold to Spilman and registered in his name, which is conceded on all hands he never paid for and does not claim, and deducting $200 from the warrants delivered to Smith as collateral security, we have this state of facts: that there was due to the prisoner from the county of Henrico, on the 16th of March 1872 the sum of $1,649, and the registered warrants for which he was bound, making the deductions to which he was plainly (as shown above) entitled, amounted to the sum of $1,114, leaving a balance in his favor, actually due him, or certainly what, according to the act of assembly, was the balance in his favor, looking to the registered warrants, of the sum of $535. So that it appears that when Dr. White had his warrant registered there was in point of fact funds amply sufficient to pay Dr. White the amount of the warrant sold to him, and all the other warrants registered before his was presented, the rule of law being that the warrants must be paid in the order presented.

The evidence further shows that White did not act alone upon the representations made by the prisoner or his agent. He did not purchase the warrant until he
573 *had consulted with the county judge, the sheriff and the treasurer. They all informed him that the warrant was all right and would certainly be paid. It must be presumed that these officers knew the law, and that the treasurer especially knew what amount was standing to the credit of the prisoner, and what amount had been registered of the warrants sold by him. He knew that warrants must be paid in the order they were presented, and he looking, as we are bound to presume, to the amount of warrants registered, and knowing, as we are also bound to presume, the amount levied in favor of the prisoner, said the warrant was perfectly good, and would certainly be paid.

I am constrained to say that upon this review of the evidence, the hypothetical case stated in the instruction refused, was strongly supported by the facts proved, and ought to have been given. I repeat, it is no answer to this view to say that the evidence shows that other warrants, not registered, were sold by the prisoner, and that he overdrew largely upon the fund credited to him. This is all true. He did obtain money under false pretences from some of the parties to whom he sold warrants which were not registered before Dr. White's; but it must be constantly borne in mind that the specific charge against the prisoner was, that he "did steal, take and carry away," a certain check, the property of Dr.

White; and the question is, did he obtain that check upon false pretences. If the hypothetical case stated in the instruction be true, he certainly did not; and it was clearly for the jury to decide whether the supposed facts were sustained by the proofs in the cause or not. The refusal of the court to give the instruction asked for was in effect to prevent the jury from considering testimony which tended to negative the false pretence and the intent to defraud.

And the case presents the strange
574 anomaly that the prisoner *may be sent to the penitentiary for cheating and defrauding Dr. White, when in point of fact Dr. White may not lose a dollar, but may yet receive from the treasury of Henrico county the whole amount of the warrant sold to him by the prisoner; for the proof is clear that there still remains in the hands of the treasurer the sum of sixteen hundred and forty-nine dollars due to the prisoner, and subject to the warrants sold by him, and which, under the law, are to be paid in the order in which they are registered. If Dr. White's warrant should be so paid he is not defrauded, and the prisoner is guilty of no false pretence. I am therefore of opinion that the Hustings court erred in refusing to give the first instruction asked for by the prisoner's counsel.

I am further of opinion that there was no error in the refusal of the Hustings court to give the 5th and 6th instructions asked by the prisoner's counsel, nor in giving the 3rd instruction with the addendum made by the court.

I am therefore of opinion, for reasons above given, as to the said court refusing the 1st instruction, that the judgment of the Hustings court be reversed and annulled, and that the prisoner be remanded to said Hustings court for a new trial; at which trial the said first instruction, or one similar thereto, if asked, shall be given by said court.

Moncure, P. I am so unfortunate as to differ from all my brethren in this case in the result at which they have arrived, and I will proceed to deliver my own opinion on the different questions arising in the case.

The most important question in this case, and the one most discussed by the learned counsel for the plaintiff in error, arises on the second and last bill of exceptions to the

opinion of the court overruling the
575 motion for *a new trial, and will be first considered by me. It is whether an indictment for larceny can be maintained by evidence of obtaining the article alleged to have been stolen by false pretences.

The affirmative of the question has, in effect, been three times unanimously affirmed by this court: first in Dowdy's case, 9 Gratt., 727, 734, decided in 1852; secondly, in Leftwich's case, 20 id., 716, 719, decided in 1870; and thirdly, in Price's case, 21 id., 846, 850. In the first of these cases the offence was receiving stolen property, knowing it to have been stolen. In the second the offence was obtaining property by false pretences, and with intent to defraud; and in the third the offence was, as in the first, receiving stolen property, knowing it to have been stolen. In regard to both of these offences, and also in regard to the offence of embezzlement of property by officers, carriers and other bailees, the statute uses identically the same language, and declares that he who shall receive or obtain, or convert to his own use by such means the property of another, "shall be deemed guilty of larceny thereof." Code, ch. 192, §§ 20, 21, 22 and 49. It is manifest that this same language used in each of these sections was used in the same sense, and must receive the same construction.

One would suppose that after these repeated affirmations by the unanimous opinion of this court, the question would be considered as settled, whether rightly or wrongly, and as alterable only by an act of the legislature. But the counsel for the plaintiff in error contended that all these unanimous affirmations by this court were but obiter dicta, not necessary to the decision of the cases in which they were made, and that therefore they were not binding authority; that the question has never, in fact, been decided by this court, and is now a new question.

576 *It is true that in none of these cases was the decision of the question necessary to the decision of the cases themselves. But it is also true, that in none of them ought the court to have made such an affirmation unadvisedly or without consideration; and the presumption is, that the court did not do so in any of them. A decision of this court is not conclusive, except in the case in which it is pronounced. It is a binding authority in other cases until reversed or modified by the court itself. A mere obiter dictum is not binding authority, because it is generally a casual remark, dropped in the course of a judicial opinion, in reference only to the case before the court, and without considering its general meaning and operation. But when it appears to have been proper that the court should express its opinion upon a question arising incidentally before it, and for the purpose of settling the practice in cases like the one before it, certainly it was the duty of the court to consider the question very carefully, and the presumption is that it did so. Such an expression of opinion is entitled to great weight, and comes nearly up to the degree of a binding authority, especially where it has been three times repeated, and every time by the court unanimously. Such an expression of opinion ought to be considered as settling the true construction of a statute and the proper practice under it.

The course of legislation under which this question arises was substantially commenced by the legislature of 1847-'8, in whose act, commonly called the criminal code, the provisions before referred to, or most of them, were substantially embodied. They were afterwards copied, with some extension and verbal alteration, into the

Code of 1849. Not long after the enactment of that code, to wit: in July 1852, Dowdy's case came before this court for decision; and the occasion seemed to the court
577 *to be a very proper one for declaring the true construction of these provisions, and the proper practice under them. The offence in that case, as before stated, was receiving stolen property, knowing it to be stolen; and there were thirteen counts in the indictment! The court said: "In the case under consideration the counts of the indictment are all for the same offence, to wit: the larceny of 'eleven hundred and forty pounds of tobacco, of the value of one hundred dollars;' and they differ from each other only in the statement of names and other incidental circumstances. The statute under which all of them but the first was framed, declares that a person knowingly receiving or aiding in concealing stolen goods, shall be deemed guilty of the larceny thereof. The common counts for larceny would alone have been sufficient in this case; and by relying solely on them the great length of the indictment would have been avoided. It would then have contained but three instead of ten counts; that is, for the larceny of the goods and chattels —first, of Nathaniel M. Osborne; second, of George McGlasson; and thirdly, of a person unknown." One of the objects of the statute was to shorten indictments; but this court saw that the practical effect of it was greatly to lengthen them. And, therefore, the court in Dowdy's case deemed it fit to declare the true meaning of the statute, in order that the practice might conform thereto. In Leftwich's case the offence was, obtaining ninety dollars in United States currency by false pretences and with intent to defraud; being an offence created by the Code, ch. 192, § 49. The indictment contained three counts, in each of which the offence was set out especially, and not in general terms as in the case of a larceny at common law, except that to the third count there was a conclusion, that so the accused, the said ninety dollars "feloniously did steal, take and carry
578 *away," &c. There was a motion to quash the first and second counts, which was overruled. This court said: "In regard to the motion to quash the first and second counts, it is contended that they ought to have been quashed, because they are not in form as for larceny at common law, and do not allege the stealing, taking and carrying away of the subject of the larceny. It would certainly have been competent for the pleader to have counted as for a larceny of the subject, in the form of an indictment for larceny at common law; and proof of the special facts set out in the act as constituting the offence would have sustained the charge." Dowdy v. Commonwealth, 9 Gratt. 727, 734. But it is also competent for the pleader, instead of counting for a larceny of the subject, in the form of an indictment for larceny at common law, to charge the specific facts which the act declares shall be deemed larceny. The legal conclusion deducible from these facts is drawn by the act itself, and need not, of necessity, be drawn in the indictment. In Price's case the offence was receiving stolen property, knowing it to have been stolen. The indictment contained four counts. The first three charged the offence specially and in different forms, as receiving a stolen horse, knowing it to have been stolen. The fourth simply charged the larceny of a horse, in the common form. This court said: "This last count would have been sufficient of itself, without the insertion of the others in the indictment. The law declares," &c. (as in the Code, p. 789, § 20): "If a person be indicted for the simple larceny of a thing, and the proof be that it was stolen by some other person and received by the accused knowing it to have been stolen, the proof will sustain the charge; because, having received stolen property knowing it to have been stolen, he is by law 'deemed guilty of larceny thereof,' and may be prosecuted as if he had him-
579 *self been the actual thief. Still, the pleader may, if he choose, charge him specially as the receiver, and may insert several counts in the indictment, charging the offence in both forms, as was done in this case. But, as a count for simple larceny would be sustained by the proof, whether it was that the accused actually stole the thing, or that he received it, knowing it to have been stolen, and as simplicity and brevity in pleading, especially in criminal cases, is desirable, the better practice would seem to be to count in such cases as for simple larceny only."

Such has not only been the repeated and uniform construction of these provisions of the law, which are not only in pari materia, but are contained in the same chapter of the Code, and are expressed, so far as the question under consideration is concerned, in identically the same language; but it seems to me to be their plain and necessary meaning. This language in all of them is: "he shall be deemed guilty of larceny thereof;" that is, larceny of the goods so received, or so embezzled, or so obtained under false pretences. Now, what is the definition of larceny? "The felonious stealing, taking and carrying away of the goods of another." Suppose these provisions, instead of saying "shall be deemed guilty of the larceny thereof," had used the definition of larceny: had said "he shall be deemed guilty of 'feloniously stealing, taking and carrying away the goods" so received, or so embezzled, or so obtained by false pretences," could there have been a doubt but that the accused might have been charged in the indictment with a larceny of the goods in the common form? And is there any conceivable difference in meaning between these two forms of expression? I think not.

This construction is confirmed by the manifest objects of these provisions, according to my understanding of
580 *them. One of these objects, to wit: to promote simplicity and brevity

in pleading in criminal cases, was referred to in Price's case. But that was a minor object compared to another and the chief object, which was to prevent the acquittal of guilty persons on account of some nice technical distinction between the offence charged and the offence proved against a person accused of a criminal offence. The crimes of larceny, receiving stolen property knowing it to be stolen, obtaining property by false pretences and embezzlement, are so much alike in many respects and often separated by lines so indistinct, and almost imaginary, that it was difficult for the prosecutor, in most cases, to determine, a priori, which particular crime to charge in the indictment, and it very often happened that the proof made out a different crime from the one charged in the opinion of the judge who presided at the trial, and the consequence was that the accused had to be acquitted, though in fact guilty of a more aggravated crime than the one charged against him. All who are familiar with the criminal law know this to be the fact, and that it is so may be plainly seen by a cursory view of the cases collected in 2 Russell on Crimes, under the proper heads; and the same may be said of any other treatise on crimes. Now, the legislature of 1847-8, which enacted the "criminal code," determined to end this evil by making all these crimes larceny, and therefore declared that if any person receive stolen property knowing it to be stolen, or embezzle property, or obtain it by false pretences, "he shall be deemed guilty of larceny thereof." There was nothing incongruous in this, nor is there any danger, as the learned counsel for the accused in this case seems to suppose, that it may take the accused by surprise. The offences are all cognate. They are all offences against property, and property of which larceny may be com-
581 mitted. *They differ only in a few circumstantial details, immaterial in a moral point of view. They all amount to a criminal and fraudulent conversion by one man to his own use of another man's property. Larceny at common law always includes a trespass, and implies that the property was taken invito domino. The other offences named did not include a trespass, and were often committed by the consent of the owner, though fraudulently obtained. The statute merely abolishes these distinctive features, and declares that the offenders shall be deemed guilty of stealing, taking and carrying away the property. There is no danger of surprise. When A is charged with stealing certain property of B, the substance of the charge is the fraudulent conversion of that property by the former to his own use, and whether it was done by means of a larceny at common law, or by receiving the property knowing it to have been stolen, or by obtaining it by false pretences, or by embezzling it after having been entrusted by the owner with its custody, can make no difference in regard to taking the accused by surprise. He knows what the law is, and that if it be proved that he effected his criminal object by either of the means aforesaid he will be convicted of larceny, and he must be prepared to meet that proof if he can. We know very well that the facts admissible to prove a larceny at common law are often as complicated as are the facts which constitute any of the other offences aforesaid, and the objection of surprise might as well be made in that case as in a case arising under the statute.

The learned counsel in his argument spoke of this course of legislation as something different from what has ever existed in England. But it singularly happens that the standard English work from which he read most of his law, Roscoe's Criminal Evidence, page 77, informs us that the 24th and 25th Vict., ch. 96, § 72, provides
582 that *"if, upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement of fraudulent application or disposition, he shall not, by reason thereof, be entitled to be acquitted; but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement or fraudulent application or disposition; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement or fraudulent application or disposition." See also id. 405, 564. Surely the accused would be at least as much taken by surprise by a proceeding under this English statute as he would be under our statute before mentioned.

If the true construction of our statute be not as before stated, what can be its meaning? The learned counsel argues that its meaning merely is to make the offences in question punishable as larceny. Now, if that had been the only meaning, why did not the legislature expressly say, as it might in at least as few words have done, "shall be punished as for the larceny thereof?" Why, on the contrary, did it say "he shall be deemed guilty of larceny thereof?"—that is, deemed guilty of larceny, not only for the purpose of punishment, but for all purposes. There is no limitation or restriction of the general words used. This view is confirmed by the phraseology of the acts referred to in the Session Acts of 1831-32, p. 22, § 10, and of 1842-43, p. 58, § 2.

I have said much more on this question, perhaps, than I ought to have done, inasmuch as we are all agreed, at least in this, that the construction of the law for which I contend must now be considered as its settled construction, however the question might be regarded if it were an original one. I have done so mainly because
583 the *learned counsel for the accused laid much more stress upon this point in his case than any other, and devoted to it the most of his argument; indeed, his long concluded argument was almost exclusively devoted to it. He seemed to have very great confidence in his view. I had

another reason for doing so, which was perhaps not so good as the former, though it was operative to some extent with me. It happened that I was a member of the legislature which framed the criminal code, and also of the legislature which enacted the Code of 1849. It also happened that I prepared the opinion of this court in each of the cases of Dowdy, Leftwitch and Price, before referred to. It is not strange, therefore, that I should have a decided view of the question under consideration, or that I should be at least as confident of the correctness of that view as my learned brother, the counsel for the accused, is of the correctness of the opposite view entertained by him. I will now proceed to consider the other questions arising in the cause in the order in which they arise, commencing with the first.

The first error assigned is, the refusal of the court to give the first instruction asked for by the accused. That instruction is in these words:

"1. If the jury believe from the evidence that the prisoner had sums of money audited and allowed him by the board of supervisors of Henrico county sufficient to pay all existing legal warrants drawn by him in his own favor, and passed to and owned by other parties, which have been registered on the books of the treasurer of the county before the warrants said to have been sold to Dr. White, and also to pay the warrants to Dr. White, then they must acquit the prisoner."

It appears from the evidence certified in the case, that county levies to a very large amount had been made in the years 1871 and 1872, by the board of supervisors 584 of *Henrico county, in favor and in the name of the accused, William J. Anable, who was clerk of the County court, and, ex officio, clerk of the board of supervisors. There had been allowed to him by the board, out of the levy of 1871, the sum of $2,284, of which amount he had drawn the sum of $2,059, leaving due to him of that levy $225; and out of the levy of 1872 the sum of $1,424, none of which, nor of the said balance of $225, making together the sum of $1,649, has been paid; the treasurer of the county having been directed by the board, in consequence of the difficulties arising about the supposed warrants, which will be presently mentioned, not to pay any warrant at all, and having declined to do so until the matters were adjudicated.

To state intelligibly the question presented by the first instruction, it seems to be proper to notice briefly some of the provisions of the law in regard to the powers and duties of the board of supervisors of a county, and of some of the officers of the board and county. They may be found in two acts in the Session Acts of 1869-70, pp. 257 and 269; one of them being chapter 179, entitled "an act prescribing the duties and compensation of county officers;" the other being chapter 188, entitled "an act prescribing the duties and compensation of certain township officers." These are the first acts which were passed under the new Constitution, which introduced the present system of county organization. They were in force when the transactions involved in this case occurred, and therefore govern it; though, I believe, the acts now in force on the same subject, being chapters 170 and 230 of the Session Acts of 1871-72, pp. 221 and 290, are to the same effect, in substance at least, so far as concerns this case. My references will be to the former.

Chapter 188, § 3. The board of 585 supervisors of the several *counties shall assemble at their respective court-houses on the first Monday in December in each year, and proceed to discharge the duties hereinafter prescribed.

§ 4. They may also hold special meetings, &c.

§ 5. They shall have power, at the meeting on the first Monday in December in each year, to audit the accounts of the county; to settle with the different county officers, &c.; to fix the county levies for the ensuing year, &c.

§ 6. They shall have power, at said meeting in December or at any other legal meeting, among other things enumerated, to examine, settle and allow all accounts chargeable against such county, and when so settled they may issue county warrants therefor, as provided by law. But they shall not issue, in any one year, a greater amount of county warrants than the amount of the county tax levied in such county for such year, &c. They shall represent the county and have the care of the county property and the management of the business and concerns of the county in all cases where no other provision shall be made.

§ 8. They shall, at the first meeting after their election, choose one of their number as chairman, who shall preside at such meeting and all other meetings during the year, if present, &c.

§ 9. He shall countersign all county warrants.

§ 10 declares that accounts are to be allowed by the board, and how they are to be made out, and requires the attorney for the Commonwealth to represent the county before the board and resist the allowance of any claim that is unjust, or ought not to be allowed.

§§ 12, 13, 14 and 15 give a right of appeal from the board to the county court, prescribe the duty of the clerk of the board in such cases, declare when an action may be maintained against a county, and when the determination of the board is to be final, &c.

586 *§ 16 directs the books, records and accounts of the board to be deposited with their clerk, and to be open, without any charge, to the examination of all persons.

§ 18 requires the board to have published yearly a full report of the receipts and expenditures of the year next preceding, and of the accounts allowed, &c.

§ 22 declares that the clerk of the county court shall be, ex officio, clerk of the board

of supervisors, and may appoint a deputy, for whose acts the clerk and his sureties shall be responsible under his official bond.

§ 23 prescribes the general duty of such clerk, among which is the duty to sign all warrants issued by the board for the payment of money, and to record in a book provided for the purpose the reports of the county treasurer of the receipts and disbursements of the county.

§ 25 declares that such clerk shall not sign or issue any county warrant except upon a recorded vote or resolution of the board of supervisors authorizing the same; and such warrant shall be signed by the clerk and countersigned by the acting chairman of the board; and the name of the person to whom it is issued shall be entered in a book to be kept by him in his office for that purpose.

Chap. 179, §§ 4-33, relate to the county treasurer, but only a few of these sections need be noticed here.

§ 8. The treasurer shall reside in the county of which he is treasurer, and shall keep his office at the county seat, and shall receive all moneys payable into the treasury thereof, and disburse the same on orders of the County or Circuit court, or warrants drawn by the board of supervisors for the county; but it shall be competent for the judge of the County court, by order entered of record, to certify that in his opinion some other point in said county would be more convenient to a majority of the citizens of said county; and upon the
587 entry *of such order the treasurer for such county shall remove his office to the place named in said order, &c.

§ 9. He shall keep a just account of all moneys received and disbursed by him for the county, and return at intervals of two months, until his settlement with the board at the end of the year, sworn statements of his receipts to the clerk of the court, to be preserved by him for the inspection of any person having an interest therein. He shall keep the books, papers and money pertaining to his office at all times ready for the inspection of the county judge or board of supervisors; and shall, when required, exhibit his account and the book containing a list of the warrants and orders drawn upon the county treasurer provided for in the following section.

§ 10. He shall provide and keep a well-bound book, in which he shall make an entry of all warrants or orders legally drawn upon him by the County or Circuit court, or the board of supervisors for the county, and presented for payment, stating correctly the date, amount, number, in whose favor drawn, and the date the same was presented; and all warrants or orders so presented shall be paid in the order presented, out of the fund drawn upon.

§ 11. No county treasurer shall refuse the payment of any warrant or order legally drawn upon him and presented for payment for the reason that warrants or orders of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon sufficient to pay such prior warrants or orders, and also such warrants or orders so presented; but such treasurer shall, as he shall receive money into the treasury belonging to the fund so drawn upon, set the same apart for the payment of warrants or orders previously presented, and in the order presented:
588 provided, *however, that nothing herein contained shall prevent the treasurer from receiving warrants of the county in payment of the county levy.

These sections show how careful the legislature has been to secure the people of a county against the imposition of unjust or improper claims, and to prevent the issuing of illegal, pretended, or fraudulent warrants upon the treasury of a county. And yet the facts certified in the record in this case show, that since the board of supervisors of Henrico county was first organized, in 1870, the board has never, by a recorded vote, authorized the issue of any warrant; but it has always been the custom, sanctioned by the acquiescence of the board, for the chairman and clerk of the board to issue warrants whenever a claim against the county had been audited and allowed by the board. It has been the habit of the chairman to sign his name to blank warrants, and leave them with the clerk of the board, to be filled up and delivered by the clerk to persons entitled thereto; trusting to the clerk to act faithfully in the matter. The record book of the proceedings of the board was in possession of the clerk, and he could always see from it what amounts had been allowed. According to this extraordinary and most unwarrantable custom, Samuel L. Anable, the father of the accused, who had been a member of the board ever since it was organized, and was chairman thereof from July 1871 to July 1872, signed, as such chairman, a large number of these blank warrants, how many does not appear, and placed them in the hands of the accused for the purpose aforesaid. The accused at different times, between the 30th of December 1871 and the 26th of March 1872 inclusive, filled up a large number of these blank warrants in his own favor for different amounts, signed them as clerk of the board, and negotiated and effected sales of them
589 through the agency of different *persons employed by him for that purpose. The precise amount of these pretended warrants in the aggregate does not appear; but it could not have been less, and was probably more, than $3,000. Such warrants, to the amount of $3,064, were actually presented to the treasurer and registered on his book; and others were negotiated and sold by the accused or his agents, which do not appear ever to have been presented or registered. One of the said warrants which were registered, amounting to $350, appears to have been afterwards returned to the accused and destroyed by him; in fact appears not to have been actually sold. This amount must therefore be deducted from the list of registered warrants aforesaid;

but still the amount of warrants disposed of as aforesaid must have exceeded $3,000.

Thus it appears that the accused, having an interest in the county levy of Henrico county only to the extent of $1,649, and well knowing that that was the full amount of his said interest, and the utmost extent to which he was entitled to receive and have county warrants on the treasurer of said county, yet filled up and signed blank warrants as aforesaid to the amount of upwards of $3,000, and negotiated and sold them, falsely pretending to the purchasers, or some of them, that he had an interest in the county levy to that extent, and a right to draw on the county treasurer to that amount.

Now, it is evident, from this statement of the facts, that a large amount of money, or its equivalent, has been thus obtained by the accused by these false pretences, and the question is, whether the check, the larceny of which is the subject of this accusation, is a part of the subject which was thus obtained.

It does not appear from the record at what precise dates the supposed warrants were negotiated and sold as aforesaid, except that the one for which the check aforesaid
590 *was received was negotiated and sold on the 27th of March 1872, the date of the check. The record shows the dates of the supposed warrants which were registered, the said dates commencing December 30th 1871, and ending March 26th 1872 (by mistake stated in the register as March 22), the last being the date of the supposed warrant sold to Dr. White for the check aforesaid. If the said warrants were sold in the order of their dates, then the one which was sold for the said check was the last one sold, as it bears the last date of all which were sold, whether registered or not. According to this view the said check was certainly a part of the subject obtained by false pretences as aforesaid, unless there be something in the order of registration of the supposed warrants which prevents that effect. The registered warrants were not all so registered precisely in the order of their dates. The first eight were, being all the warrants that were registered prior to the one for which the check aforesaid was received. Two warrants are registered below that one, which are shortly prior in date to that one, being dated March 6 and March 16th; while that one is dated March 26th 1872. The warrants which were sold but have not been registered, so far as appears from the record, also bore date before the one for which the said check was received.

But the counsel for the accused insists, that if when the warrant for which the check was given was registered the amount due to the accused on account of the county levy was sufficient to cover the amount of all the supposed warrants in favor of the accused which had been registered, including the one for which the check was given, then the accused cannot be guilty of obtaining that check by false pretences, and therefore cannot lawfully be convicted of the larceny of the check, even though long before he obtained it he may have sold
591 and *assigned his whole claim against the county; and the first instruction asked for by him was intended to embody this as a proposition of law.

I can only say that if this be law, it strikes me as something very strange; for even few admit the truth of the fact assumed by the instruction, as to the sufficiency of the amount of his claim against the county to cover the amount of warrants registered down to and including the time of registering the one for which the check was given, (which I am not disposed to controvert, and which may be true,) and even if we admit, which I certainly do not admit, that the holders of these supposed warrants were entitled to receive payment of them from the county treasurer in the order of their being registered, until the amount due the accused by the county was exhausted, although before they were drawn he had sold and assigned to others the whole of said amount, still it does not follow that the check in question was not obtained by fraudulent pretences.

Let us suppose that the whole of these warrants, to the amount of upwards of $3,000, had been sold and assigned before any of them were registered, would not the accused have thereby obtained a part of the proceeds of sale by false pretences?—by falsely pretending that he had in the county treasury enough to pay the whole amount of said warrants, when he knew he had not more than about one-half of that amount in the said treasury? If any part of said proceeds of sale would have been obtained by such pretences, which part would have been so obtained? Certainly that part obtained after he had fully sold and assigned the whole amount of what was due him by the county. His offence would have been complete so soon as he obtained that part or any portion of it; and he might then have been prosecuted and punished for
592 the offence. Can it be possible *that this offence, thus complete, would be purged by having the warrants last sold first registered, supposing such registration would entitle the holders of them to priority of payment? Or that another offence would thus be substituted for the first? Or that the accused, from having been guilty of obtaining one thing by false pretences, would now become innocent of that offence, and become guilty of another offence, in doing an act which, when done, was innocent? Certainly this cannot be so; and yet it must be so, if the proposition contended for be correct; unless I be very much deceived.

The fallacy of the reasoning in opposition to the view I contend for seems to me to consist in this: that, to maintain this prosecution, it is necessary to show that Dr. White sustained a loss by the transaction; and as Dr. White, by getting his warrant registered first, will, according to the argument, avoid that loss himself and throw it upon another, therefore this prosecution for

obtaining the check from him by false pretences cannot be maintained. With all deference I think this a non sequitur. A man from whom property is stolen may get it back or recover its value. The chief himself may voluntarily return it. But even that will not purge the offence when once it has been completed. For the same reason, if this offence was complete when the check was received, it does not cease to be an offence, if it can be supposed that Dr. White became entitled to receive the amount of the warrant assigned to him by having it first registered.

But let me suppose a case for the purpose of illustrating the strange consequence to which the view contended for might lead. Suppose that the county had owed to the accused only $1,000, the whole of which debt he, bona fide, sold to A, filling up a blank warrant and endorsing it to him for the amount; that some time after-
593 wards *the accused fraudulently filled up another blank warrant in his own favor for the same amount, and sold it to B, falsely pretending that he was still a creditor of the county to that amount; and that B has his warrant first registered, whereby, according to the view contended for, he becomes entitled to have his warrant paid, and prevents the payment of A's warrant. Now, here is a case in which undoubtedly the accused has obtained $1,000 by false pretences. Suppose he is indicted therefor, and, to avoid all difficulty as to the person from whom the money was thus obtained, the prosecutor, as he may, inserts two counts in the indictment, one for obtaining the money of A, and the other for obtaining it of B by false pretences. Under which of these two counts can the accused be convicted? Certainly not under the first, because he acted bona fide in the sale to A, and there was no criminal intent, which is always necessary to the constitution of a crime. And yet it is contended that he cannot be convicted under the second count, because B has gotten his money, and therefore it is contended could not have been cheated. And thus the accused, by this supposed operation of the law, must go scott free, though all must admit that he has cheated A or B of $1,000!

But, it is needless to discuss this question further, because it does not arise. Dr. White has not obtained payment of the warrant assigned to him, and non constat that he ever will. In my opinion he certainly never will, if when the supposed warrant was assigned to him the accused had, by prior sales and assignments, entirely exhausted the amount which was due him by the county.

With all due deference to the opinions of those who differ with me, I think the purpose and effect of the registration of these county warrants has been wholly misconceived. The purpose is not to give them effect or make them complete, nor to
594 make them void, even as to *subsequent purchasers without notice, unless duly registered. The law in regard to the registration of these warrants is not in that respect like the law in regard to the registry of deeds. The parties entitled to them may or may not, at their pleasure, have them registered, and will be entitled to receive payment of them, whether they be registered or not. The only effect of their not being registered is, that the registered warrants will be first paid, and paid in the order of their registration. The county levy comes into the county treasury by degrees, and there is not enough money there to pay all the warrants at the same time. The money should be applied as received, as far as it will go, and the law directs it to be applied to the payment of the warrants in the order of their registration. This arrangement is made for convenience merely, and the preference which it gives to priority of registration is a mere preference in regard to time and order of payment, and is a reasonable reward to superior diligence. Enough money is raised by the county levy for the payment of all the warrants which are drawn upon it. Their payment is a mere question of time, and the order of their payment cannot prevent the ultimate payment of any of them. But these observations apply only to legal and genuine warrants, and not to forged and fabricated ones, which, in fact, are no warrants at all. If the chairman and clerk, or the clerk alone, of the board of supervisors, forge a county warrant, with intent to deceive the county treasurer, which does in fact so far deceive him as to induce him to put it on the register, will anybody contend that payment of such a forged paper can be enforced against the county treasury, even by a bona fide holder for value and without notice? The paper is absolutely null and void, and never for a moment had any force as a county warrant, and never can have.

Now, that is precisely the condition
595 *of these pretended warrants of the accused, which were issued after he had exhausted, by prior sales and assignments, the whole of his claim against the county.

The law, as we have seen, expressly declares that the clerk shall not sign or issue any county warrant, except upon a recorded vote or resolution of the board of supervisors authorizing the same, and such warrant shall be signed by the clerk and countersigned by the acting chairman of the board, and the name of the person to whom it is issued shall be entered in a book to be kept by him in his office for that purpose. By a very bad custom, the chairman of the board of Henrico has been in the habit of signing blank warrants and trusting them to the clerk, to be filled up, signed by him anp issued to the county creditor. Although a bona fide execution of this trust by the clerk (if trust it can be called) would not expose him to the imputation of a criminal offence, however illegal the custom may be, there being no criminal intent in the case, yet certainly he is not authorized to issue a warrant to anybody he pleases, whether a county creditor or not; and if he fraudu-

lently issue a warrant to a person not a county creditor, with intent to deceive, he is guilty of forgery; and if he obtain money or other valuable thing by means of such a paper, he is guilty of obtaining the same by false pretences, and is by law deemed guilty of the larceny thereof. To fill up, with a fraudulent intent to deceive, such a blank paper, entrusted to him for a different purpose as aforesaid, is as much a forgery as if the whole paper had been forged and fabricated. That the paper in this case was issued to a person who had been a county creditor makes no difference. He had previously sold and assigned to others all that was due him by the county, and was then no longer a county creditor. He stood as if a dollar had never been due him by
596 the county. He knew that such *was his condition; and knowing that fact, he fraudulently filled up, negotiated and sold this paper, pretending that it was a true and genuine county warrant upon a sure and adequate fund for its payment, and that in due time and in due and regular course of such proceedings, it would certainly be paid by the county treasurer; and by these means he obtained the check in question. If these be the facts, as the evidence tends to prove them to be, and as they may be consistently with the first instruction asked for, did he not obtain the check by false pretences? Even if this pretended warrant can ever be of any avail for any purpose, in any future controversy about the fund which was due to the accused out of the county levy, certainly he will have obtained the check by false pretences; for certainly he never would have obtained it if he had not fraudulently misrepresented the facts with intent to deceive. The most that can be said (if that much can be said) of these supposed warrants, or any of them, is, that they, or such of them as were drawn while there was any fund to be drawn upon, may be regarded as equitable assignments, binding in equity the fund on which they are drawn in the order in which they were given. Prior in tempore, prior in jure. But those which were drawn after the fund was exhausted by prior warrants, and when it was well known to the accused to have been so exhausted, are absolutely null and void for any purpose. They are, then, fabrications and forgeries.

In no view of the case therefore did the court err in refusing to give the first instruction.

The second and fourth instructions asked for by the accused were given, and there is of course no question as to them.

The third instruction asked for was also given, but with an addition which was excepted to. I think that addition
597 *was clearly right, and as we all think so I will say no more on the subject.

The fifth instruction was refused, and rightly so; but as this is not complained of as an error by the accused, I will take no further notice of it.

The sixth instruction was refused and that is complained of as error. It presents the question whether the check being described in the indictment as endorsed by Newburn, to whose order it was payable, and the evidence being that it was not endorsed by Newburn when it was handed to him by White, but was so endorsed afterwards; that is a fatal variance.

I do not think it is, for two reasons:

First. The law of larceny does not require a minute description of the property stolen. The general rule is that it should be described with such a certainty as will enable the jury to decide whether the chattel proved to have been stolen is the very same with that upon which the indictment was founded, and show judicially to the court that it could have been the subject matter of the offence charged, and enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel. 2 Russ. on Crimes, 107. It is generally sufficient in an indictment to describe a matter made a subject of larceny by statute in the words in which it is described by the statute. Id. 110. To be sure, if an indictment profess to set out a writing in haec verba, it ought generally to be truly set out. But here the check was not intended to be set out, nor was it necessary. It is merely described by certain marks, and the question is, whether the description is sufficient for the purpose of identity, notwithstanding there may have been a misdescription in the respect mentioned. Nobody can doubt the fact of identity in this case between the check proved and the check
598 charged to have *been stolen. It is described in the indictment, and truly described, by stating the name of the drawer, the place and time at which it was dated, the bank on which it was drawn, the amount for which it was drawn, the person to whom or to whose order it was made payable, and the person to whom it belonged. It is further described as "endorsed, Edward B. Newburn." It appears that this endorsement was not upon the check when it was handed to Newburn by Dr. White, but was put there afterwards. When it was put there, whether in Dr. White's presence or not, does not appear. It was certainly put there very soon thereafter, and before the money was drawn. It was of necessity put there as a means of getting the money, and Dr. White created that necessity by making the check payable to order. The question then is, whether this is a fatal variance? I think not. I think the maxim here applies "falsa demonstratio non nocet."

But, secondly, I think there is a better answer still; which is, that Dr. White was not deprived of the title or possession of his property in law by its being stolen from him; that both title and possession continued thereafter in him, so long as it was held by the chief or his agent; that during all that period there was a continual repetition of the larceny, in contemplation of law; that the legal title and possession of Dr. White were not determined by the endorsement of the check by Newburn; and

that, therefore, the check must be deemed to have been stolen, taken and carried away, as well after as before it was endorsed by Newburn. And so there was no variance.

The only remaining question to be considered in this case, if any, must arise under the second bill of exceptions; which was to the opinion of the court overruling the motion for a new trial. I have already
599 considered *all the questions raised by the counsel of the accused under that bill of exceptions. One or two questions were, however, suggested on the bench, and one of them by myself, in the course of the argument, which ought perhaps to be noticed.

First. It was suggested that the object of the accused was to obtain money, and not a check; that he gave no authority to Newburn to obtain a check; indeed, that he gave no authority at all to Newburn, to obtain either money or a check; but only gave authority to Quarles to obtain money by a sale of the pretended warrant. To this suggestion the answer is, that the authority given to Quarles, to obtain money by a sale of the warrant, was an authority to sell it and to obtain the money in the usual manner in such cases; and the employment of Newburn as a sub-agent by Quarles, and the receipt of the money by Newburn, by the means of a check, were within the scope of the power conferred by the accused. If it was larceny to obtain the money, it was equally larceny to obtain the check, which was received as an equivalent for the money, according to the universal custom in such cases, and was the usual and proper means of obtaining the money.

Secondly. It is suggested that the check was not White's and could not have been recovered by him of Newburn, who at least had a lien upon it for his commission, as also had Quarles. To this suggestion there are several sufficient answers: first, neither of them could have had any claim to commission on a check obtained by them or their principal by false pretences; secondly, even supposing they had such a claim, the general property and right of possession of the check was in White, subject only to a lien or charge for commission, and he could therefore be properly stated as the owner in the indictment; and, thirdly, the
600 Code, ch. 207, § 8, provides that *in such a case as this it shall be sufficient to prove that when the offence was committed the actual or constructive possession, or a general or special property in the whole or any part of the subject of the offence, was in the person alleged in the indictment to be the owner thereof.

Thirdly. It does not certainly appear from the record, in what precise order the supposed warrants were sold and assigned by the accused; and, therefore, it may not certainly appear that before the check was obtained he had sold and assigned warrants to the full amount of what was due him by the county. I confess I had some doubt at first upon this question; but, on further reflection, I am decidedly of opinion, that the jury having found a verdict against the accused, with which the court of trial was satisfied, the appellate court ought not to reverse the judgment because the verdict was contrary to evidence in that respect. All the supposed warrants and the holders of them were before the jury, and nothing would have been easier, I suppose, than to have shown the order in which the sales were made. That the learned counsel of the accused raised no question of that kind, but on the contrary raised the question which his first instruction presents, shows clearly that no such question as the former could be raised on the facts of the case.

Upon the whole I think there is no error in the judgment, and that it ought to be affirmed; but as the other judges think otherwise, it must be reversed, and the cause remanded for a new trial to be had thereon.

Anderson and Staples, Js., concurred in the opinion of Christian, J.

Bouldin, J., concurred in the opinion that the offence might be prosecuted under the indictment. He also concurred in the opinion of Christian, J., as to the refusal
601 *of the first instruction, and thought that the court below erred in refusing to give the sixth instruction. The allegata probata must be the same. He referred to Johnson's case, supra. Here there is no proof that Anable ever saw this check, or had any connection with it. There was an agent and sub-agent, and the latter was only the agent of the former, not of Anable.

Judgment reversed.

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602 *Craft v. The Commonwealth.

November Term, 1873, Richmond.

1. **Prosecution for Felony.***—Where a prisoner has been convicted of a felony, and a new trial is granted him, the court may proceed to try him at the same term, against his consent.
2. **Same—Copy of Indictment.**—If a prisoner receives a copy of the indictment and of the list of jurors, at any time before the trial is commenced, though not until the case is called, it would be proper to give the prisoner a reasonable time to examine the indictment and the list of jurors, if he asks it; but it is not a ground for continuing the cause until the next term of the court.
3. **Same—Venire Facias.**—In directing jurors to be summoned from another county, the court may make an order directing its officer to summon them, or may direct the clerk to issue a *venire facias*, requiring the officer to summon them.
4. **Same—Same—Deputy.**—During the recess of the Corporation court, the sergeant appoints a deputy

*Prosecution for Felony—Proceedings.—See Lawrence v. Com., 81 Va. 484 and Prince v. Com., 80 Va. 331, 15 S. E. Rep. 863, citing the principal case. See also, Briggs v. Com., 82 Va. 554, and Poindexter v. Com., 33 Gratt. 766, and *note*. See also, monographic *note* on "Autrefois Acquit" appended to Page v. Com., 26 Gratt. 943, and monographic *note* on "Continuances" appended to Harman v. Howe, 27 Gratt. 676.

without the consent in writing of the judge of the court; but the deputy takes the oath of office before the judge, which is in writing and signed by the deputy, and was certified in writing by the judge. This is a sufficient consent in writing by the judge, and the deputy has authority to execute a writ of *venire facias*, directed to his principal.

5. **Same—Same.**—A Corporation court has authority to direct jurors to be summoned from without the limits of the corporation, for the trial of a prisoner indicted in that court, when an impartial jury cannot be obtained within the corporation.

6. **Same—Same.**—In the sense of the law all parts of the adjoining county, outside of the limits of a corporation, is remote from the place where 603 *the offence is alleged to be committed, if it is alleged to be committed within the limits of the corporation.

7. **Same—Same—Objection.**—Where jurors are directed to be summoned from an adjoining county, and it appeared that one of the panel had been summoned by mistake or misapprehension of the law or otherwise, from a place near to instead of remote from the vicinage, the objection, if valid, instead of being made to the array of jurors, should be made to the individual juror so summoned.

8. **Same—Same.**—If a person has the constitutional qualifications of a voter, though he has not been registered and has not voted, he is a qualified juror.

9. **Same—Same—Statement by Attorney.**—Upon the trial of a prisoner for murder, before the introduction of the evidence is commenced, the attorney for the Commonwealth may, with the permission of the court, and under its supervision, make a statement to the jury touching the several grades of homicide, and the law in reference thereto.

At the April term 1873 of the Corporation court of Danville, Christopher Craft was indicted for the murder of William Jeffries. At that term of the court his case was continued, on his motion, to the July term, and at the July term, on the motion of the attorney for the Commonwealth, it was continued until August. At the August term of the court the prisoner was tried and found guilty by the jury of murder in the first degree, but the court, on his motion, set aside the verdict and granted him a new trial, to be had at the same term of the court. To the opinion of the court ordering a new trial at the same term of the court the prisoner excepted. This is his first exception.

The new trial of the prisoner was granted on Wednesday the 6th of August, and on the next day the court made an order that a writ of venire facias be issued, directing the sergeant of the town of Danville to summon from the body of the county of Pittsylvania, (which is the county in which the town of Danville is situ- 604 ated,) *twenty-four lawfully qualified jurors to appear at the court at 10 o'clock Tuesday morning next, to recognize on their oaths whether the said Christopher Craft be guilty of the murder whereof he stands indicted.

On the calling of the cause on Tuesday the 12th of August, for a new trial, in pursuance of the order of the court, the prisoner, by counsel, moved the court for a continuance of the cause:

First. Upon the ground that the case had been once tried during the present term of the court.

Second. That the prisoner had not been furnished with a copy of the indictment and the list of the jurors, though he had demanded them in writing on the 7th.

The proof was that he did hand to the clerk a written demand for a copy of the indictment and of the venire facias, and a list of the venire summoned to try him, in the court-house on the 7th, when he was told by the clerk that he could furnish him with a copy of the indictment, but that the list of jurors had not been returned to him, and that the writ of venire facias, which had been issued for them, was not returnable until Tuesday the 12th of August, the day designated for the trial: and the prisoner made no further application for the copies. The writ, with the return thereon, was not returned to the clerk until on the morning of Tuesday after the court had been convened.

But as the trial had not been commenced when the motion was made, the court directed the clerk to copy the indictment and a list of the jurors and present them to the prisoner; which being done, the motion for a continuance was overruled: and the prisoner again excepted. This is his second exception.

After the clerk had furnished the prisoner with a copy of the indictment and of 605 a list of the jurors, the *prisoner moved the court to quash the writ of venire facias, and to quash the return thereon:

First. To quash the venire facias, upon the ground that the law does not authorize the clerk to issue a venire facias except for the summoning of venire men from the qualified jurors of the county; and this venire facias is issued by the clerk of the Corporation court of Danville to the sergeant of the town of the Danville, directing him to summon twenty-four qualified jurors from the body of the county of Pittsylvania.

Second. To quash the return upon the said writ, upon the ground that J. C. Thornton, who summoned the jury, was not the legally constituted deputy of W. E. Boisseau, sergeant, and therefore had no legal right to execute said writ. The proof was, that on Saturday the 8th of August, the court not sitting on that day, Boisseau, without the written consent of the judge of the Corporation court of Danville, appointed J. C. Thornton one of his deputies, and on that day Thornton took the oaths of office before H. W. Flournoy, the judge of the corporation court. The court overruled the motion; and the prisoner again excepted. This is his third exception.

On the calling of the cause on the 12th of August, after the venire summoned to try the same had been convened, and before they had been sworn on their voir dire, the prisoner, by counsel, challenged the whole

array, and excepted to the whole panel, and asked that the same and the writ of venire facias and the return thereon be quashed, for the following reasons, to wit:

First. For the reason that J. C. Thornton was not and is not a properly constituted deputy of W. E. Boisseau, sergeant, and had no legal authority to summon jurors or veniremen.

Second. That the clerk had no authority to issue a writ of venire facias, directing that veniremen or jurors be 606 *summoned from the county or from anywhere, except the corporation of Danville.

Third. For the reason that the Corporation court has no authority to summon jurors, except from the corporation over which it has jurisdiction.

Fourth. That even if there had been authority in the court to direct that a jury be procured from the county of Pittsylvania, and the writ of venire facias had properly issued and had been properly served by a legally constituted officer, it was the duty of such officer, under and in pursuance of the writ, to have summoned men residing remote from the scene of the alleged murder; which has not been done.

The proof upon the first ground stated has been given under a previous exception. Upon the fourth ground it was proved that one of the jurors summoned lived about half a mile outside of the corporate limits, another about a mile, and four others lived from two to three miles beyond these limits. The court overruled the motion; and the plaintiff again excepted. This is his fourth exception.

On the same 12th of August, and before the jury was sworn for the trial of the cause, the prisoner moved the court for a change of venue, upon the ground that an impartial jury for the trial of the same could not be obtained in the town of Danville. And, thereupon, W. E. Boisseau, the sergeant of the town, being sworn, stated that an unprejudiced jury, or one whose minds had not been made up touching the guilt or innocence of the prisoner, could not, in his opinion, be obtained from the qualified jurors within the corporation of Danville. But the court being of opinion that it was not confined to the corporation of Danville for the selection of jurors, and had the right to send to another county or corporation to obtain jurors for the trial 607 of the cause, overruled the *motion; and the prisoner again excepted. This is his fifth exception.

After the calling of the cause, and when the veniremen who had been summoned for its trial were being examined on their voir dire, one of them, J. W. Lee, stated that he was over twenty-one years of age, and that he had been a citizen of Virginia and the county of Pittsylvania for three years, long enough to entitle him to register as a voter therein, but that he had never registered as a voter, nor voted there. Whereupon the prisoner, by counsel, challenged the said J. W. Lee, and asked the court to exclude him from the panel, upon the ground that he was not a qualified voter, and therefore not a legal juror. But the court overruled the motion; and the prisoner again excepted. This is his sixth exception.

After the jury had been sworn and charged by the clerk as to the law touching the indictment, the commonwealth's attorney asked leave of the court to make a statement to the jury touching the several grades of homicide and the law in reference thereto. To this the prisoner, by his counsel, objected, on the ground that it was the office of the clerk, in the trial of felonies; and that any statement made by the attorney, at that stage of the case, would be a partial argument of the cause before the evidence had been adduced, and calculated to prejudice the jurors against the prisoner's case, and thereby endanger the impartiality of the trial. But the court overruled the objection and permitted the commonwealth's attorney to make his statement; and the prisoner again excepted. This is his seventh exception.

The jury found the prisoner guilty of murder in the first degree; and the 608 court thereupon sentenced him to *be hung. From this judgment the prisoner obtained a writ of error from a judge of this court.

George C. Cabell, for the prisoner.

The Attorney-General, for the Commonwealth.

Bouldin, J., delivered the opinion of the court.

The first error assigned in this case is, that the court, after setting aside the verdict of the jury and awarding the prisoner a new trial, should not have again put him on his trial at the same term of the court.

It is not pretended that there is any law requiring, or even authorizing, a continuance of the case, under such circumstances, until the next term of the court, if in the opinion of the court it may be convenient or expedient to try the case at the same term. On the contrary, by the policy of our laws, by which criminal cases are always deemed privileged, and by the provisions of the tenth section of the bill of rights, which guarantees to the accused a speedy trial by jury, it would seem manifest that the court is not only authorized, but that it is its duty to proceed with the trial at the same term, if justified by the state of the docket; and of this the court is the proper and only judge. We are of opinion, therefore, that there was no error in setting down the case for trial at the same term.

The second error assigned is, the refusal of the court to grant the accused a continuance of the cause.

This was asked on two grounds:

The first ground was, that it was unusual to hurry the accused into trial at the term of the court at which there had already

been a trial of his cause. This is
609 *substantially the question already disposed of under the first assignment of error. There being not even a suggestion that any witness was absent, or that by delay any additional testimony on behalf of the accused could be produced, we think that the reason assigned was no ground for a continuance.

The next ground was, that the accused had called for a copy of the indictment against him and a list of the jurors summoned to try him, which he did not receive until he was set to the bar on the day of the commencement of his trial. We think there was no error in refusing to grant a continuance for this reason. It is certainly true that the law entitles the accused to a copy of the indictment and a list of the persons summoned as jurors to try him, but it prescribes no time in which this shall be furnished. It was in fact furnished in this case before his trial commenced. He needed no time to understand the indictment, for he had already, and at the same term, been tried on that indictment. The list of jurors was placed in his hands before the trial commenced, and the court doubtless did allow him, or if asked would have allowed him, a reasonable time to examine it. Whether that reasonable time should have been one day or less is a question not before us, because no such motion was made to the court below. The motion was, not for this reasonable delay to examine the list, but for a continuance of the cause until the next term; and this court is of opinion that the motion was properly overruled.

The next assignment of error is, to the refusal of the court below to quash the venire facias issued in the cause, and the return thereon.

The first reason assigned for quashing the venire facias is, that it was defect-
ive and not issued in accordance with
610 *the statute. That in this case, in which jurors were wanted from beyond the limits of the corporation, and beyond the ordinary jurisdiction of the court, they should have been brought or summoned not by venire facias but by order of the court; and to sustain this objection reference is made to Sess. Acts 1871-'2, p. 34, § 10. That act provides that "in a criminal case in any court, if qualified jurors not exempt from serving cannot be conveniently found in the county or corporation in which the trial is to be, the court may cause so many as may be necessary of such jurors to be summoned from any other county or corporation by the sheriff or sergeant thereof, or by its own officer." It will be seen that nothing is said in the act about the form of process by and under which the jurors aforesaid shall be summoned—whether by venire facias or a simple summons. All that the act requires is, that the judge shall cause them to be summoned; leaving it to his discretion entirely how they are to be summoned.

In this case the court entered a formal order in the cause, directing the clerk to issue a venire facias, requiring the sergeant of the corporation to summon from the body of the county of Pittsylvania twenty-four lawfully qualified jurors, &c., &c.; and under this order the clerk issued the very process ordered by the court. The statute required the court to cause the jurors to be summoned. The court did cause them to be summoned by venire facias, and they obeyed the summons. We can see no violation of law in this proceeding. On the contrary, the object of the law is fully and in terms accomplished by it. The fact that the clerk may, and indeed must, without formal order of court, issue writs of venire facias within his county or corporation in proper cases, certainly cannot have the
effect of rendering illegal such a writ
611 *when issued by the clerk to another county or corporation, under the direct authority and express order of the court, in a proper case for such order.

This court is of opinion that there was no error in the refusal of the court below to quash the venire facias for the reason stated.

Nor did that court err in refusing to quash the return and writ for the reason secondly assigned, viz: that the judge had not given his consent in writing to the appointment of the deputy who executed and returned the writ.

That deputy appeared before the judge of the court during the recess of the court, and took the oath of office, which was in writing, was subscribed by the deputy, and was certified in writing by the judge himself. This was regarded by the judge as a sufficient consent in writing on his part to the appointment of the deputy; and this court concurs in that opinion.

The fourth assignment of error is, that "the court erred in not sustaining the prisoner's challenge to the array of jurors," for reasons set forth in his fourth bill of exceptions.

The first and second reasons assigned in this bill of exceptions have been already disposed of in considering the third assignment of error.

The third reason assigned presents greater difficulty and deserves a more serious consideration. It is that the Corporation court of Danville has no power to summon a jury from beyond the limits of the corporation in a criminal prosecution. The power in a criminal case to summon a jury from beyond the limits of the county or corporation is confined, it is contended, by the amended act of February 11th 1873, Sess. Acts '72-3, chap. 97, p. 80, to the Circuit courts alone. The power referred to prior to that amended act had been conferred on "any court" in a
criminal case, and thus clearly em-
612 braced Corporation *courts. It is true that the tenth section of the Code of 1860, which conferred the power, as amended by the act aforesaid of February 11, 1873, strikes out the words "any court," and refers in terms only to "Circuit courts;" but it does not follow as a necessary consequence that such power can only be exercised by those courts. The power and

jurisdiction of Corporation courts generally, as at present organized, are nowhere prescribed and defined in detail by separate express legislation. The jurisdiction of these courts has been generally conferred, both in the Constitution of the State and in the Acts of Assembly under that Constitution, by reference to the jurisdiction of other courts, and chiefly of the Circuit courts, without stating in the grant of jurisdiction, otherwise than by reference as aforesaid, what that jurisdiction is, except in some special cases.

Thus the 14th section of the 6th article of the State Constitution provides as follows: "For each city or town in the State containing a population of five thousand, shall be elected on the joint vote of the two houses of the general assembly, one city judge, who shall hold a Corporation or Hustings court of said city or town as often and as many days in each month as may be prescribed by law, with similar jurisdiction which may be given by law to the Circuit courts of this State," &c., &c. We are thus referred by the Constitution itself to the jurisdiction "which may be given by law to the Circuit courts of the State," for the extent and character of jurisdiction conferred on the Corporation courts; and it would seem from the peculiar terms of the Constitution, that it was the purpose of the framers that whatever jurisdiction might, from time to time, be conferred on the Circuit courts, would, ipso facto, attach to the Corporation courts.

In prescribing and defining the jurisdiction of the Corporation courts under this law, we find that the legislature 613 *has pursued the same course. By the act of April 2d, 1870, "entitled an act to prescribe and define the jurisdiction of the County and Corporation courts of this Commonwealth, and the times and places of holding the same," Sess. Acts 1870–71, ch. 38, § 7, p. 36, the jurisdiction of the Corporation courts is prescribed and defined as follows:

"§ 7. The several Corporation courts shall, within their respective limits, have the same jurisdiction as the Circuit courts, and the same jurisdiction as County courts, over all offences committed within their limits: provided, that the provisions of this section shall not apply to the courts of the city of Richmond."

And by the act of May 19th, 1870, Sess. Acts 1870–71, ch. 96, p. 117, this section was so amended as to extend the jurisdiction of Corporation courts by the addition of the following words, after the grant to those courts of the criminal jurisdiction of the County courts, viz: "and also jurisdiction in all other cases which were cognizable by the former Hustings courts of the respective cities, under the laws as they existed on the 26th day of January, eighteen hundred and seventy."

These are the provisions under which the Corporation courts, except that of the city of Richmond, exercise their general powers and jurisdiction; and it will be seen, as we have already said, that their general jurisdiction is prescribed and defined, not by a separate enumeration of their powers and duties, but by reference to the jurisdiction of other courts. When, therefore, in a criminal case, we wish to ascertain what are the powers and duties of a Corporation court, (other than that of the city of Richmond,) we are referred by the Constitution and the laws to the jurisdiction of the Circuit courts; to the powers and duties of those tribunals in such case; and the same jurisdiction precisely is conferred on 614 the Corporation *courts. Jurisdiction is defined by both Bouvier and Burrill as follows: "Jurisdiction is a power constitutionally conferred upon a court, a single judge or a magistrate, to take cognizance of and decide causes according to law, and to carry their sentence into execution;" and by the latter, in a more general sense, "power or right to exercise authority." The power and authority of the Circuit courts of the State in a criminal case—their jurisdiction, extends to and embraces the power and duty of summoning, under circumstances, an impartial and duly qualified jury from beyond the limits of the county or corporation; and this being a most important and valuable safeguard to an impartial trial, as well on the part of the prisoner as of the commonwealth, we can see no reason in favor of its exercise by a Circuit court which would not apply a fortiori to the Corporation courts when exercising the grave functions of a criminal tribunal. We say a fortiori, because, from the necessarily contracted limits of such corporations, the necessity for the exercise of this wholesome power must more readily and frequently arise in a corporation than in counties.

As the exercise, then, of the power in question is clearly within the jurisdiction of the Circuit courts, and the same jurisdiction is conferred on the Corporation courts; as both courts have in such cases the same power and authority, we do not regard it a dangerous latitude of construction to hold that this grave and important function, although conferred in terms only on the Circuit courts, necessarily follows the jurisdiction of both courts in the cases to which it applies. To hold otherwise would lead to strange results. In the town of Danville, as in other cities and towns of the State, there is both a Circuit and a Hustings court, both having the same criminal jurisdiction and bounded by the 615 same narrow *territorial limits; yet, under the rule contended for, the singular anomaly would be presented of one of these courts exercising this wholesome and conservative power, whilst under identically the same circumstances it is denied to the other. We would be reluctant to adopt a conclusion so unreasonable.

We are of opinion, therefore, that there was no error in ordering the venire facias to the county of Pittsylvania, and that the challenge to the array of jurors for that cause was properly overruled. Nor do we think that there is any legal validity in the fur-

ther objection to the array of jurors, that the mandate of the writ was not obeyed by the officer who executed it; in this, that the jurors near to instead of remote from the vicinage were summoned. The objection is not sustained in point of fact. The nearest juror to the scene of action resided about one-half of a mile beyond the corporate limits of the town of Danville. This is remote from the vicinage. In the eye of the law the entire panel was summoned from places remote from the vicinage. It was summoned from the body of the county of Pittsylvania, and beyond the limits of the corporation; and this, in law, is remote from the vicinage of the alleged crime. The word "remote," as used in the statute, is a relative term. What would be "remote" from the vicinage in a small town like Danville would be near the vicinage in the country, in a sparsely settled county. In a small town of four thousand inhabitants it would rarely, if ever, be practicable to summon a panel from a distance of more than one-half of a mile from the scene of the crime, yet the law implies that within such corporation a qualified jury "remote" from the vicinage may be secured; and in point of fact such qualified jury was secured in this very case within the limits of the town of Danville on the first trial of the case. We are of opinion therefore that
616 *the entire panel having been summoned from the body of the county of Pittsylvania, and beyond the limits of the corporation, was legally summoned.

We are further of opinion, that had one of the panel been summoned by mistake or misapprehension of the law, or otherwise, from a place near to instead of remote from the vicinage, the objection, if valid, instead of being made to the array of jurors, should have been made to the individual juror so summoned. The challenge to the array of jurors was therefore properly overruled.

5. The court is further of opinion that there was no error in the refusal of the court below, on the motion of the prisoner, to change the venue. The fact that a duly qualified jury was promptly and readily obtained from the county of Pittsylvania demonstrates that a change of venue was unnecessary.

6. Nor did the court err in refusing to sustain the prisoner's challenge of J. W. Lee because he was not a qualified voter, and therefore not a juror qualified according to law. The objection to the juror was not that he did not possess the constitutional right to vote, but that he had not been registered, so as to enable him to exercise his constitutional franchise. We do not regard registration as one of the qualifications of a voter, but merely a convenient means of ascertaining who is entitled to vote. It is evidence only of a pre-existing right, which evidence must, under the registration acts, exist at the time of voting. It does not confer, but is merely proof of, the right. The Constitution confers and secures that right in the following terms: "Every male citizen" (not registered male citizen) "of the United States, twenty-one years old, who shall have been a resident of this State twelve months next preceding any election, shall be entitled to vote on all questions," &c., &c., excepting only idiots and lunatics, convicts, and persons who since the
617 adoption of *the Constitution may have fought a duel with deadly weapons, sent or accepted a challenge to fight with such weapons, or knowingly conveyed a challenge, or aided or assisted in any manner in fighting a duel. In this list of exceptions non-registered persons are not included. The juror Lee was "entitled to vote" under the terms of the Constitution; and our opinion is, that the court did not err in overruling the motion to exclude him.

The last error assigned was, that the commonwealth's attorney was allowed by the court to make a statement to the jury before the testimony was introduced, "touching the several grades of homicide and the law in reference thereto."

This statement was made by the permission and under the control of the court, and there is no suggestion even that the law, as actually stated to the jury, was inapplicable, or erroneously or improperly stated; and whilst the practice is unusual we cannot say, thus guarded, that it is erroneous.

On the whole case we are of opinion that there is no error in the judgment of the Corporation court, and that the same be affirmed.

Judgment affirmed.

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618 *Read v. Commonwealth.

November Term, 1878, Richmond.

1. **Larceny—Appeal.***—When a person is tried by a justice of the peace for a petit larceny, and convicted, he has an absolute right of appeal to the County court; and in that court the cause is to be heard *de novo* upon the evidence; and the accused is entitled to be tried by a jury as in like cases originating in that court.
2. **Same—Same.**—In such a case it is error in the County court to reverse the judgment of the justice and remand the case to the justice to be tried by him; and any subsequent trial of the case by the justice is null and void.
3. **Same—Same—Proceedings.**—In such case the justice again tries and convicts the accused, and he again appeals to the County court. The proceedings before the justice on the second trial being null, the accused is in the County court upon the first appeal, and is to be tried by a jury as if the case had originated in that court.
4. **Same—Same—Same.**—The accused having been tried by a jury in the County court, and found guilty and sentenced, the errors in the proceedings of the justice on his second trial cannot affect the judgment of the County court.

***Larceny—Appeal.**—See monographic *note* on "Autrefois Acquit" appended to Page v. Com., 26 Gratt. 943; Miller v. Com., 88 Va. 680, 14 S. E. Rep. 342, citing the principal case and Brown v. Epps, 91 Va. 726, 21 S. E. Rep. 119.

In August 1872 Washington Read was brought before J. J. Jackson, a justice of the peace for Charlotte county, upon a charge of receiving three hundred pounds of tobacco, of the value of thirty dollars, the property of G. B. Hannah. Upon the hearing of the case, the justice
619 *sentenced the prisoner to receive thirty-nine lashes, and to be imprisoned in the county jail for three months.

From this judgment Read appealed to the County court; and that court reversed the judgment, and sent the case back to the justice who tried it, for a new trial to be had therein.

On the 16th December 1872 Read was again tried by the same justice, who again found him guilty of receiving three hundred pounds of tobacco, of the value of thirty dollars, of the goods and chattels of G. B. Hannah, knowing the same to be stolen; and sentenced him to receive thirty-nine lashes. Read thereupon again appealed to the County court of Charlotte.

The case was called in the County court on the 6th of January 1873, when the prisoner moved the court to quash the proceedings in the cause, and set aside the judgment of the justice rendered on the 16th of December 1872, on the ground that said judgment does not inflict the punishment prescribed by law, and inflicts a punishment which cannot be separately inflicted unaccompanied with imprisonment; which motion the court overruled. And the prisoner also moved the court to quash the prosecution and discharge him from custody, on the ground that the trial had before justice Jackson on the 16th of December 1872 was the second trial for the same offence. And this motion the court overruled. To both of which rulings of the court the prisoner excepted. And he then pleaded "not guilty."

Upon the trial the jury found the prisoner guilty of the offence charged against him, and ascertained the term of his imprisonment in the county jail to be six months. And he thereupon moved the court for a new trial; but the court overruled the motion, and rendered a judgment upon the verdict, that the prisoner be confined
620 in *the county jail for six months, and in addition, that at the expiration of his term of imprisonment he should receive thirty-nine lashes, &c. The prisoner excepted to the refusal of the court to grant him a new trial; but neither the facts nor the evidence is inserted in the bill.

Upon the petition of the prisoner the judge of the Circuit court of Charlotte county allowed a writ of supersedeas to the judgment. The case came on to be heard in the Circuit court on the 4th of April 1873, when the court being of opinion that the writ of supersedeas was improvidently allowed, ordered that proper process do issue against the said Washington Read to execute the judgment of this court. Read thereupon applied to this court for a writ of error and supersedeas; which was awarded.

Wood Bouldin, Jr., for the prisoner.

The Attorney-General, for the Commonwealth.

Anderson, J., delivered the opinion of the court.

The court is of opinion that by section 3 of the act of assembly, approved March 30, 1871, (Session Acts of 1870-71, p. 362,) the accused is entitled to an appeal of right, without assignment of error, from the judgment of the justice; and that upon such appeal the cause is to be heard de novo upon the evidence. For this purpose the justice is required to recognize the witnesses to appear at said court. The accused is, by section 4, entitled to trial by a jury, to be impanelled as in like cases originating in said court; and it is the duty of the court to try the case and to pronounce judgment, as if it had originated in that court. It was error, therefore, in the County
621 *court to remand the cause to the justice of the peace, to be tried by him. The justice had no further jurisdiction of the case, and the second trial by him was a nullity.

How, then, did the case stand when it came back to the County court upon the second appeal? Just as it did before the order was made remanding it to the justice. That order, and all the intermediate proceedings, were null and void; and the prisoner was before the court by appeal, just as if they had not been taken, to be tried upon the charge of larceny laid in the warrant of arrest, in the same way as in like cases originating in that court. He was arraigned upon the charge, pleaded not guilty, tried by a jury and found guilty. A motion was made for a new trial, upon the ground that the verdict was contrary to the law and evidence; which motion was overruled by the court, and exception taken by the prisoner; but neither the evidence nor the facts are certified. We cannot say, therefore, that the verdict is contrary to the law and evidence.

There are also exceptions to two other rulings of the court. The first is, because the second judgment of the justice does not inflict the punishment prescribed by law; and the court overruled a motion to set it aside upon that ground, and to discharge the prisoner from custody. If the judgment was erroneous on that ground, the court had plenary jurisdiction to try the cause de novo, did so, and corrected the judgment of the justice, by rendering such judgment as was proper. It was not bound to entertain the preliminary motion. If it had done so it would have still been bound to try the cause upon its merits, and the result would have been the same. And for that reason the court was right in overruling the motion to discharge the prisoner from custody. It was the duty of the court to try him upon the evidence.

622 *The ground of the second exception is, that the second trial of the prisoner was illegal, he having been convicted

before for the same offence by the justice. It does not appear from the previous judgment of the justice that he had been convicted of the same offence. The charge was larceny, and the first judgment of the justice convicted him only of receiving the goods of another, which constituted of itself no offence. But if it were conceded (which we do not think is true) that the second judgment of the justice was illegal upon the ground of a previous conviction by the justice for the same offence, the accused had appealed to the County court from the first judgment of conviction, which gave the court jurisdiction, as original, to try the case upon the evidence; which had not yet been done. To set aside the second judgment on this ground of alleged illegality, or upon the better ground, that the whole proceeding was null and void, would only, in effect, remit the accused to a trial by the County court de novo, upon his appeal from the first judgment. The appeal gave the court jurisdiction, not merely to review the decision of the justice on the ground of error, but original jurisdiction to try the cause upon its merits, as if the justice had passed no judgment upon it. And there appearing to be no error in the verdict of the jury or in the judgment of the court thereon, the Circuit court, instead of expressing an opinion that the writ of supersedeas awarded to the judgment of the County court was improvidently allowed, ought to have affirmed the judgment of the County court; and the judgment of the Circuit court ought to be amended in that respect and then affirmed. Therefore it is considered by the court that the said judgment of the Circuit court be amended as aforesaid and affirmed.

623 *Which is ordered to be certified to the Circuit court of Charlotte county.

Judgment amended and affirmed.

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624 *Cullen v. The Commonwealth.

November Term, 1873, Richmond.

1. **Self-incriminating Evidence.***—By the 8th section of the bill of rights of Virginia a person is not only secured against giving evidence against himself on his own trial, but he cannot be required on the trial of another, to testify, if his evidence will tend to criminate himself.
2. **Same.**—Even if a person might be required to give evidence on the trial of another which might tend to criminate himself, if the statute afforded him a complete indemnity, by discharging him from all prosecution for the offence, (of which *quære?*) the act of October 7, 1870, amending § 1, ch. 12, of the Code of 1860, does not afford that indemnity; and, therefore, in requiring any person engaged in a duel to testify against another prosecuted for having fought, &c., such duel, is unconstitutional.
3. **Same.**—Under the principles of the common law and the statutes against duelling, it may well be apprehended that the surgeon of a party to a duel would be regarded in law as being concerned in, or as aiding and abetting the duel.
4. **Same.**—The fact that the witness has testified before the coroner, and stated the facts, does not deprive him of his privilege; and that having been done without being advised of his privilege, it is not a waiver of it by him.

At the July term 1873, of the Hustings court of the city of Richmond, an indictment was sent to the grand jury against John S. Meredith, Wm. L. Royall, Wm. R. Trigg and Wm. B. Tabb, for the murder of John B. Mordecai; and Dr. J. G. 625 Dorsay Cullen was sworn and *sent with other witnesses to the grand jury to testify in relation to the case. Before the grand jury Dr. Cullen was asked to state what he knew of a duel between W. Page McCarty and John B. Mordecai, near Oakwood cemetery. To this enquiry Dr. Cullen declined to answer; and this refusal having been communicated to the court by the grand jury, he was brought in to court, and declared that he so declined because the answer to said question would tend to criminate him.

The attorney for the commonwealth then moved the court that Dr. Cullen be compelled to answer the question. Upon this motion evidence was introduced for the purpose of showing that Dr. Cullen's conduct in relation to the duel was such as that his evidence could not criminate him; and the testimony given in by him before the coroner's inquest, which had been reduced to writing and signed by him, was also introduced for the same purpose, and also to show that having voluntarily testified before the coroner's inquest, he had waived his right, if it existed, to decline to testify in the case.

After hearing the evidence the court ordered that Dr. Cullen should answer the said question propounded to him by the grand jury in relation to the said duel. And Cullen still declining to answer the question, the court ordered that he be committed to the jail of this city for the space of one day, and that he pay a fine of fifty dollars for his said contempt. To this judgment Dr. Cullen excepted, stating the evidence in his exception; and applied to a judge of this court for a supersedeas; which was allowed.

Crump and Ould, for the appellant.

The Attorney-General, for the commonwealth.

***Self-incriminating Evidence.**—As to the privilege granted to a man under the 8th section of the bill of rights that he cannot be compelled to give evidence against himself, see Temple v. Com., 75 Va. 896, citing the principal case. That this privilege may be waived, see Brown v. Epps, 91 Va. 738, 21 S. E. Rep. 119, and where the constitution affords complete indemnity by discharging a person from all prosecution for the offence, it was held by a majority of the court that the witness could be compelled to testify. See Kendrick v. Com., 78 Va. 490. The principal case is also cited in Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. Rep. 203, and in Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. Rep. 646.

626 *Bouldin, J., delivered the opinion of the court.

Doctor J. S. Dorsay Cullen was sent before the grand jury of the Hustings court of the city of Richmond to give evidence on behalf of the Commonwealth on an indictment charging John S. Meredith, William L. Royall, William R. Trigg and William B. Tabb with the murder of John B. Mordecai, as principals, in the second degree, and accessories before the fact, the actual killing being charged to have been accomplished by W. Page McCarty. When Dr. Cullen appeared before the grand jury the following question was propounded to him: "State all you know in regard to a duel alleged to have taken place on the 9th day of May last, near Oakwood, between W. Page McCarty and John B. Mordecai?" Dr. Cullen declined to make any disclosure on the subject to the grand jury, saying to them in substance as follows: "I must decline to answer the question because my answer thereto will criminate myself." The witness was then brought before the Hustings court, and still insisting on his right to decline to answer, that court, after hearing testimony, ordered the witness to answer the question. He again declined for the reason already stated; whereupon the Hustings court adjudged him guilty of a contempt, imposed on him a fine of fifty dollars, and ordered him to be imprisoned for one day.

To that judgment Dr. Cullen applied for and obtained a writ of error and supersedeas from one of the judges of this court, on which the case is now before us. The question is, was Dr. Cullen guilty of a contempt of the Hustings court in refusing, for the reason stated by him, to make the disclosure called for by the grand jury and ordered by the court?

It is insisted by his counsel that he 627 was not, because he *has a right guaranteed by the Constitution of the State, of which neither legislature nor courts can deprive him, to refuse to answer any question, the answer to which would tend to criminate him; and such it is contended would be the effect of an answer to the interrogatory propounded. Is there such constitutional right?

The right to refuse to answer such questions before any judicial tribunal was the well-settled law of England long before the separation of the American colonies from the mother country; but the State of Virginia, ever foremost in proclaiming principles of personal liberty and security, and providing safeguards to individual rights, was unwilling, when she assumed the attitude of an independent and sovereign State, to leave this great principle and others of kindred character subject, as at common law, to the mutations of legislative will or to the hazard of judicial discretion. She therefore thought proper, as far back as June 12th, 1776, and prior to the declaration of independence, when forming her own State Constitution, to make a solemn declaration of the rights of the good people of Virginia, 'which rights do pertain to them and their posterity as the basis and foundation of government." And we find that by the 8th section of that declaration it is provided as follows:

"That in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers."

This section was framed nearly one hundred years ago by "men of the days 628 gone by." It was framed for *the protection of the citizen, and announced great principles of individual right, to be secured to the people of Virginia and their posterity forever; and it stands to this day, untouched in word, syllable or letter, a part of our State Constitution, and a bulwark and safeguard to the citizen, having for near a century withstood the shock of revolution and the rage of innovation. The earnest and eminently wise and practical men who framed that declaration, certainly meant something when they solemnly declared that a man shall not be compelled to give evidence against himself. They were not issuing a mere brutum fulmen. On the contrary we think that it was their purpose to proclaim and render inviolable a great practical individual right—to declare as part of the organic law, that no man should anywhere, before any tribunal, in any proceeding, be compelled to give evidence tending to criminate himself, either in that or any orher proceeding: in other words, to make the common law thus extended to all cases—parliamentary as well as judicial—a part of the organic law of the State: and we think it would be unjust to the men who framed and to the men who have so long preserved intact that important provision, were we to confine it only to cases in which a man is called on to give evidence against himself in a prosecution pending against him. This would indeed be to dwarf the spirit and meaning of a great principle to the most insignificant proportions, and would scarcely be in character with the earnest, wise and practical men who proclaimed it. They certainly would scarcely have thought it necessary to guard in their organic law against an evil which had occurred in no civilized community within the memory of men then living, and at the same time to leave to the mutations of legislative will the protection of the citizen from being compelled to give evidence against himself in proceed- 629 ings against *others—an evil of a very practical character, and leading directly to the same result: self-accusation. We do not feel warranted in giving any such narrow and restricted construction to this declaration. It would render the pro-

vision wholly nugatory; and we do not think it is required, as has been contended, by the grammatical structure of the section. The portion of that section immediately preceding this important provision does, as must be conceded, refer to proceedings in a pending prosecution, and declares the rights of the accused in such prosecution; commencing with the arraignment, and declaring his rights down to the verdict of the jury; each separate declaration of a right being separated from the others by a comma merely, until, after providing against conviction without a unanimous verdict, the close of that portion of the section is indicated by a semi-colon. Then follows the broader declaration, now under consideration; "Nor shall he" (that is "a man," for it was the rights of man which the men of '76 were proclaiming,) "be compelled to give evidence against himself," commencing after and followed by a semi-colon; thus affirming, as a distinct and fundamental right, that "a man" shall not be compelled to criminate or accuse himself. Had it been the purpose of the framers of the bill of rights to confine that declaration to a man's rights when under trial, the rules of grammar and logic would have required its insertion in the body of the preceding sentence, and before the legitimate close of that sentence, providing against conviction without a unanimous verdict. The sentence had already provided for evidence for and against the accused, and had reached final verdict; and as evidence always precedes and never follows the verdict, neither strict grammar nor sound logic would require that this independent, 630 broad and comprehensive *declaration should be read and construed as part of the preceding sentence.

But were this otherwise—were it, in fact, obvious that the primary and strictly grammatical sense of the words and structure of the sentence would lead to the restricted construction contended for, yet, when we consider the time and circumstances under which that declaration was promulged, and the character and purposes of the men who made it, we revolt instinctively from a conclusion "so lame and impotent," and are of opinion that it was intended to be and is, in effect, a complete protection to the citizen against self-accusation—a broad and catholic declaration that he shall not, before any tribunal or in any proceeding, be compelled to give evidence which, on a prosecution against himself, would tend to criminate him; and of this protection, in a proper case for its application, he cannot be deprived by legislation.

We are fortified in the liberal construction we have given to this declaration, by the form in which the same principle was affirmed by the constitutions of other States, which followed in the wake of Virginia, and made her bill of rights the basis of their own.

Massachusetts, who at that early day evinced a generous rivalry of Virginia in her efforts to declare and vindicate the "rights of man," announced the principle as follows: "No subject 'shall' be compelled to accuse or furnish evidence against himself;" evidently giving to Virginia's declaration the broad construction adopted by this court.

The ninth section of the first bill of rights of Pennsylvania, promulged soon after our own, is a substantial and almost literal copy of our eighth section, but with this difference, that the clause under consideration, which is a literal copy of ours, follows a colon, instead of a 631 *semi-colon; is followed by a colon instead of a semi-colon, and commences with a capital letter, thus: "Nor shall he" (a man) "be compelled to give evidence against himself;" and the next and concluding clause is also a literal copy of our own, except that it begins with a capital letter also, and in lieu of the words "that no man be deprived," it uses the words "Nor can any man be justly deprived, &c.;" evidently showing that the two last clauses were considered as announcing general and independent propositions.

Delaware, after announcing as the fourteenth section of her bill of rights so much of our eighth section as precedes the clause under consideration, in almost the same words makes a distinct section of the principle announced in that clause, slightly modified as follows, viz:

"15. That no man in the courts of common law ought to be compelled to give evidence against himself."

Maryland divided our eighth section into three separate sections—nineteenth, twentieth and twenty-first—corresponding in substance with the three separate clauses of our eighth section.

The twentieth section is as follows:

"20. That no man ought to be compelled to give evidence against himself in a court of common law, or in any other court, but in such cases as have been usually practiced in this State, or may hereafter be directed by the legislature."

We have referred to these several declarations made in the revolutionary era, and very soon after Virginia's, as showing the cotemporaneous construction of her declaration by the conventions of other States, all showing that the principle secured by the declaration was announced as a separate and general right.

We have been pointed to the judicial decisions of but two States, Massachusetts and New York, on the question 632 *before us; and our conclusions are sustained by the Supreme courts of both States. Emory's case, 107 Mass. R., 172, and the People v. Kelley, 24 New York, p. 74.

The terms of the New York constitution are far more restricted than our own. They are as follows: "that no person shall be compelled, in any criminal case, to be a witness against himself;" and the argument as to the grammatical sense of the clause was earnestly pressed upon the court.

Judge Denio said, p. 81: "The primary and most obvious sense of the mandate is, that a person prosecuted for a crime shall not be compelled to give evidence on behalf of the prosecution against himself in that case." But notwithstanding this impression of the judge as to "the primary and most obvious sense of the mandate," he takes no such narrow and restricted view of this grave constitutional safeguard. On the contrary he goes on to say:

"But there is great force in the argument that constitutional provisions, devised against governmental oppressions, and especially such as may be exercised under the pretence of judicial power, ought to be construed with the utmost liberality, and to be extended so as to accomplish the full object which the author apparently had in view, so far as it can be done consistently with any fair interpretation of the language employed. The mandate that an accused person should not be compelled to give evidence against himself, would fail to secure the whole object intended if a prosecutor might call an accomplice or confederate in a criminal offence, and afterwards use the evidence he might give to procure a conviction on the trial of an indictment against him. If obliged to testify on the trial of the co-offender, to matters which would show his own complicity, it might be said upon
633 a *liberal construction of the language that he was compelled to give evidence against himself; that is, to give evidence which might be used in a criminal case against himself." People v. Kelley, 24 N. Y. R., p. 82.

And in closing the view of the court on this branch of the case, he says: "It is of course competent for the legislature to change any doctrine of the common law; but I think they could not compel a witness to testify, on the trial of another person, to facts which would prove himself guilty of a crime without indemnifying him against the consequences, because, I think, as has been mentioned, that by a legal construction, the Constitution would be found to forbid it." Ibid, p. 83.

We approve the reasoning and results of Judge Denio's opinion, and will add that if such a conclusion can be sustained under the very restricted terms of the New York Constitution, a fortiori is it proper under the much broader and comprehensive terms of our bill of rights?

This important privilege being thus guaranteed to the citizen by the Constitution, the next question is, is the case before us a proper one for its exercise?

It is contended by the attorney-general that it is not, because, by the act of October 11th, 1870, entitled "an act to amend and re-enact section 1, chap. 12, of the Code of Virginia, (1860) with regard to duelling," it is enacted, among other things, as follows: "Every person who may have been the bearer of such challenge or acceptance, or otherwise engaged or concerned in any duel, may be required in any prosecution against any person but himself, for having fought or aided or abetted in such duel, to testify as a witness in such prosecution; but any statement made by such person, as such witness, shall not be used against him in any prosecution
634 against himself." *And it is insisted by the attorney-general that the testimony of no such witness can tend to criminate himself, because no statement made by him can be used as evidence against him in any prosecution against himself.

We sympathize fully with the legislature in their efforts to suppress the barbarous and anti-Christian practice of duelling. Having its origin in false pride and a mistaken sense of honor, and upheld and sanctioned to a certain extent by a vicious public sentiment, the practice has lingered in the Southern States much longer than it should have done, although condemned alike by the laws of God and man; and notwithstanding it has cost our country the lives of some of her noblest sons. We would gladly see it forever banished from our land. The practice is cruel in the extreme, and is founded neither in morals nor in reason, nor in common sense. It has been well and truly said that it proves nothing, except that the parties, as is commonly the case with male animals, are willing to fight. It not unfrequently results in the death of one or both of the combatants, and the question which called them to the field of honor (so called) remains unsettled and is adjourned forever, leaving, quite as often as otherwise, the injured party the victim and the wrongdoer triumphant. Nothing could be more unsatisfactory and unreasonable, and, as we have already said, we sympathize fully with the legislature in their efforts to suppress so baneful a practice. But we should ever be careful, whilst endeavoring to suppress a great evil, that we do not ourselves fall into the error of committing a great wrong; not to do wrong that good may come of it; not to invade the constitutional right of the citizen. We are very reluctantly drawn to the conclusion that such is the effect of the act in question; that it would deprive the witness of
635 his constitutional *right to refuse to give evidence tending to criminate himself without indemnity, and is therefore to that extent unconstitutional and void.

The privilege claimed in this case is one, as we have seen, which was not only allowed by the courts, but which for near a century has been carefully guaranteed by the Constitution. Whether such constitutional privilege can be taken away by the legislature at all, on any terms of indemnity, is a question not necessary to be now decided. But we are all clearly of opinion that before it can be taken away there must be absolute indemnity provided, and that nothing short of complete amnesty to the witness—an absolute wiping out of the offence as to him, so that he can no longer be prosecuted for it—will furnish that indemnity. We do not think the act of assembly referred to furnishes such indemnity. It only provides that the "statement" made

by the witness shall not be used against him in a prosecution against himself. Now, it is apparent that, without using one word of that statement, the attorney for the Commonwealth might in many cases, and in a case like the present inevitably would, be led by the testimony of the witness to means and sources of information which might result in criminating himself. This would be to deprive him of his privilege without indemnity.

We are of opinion, therefore, that the act of assembly aforesaid, failing to afford complete indemnity, does not deprive the plaintiff in error of his constitutional privilege.

But it is further contended that the plaintiff in error was not entitled to claim the privilege in this case, because the court could see from the testimony that his answer to the question propounded would not tend to criminate him at all. Without deciding whether in this case it was or was not proper for the court to go into 636 *other testimony than the statement of the witness himself to ascertain whether he was entitled to the privilege claimed or not, this court is well satisfied on that testimony that it was a proper case for the witness to claim his privilege; that the disclosure called for by the interrogatory propounded would tend to criminate him. Without prejudging the question of guilt or innocence on the set out, it will suffice for us to say that there is enough in the settled principles of the common law, and in the statutes against duelling, to lead to the apprehension, at least, that the surgeon of the party to a duel would be regarded in law as being concerned in, or as aiding and abetting the duel; and we are further of opinion, that there is enough in the testimony to justify Dr. Cullen in the apprehension that a full disclosure of the facts by him would tend to show that, knowing a duel was to be fought near Oakwood, he attended at that place at the instance of one of the parties, to be ready to render his professional services as surgeon to one or both of them, should they be required; that the duel was in fact fought; and that his services as surgeon were required and rendered. Such testimony, we think, might tend to criminate the witness, and we are of opinion that he should not have been compelled to make the disclosure, unless for some other reason he had lost his privilege of refusal.

But it has been earnestly argued that this is not a proper case to recognize the privilege, because the witness has already made elsewhere a full and voluntary disclosure of the facts, and that nothing he could now say would do more to criminate him than has been done already by that statement. Conceding this to be so, we are by no means prepared to say that it answers the claim of the witness to his privilege. If, as we have held to be the case, a full disclosure 637 of the facts might *tend to criminate the witness, we cannot see how that tendency is at all removed by showing that the witness had elsewhere made a statement tending to criminate him. The question before us is not what the witness may have said elsewhere; but whether, when it is apparent that a disclosure from him may tend to criminate him, he shall now, in a pending trial, be compelled to make that disclosure, although he claims his constitutional right of refusal. We do not see that his statements elsewhere have anything to do with the question. They are matters of fact wholly collateral, on which issues might be taken.

But however that may be, it is utterly impossible for any court to know in advance what additional facts, tending to criminate the witness, might not be elicited by a rigid and searching examination by learned counsel. Indeed, a mere repetition on oath of the same facts would of itself, as corroborative evidence, tend to criminate him; and we think it would be equivalent to a denial of the privilege altogether to expose the witness to the hazard of such examination.

It is contended in the last place that the witness has lost his privilege by waiver; that he has already made a full and voluntary disclosure of the facts before the coroner when holding an inquest over the dead body of the deceased, and was thereby precluded from thereafter asserting his privilege of refusal to answer.

We entertain no doubts that a witness may waive his privilege, whether secured to him by the Constitution or otherwise, on the familiar principle that a man may always waive a provision made for his benefit. But the waiver of such a privilege as we are now considering, must always be made understandingly and willingly, and generally after being fully warned by the court. In 1 Greenleaf Ev., § 451, we 638 are told that whether the *testimony will tend to criminate the witness or not is a point on which the court is bound to instruct him. And the author goes on to say in the same section: "But in all cases where the witness, after being advertised of his privilege, chooses to answer, he is bound to answer everything relative to the transaction." Without "being advertised of his privilege," the witness evidently would not, in the estimation of the learned author, be held as waiving his privilege. The authorities referred to by Mr. Greenleaf, and those commented on at the bar, fully sustain the position that, as a general rule, the witness should be warned as to his privilege before he can be held to have waived it by answering. This is the rule when the answers have been made in the case before the court. It would apply "a fortiori" to a case like this, where the supposed waiver was not made before a court but before a coroner in the country, and when the witness made his statement without being advertised of his privilege "inops consilii," and evidently without appreciating the position in which he was placed. Without deciding that a witness can be held in any case to have waived his

privilege by answering before a different tribunal, we are clearly of opinion that there has been no such waiver in this case.

The result is, that in refusing to answer the interrogatory propounded, Dr. Cullen was exercising a privilege secured to him by the Constitution, and was not guilty of a contempt of court.

Judgment of Hustings court reversed and cause remanded, with instructions to allow the witness his privilege of declining to make the disclosure called for, if insisted on by him.

Moncure, P., dissented.

Judgment reversed.

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639 *Venable v. Commonwealth.

November Term, 1873, Richmond.

Felony—Confessions.*—Prisoner charged with murder, makes a confession to a police officer on the morning of the day he is examined by the police justice. Before that examination he has employed counsel, and he is warned, both by his counsel and the police justice, against making any statement or confession. Being committed by the justice, on getting to the jail he appears to be very much frightened and agitated; and upon getting there he makes a confession, and again on the same day confesses the deed to a woman of his acquaintance who is in the jail. Though the confession to the police officer was properly excluded, the confession made after the warnings given him are proper evidence.

At the June term 1873, of the Hustings court of the city of Richmond, Horace Venable was indicted for the murder of Mary Holmes. He was tried at the same term of the court, and the jury found him guilty of murder in the first degree; and the court sentenced him to be hung. From this judgment he applied for and obtained a writ of error and supersedeas from this court.

The only question in the cause was as to the admission of his confessions as evidence; and upon this the facts are stated in the opinion of the court.

Young, for the prisoner.

The Attorney-General, for the Commonwealth.

640 *Moncure, P., delivered the opinion of the court.

This is a writ of error to a judgment of the Hustings court of the city of Richmond, convicting the plaintiff in error of murder in the first degree, and sentencing him to be hung therefor. There is but one assignment of error in the case; and that is, the admission by the court of certain confessions set out in the bill of exceptions, as evidence against the prisoner. A like confession, previously made to another person (Hulce) had been excluded by the court, no doubt because it was obtained by a temporal inducement—by a promise or hope of favor held out to the prisoner, in respect of his escape from the charge against him, by a person in authority, in the meaning of the rule of law on this subject. And the only question is, whether the subsequent confessions admitted by the court were produced by the same motive which is supposed to have produced the first; or whether the court was justified in believing, from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes, under the influence of which the original confession is supposed to have been obtained, were entirely dispelled. In the absence of any such circumstances, the influence of the motive proved to have been offered will be presumed to continue and to have produced the subsequent confessions, unless the contrary is shown by clear evidence. Thompson's case, 20 Gratt. 724; 2 Russ. on Crimes, 838; Greenl. Ev. 257. But the contrary may be shown by clear evidence, and the subsequent confessions are in that case admissible. The only question is, whether the contrary is so shown in this case?

The confession was made to Hulce on the morning of, and before the examination of the prisoner before the *police justice. The subsequent confessions were made on the morning when the prisoner was brought to jail, after his examination before the police justice. It does not appear that he was carried to jail on the same day of his examination, though he no doubt was. So that there must have been but a short interval of time, perhaps less than a day, between his first and last confessions.

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The statement in the bill of exceptions in regard to the last confessions is, that after the first confession was ruled out "the Commonwealth introduced a witness, one Charles Jones, a colored man, who is cook at the jail, who testified that on the morning when prisoner was brought to jail witness asked the officer who had just brought him to jail, one Michaels, what prisoner was there for; to which the officer replied, for the murder of Mary Holmes, and he believed he had confessed it; to which witness said: 'I reckon not; he certainly wouldn't be such a fool as to confess it.' The officer said, 'Yes, and he would do it now if I would let him;' and thereupon the prisoner said: 'Yes, I did it.' The officer, Michaels, who took the prisoner to jail, stated that the prisoner seemed to be frightened and trembling while the officer was taking him to jail, and seemed to be agitated when he got to the jail; he was near by when prisoner and Jones were talking; did not hear his confession; paid no attention to the conversation between them. And thereupon the Commonwealth introduced another witness, Lucy Kinney, a colored woman, who testified that she was an inmate of the jail, being detained there for non-payment of a fine; that she knew

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***Felony—Confessions.**—See on this point, monographic *note* on "Confessions" appended to Schwartz v. Com., 27 Gratt. 1025.

Horace Venable well, and knew deceased also; that Horace Venable lived at her mother's house for a long while; that on the morning when he was brought to the jail, after his examination before the police justice, she was washing the porch of the jail; that she spoke to prisoner and 642 said: 'Hello, *Horace; what are you doing here?' and his reply was, that he was there for killing Mary Holmes, and that he was sorry that he had done it; to which witness replied that it was too late for him to be sorry then, he ought to have thought about that before he killed her; and he then said that he was determined if he didn't have her nobody else should; he was sorry for it now, and if ever he got out of this scrape he would never get into another. It also appeared that between the time when the statement to Hulce (which had been ruled out) was made and the time when prisoner made the foregoing statements to the witnesses, Jones and Kinney, the prisoner had had counsel; that he had had his examination before the police justice and had been warned, both by counsel and by the police justice, against making any statement or confession. The testimony of the witnesses, Jones and Kinney, went to the jury without objection on the part of the prisoner's counsel. After the examination of the witnesses on the part of the Commonwealth, and the examination of witnesses for the defence had closed, and just as the argument was about to commence, one of the jurors asked that the witness, Charles Jones, might be recalled, and asked him to repeat his former statement, which witness did; and thereupon the prisoner, by his counsel, moved the court to exclude from the jury the whole of the said conversations that had taken place between the prisoner and Charles Jones, and between the prisoner and Lucy Kinney, which motion the court overruled; to which opinion of the court refusing to exclude the said conversations from the jury, the prisoner, by his counsel, excepted."

We think it clearly appears from the foregoing statement that after the prisoner made his first confession, and before he made his subsequent ones, he was duly warned against making any confes- 643 sion. The first confession was *made to a subordinate officer of the police, who advised the prisoner to employ counsel. He did employ counsel, who represented him before the police justice; and he was warned, both by his counsel and by the police justice, against making any statement or confession. After his examination before the police justice, and after he had received that double warning from these functionaries, whose advice ought to have been much more potential with him than a mere suggestion of a ministerial police officer, he made his subsequent confessions to persons in the jail. The terms in which the confessions were made indicate that they were true. In assigning his reason for committing the deed with which he was charged, he said, "that he was determined, if he didn't have her, nobody else should; he was sorry for it now, and if he ever got out of this scrape he would never get into another." A great deal of stress was laid, in the argument of the prisoner's counsel before this court, on the fact proved by Michaels, who took the prisoner to jail, that he, "the prisoner, seemed to be frightened and trembling while the officer was taking him to jail, and seemed to be agitated when he got to the jail." But no degree of alarm or agitation will, of itself, render confessions made during its existence inadmissible. Smith's case, 10 Gratt. 734, is a striking instance of that fact. But, as was said there, that matter is for the consideration of the jury, and affects the credit, but not the competency of the evidence. The court below was satisfied that the subsequent confessions were voluntary, and therefore admitted them. And we think the court did not err in that respect.

We are of opinion that there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

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644 *Randall v. The Commonwealth.

January Term, 1874, Richmond.

1. **Felonies.**—All offences for which the penalty is confinement in the penitentiary are felonies, and the indictment for such an offence must describe it as having been done "feloniously."
2. **Same—Verdict Uncertain.**—Upon an indictment under the act concerning malicious and unlawful shooting, stabbing, &c., (Code of 1860, ch. 171, § 9,) which charges that the prisoner did unlawfully shoot, &c., with set purpose and malice aforethought to kill and murder, &c., the jury find the prisoner guilty of malicious shooting, without saying who he shot, and fix the term of his imprisonment in the penitentiary at five years. No judgment can be entered on the verdict.
3. **Same—Same—Reversal.**—The indictment and the verdict being fatally defective, the judgment may be reversed by the appellate court, though no motion in arrest of judgment was made in the court below.
4. **Same—Same—New Indictment.***—The proceedings in the case will not prevent the finding of another indictment against the prisoner for the same offence, after the attorney for the Commonwealth has, with the consent of the court, entered a *nolle prosequi* upon the pending indictment.

At the November term 1873 of the County court of Chesterfield, the grand jury found an indictment against Henry Randall, that "on the 23d day of August 1873, in the county aforesaid, with malice aforethought, in and upon one J. S. Moore, the said 645 Henry Randall, being *then and there armed with a dangerous weapon called

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***Felonies—New Indictment.**—See monographic *note* on "Autrefois Acquit" appended to Page v. Com., 26 Gratt. 943. See State v. Harr, 38 W. Va. 58, 17 S. E. Rep. 794; State v. Newsom, 13 W. Va. 859; State v. Whitt, 39 W. Va. 468, 19 S. E. Rep. 873; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654; State v. Cartright, 20 W. Va. 37.

a pistol, did then and there unlawfully shoot and wound him the said J. S. Moore, with intent him the said J. S. Moore, with set purpose and malice aforethought, to kill and murder, against the peace," &c.

The case was sent to the Circuit court of the county, and came on for trial in that court at its November term, when the jury found a verdict as follows: "We the jury find the prisoner, Henry Randall, guilty of malicious shooting, and fix the term of imprisonment in the public jail and penitentiary house at five years." There was a motion in arrest of judgment, which was overruled; and the prisoner was sentenced by the court in accordance with the verdict. And he thereupon applied to this court for a writ of error; which was allowed.

S. M. Page, for the prisoner.

The Attorney-General, for the Commonwealth.

Moncure, P., delivered the opinion of the court.

The offence for which the plaintiff in error was intended to be prosecuted in this case is the offence declared by the Code of 1860, chapter 191, section 9, concerning malicious and unlawful shooting, stabbing, &c. The jury, by their verdict, found the prisoner "guilty of malicious shooting," and fixed his term of imprisonment in the penitentiary at five years, to which he was accordingly sentenced. And he applied for and obtained from this court a writ of error to the judgment. In his petition for the writ he assigned sundry errors in the said judgment, one of which is, that the verdict found him guilty of no offence at all, having found him guilty merely "of malicious shooting." The attorney-general rightly admitted *that this error was well assigned, and that for this error the judgment would have to be reversed. If this were the only error in the case it would have to be remanded to the Circuit court for new trial to be had therein upon the said indictment.

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But the indictment itself is fatally defective, as an indictment for felony, in not charging the offence to have been done "feloniously;" and this also is assigned as an error in the petition. We think this error, too, is well assigned. There are certain technical terms of description required to be used in the indictment for certain offences which are absolutely necessary to determine the judgment. Thus the word "feloniously" must be used in every indictment for felony. 1 Chit. C. L. 242 marg.; Davis C. L. 430; 3 Rob. Prac., old ed., 39; 2 Va. Ca. 122 Barker's case; 143 Trimble's case; Taylor's case, 20 Gratt. 825. The Code, ch. 191, section 9, does not expressly declare the offence therein mentioned to be a felony, but it makes the said offence punishable with confinement in the penitentiary; and all offences so punishable are declared by law to be felonies. Code, ch. 199, section 1. When an offence is so punishable it must be described in an indictment therefor by the term "feloniously," whether it be expressly called a felony or not in the law which creates it or makes it so punishable. 2 Va. Ca., 122 and 143, supra. The averment that the act was done "feloniously" is so important that the omission of it is an error even after verdict for which the judgment will be arrested. 3 Rob. Prac., and 2 Va. Ca., supra. And anything which is good cause for arresting a judgment is good cause for reversing it, though no motion in arrest is made. Matthews' and Garner's cases, 18 Gratt. 989.

Therefore the plaintiff in error cannot be convicted of felony on the indictment aforesaid; but in order to his *being tried for the felony aforesaid a nolle prosequi may be entered by the attorney for the commonwealth, with the consent of the court, on the said indictment, and a new and proper indictment may be exhibited and found against the said plaintiff for the said felony; on which new and proper indictment he may be tried, notwithstanding the proceedings had upon the old and defective indictment. 2 Rob. Pr., old ed., 127; 2 Va. Ca. 70-111.

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The court is, therefore, of opinion that the said judgment is erroneous, and ought to be reversed and annulled, and that the verdict should be set aside and the cause remanded to the Circuit court, for further proceedings to be had therein, in conformity with the foregoing opinion.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the verdict found by the jury in this case is fatally defective in finding the prisoner guilty of "malicious shooting" merely, which, in itself, is no offence at all; and if that were the only error in the judgment it would be proper to reverse the judgment, set aside the verdict, and remand the cause for a new trial to be had therein upon the indictment on which the plaintiff in error was formerly tried. But the court is further of opinion that the indictment itself is fatally defective, as an indictment for felony, in not averring that the act therein charged was done "feloniously;" that the said plaintiff cannot be convicted of felony on that indictment, and that in order to his being tried for the felony intended to be charged against him, to wit: the offence declared by the Code of 1860, chapter 191, section 9, page 784, concerning malicious and unlawful shooting, stabbing, &c., a nolle prosequi may be entered by the attorney for the Commonwealth, with the *consent of the court, on the said indictment, and a new and proper indictment may be exhibited and found against the said plaintiff for the said felony, on which new and proper indictment he may be tried, notwithstanding the proceedings had upon the old and defective indictment.

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Therefore it is considered that the said

judgment is erroneous, and that the same be reversed and annulled. And it is ordered that the verdict of the jury be set aside and the cause remanded to the Circuit court for further proceedings to be had therein, in conformity with the foregoing opinion.

Judgment reversed.

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649 *Boxley v. The Commonwealth.

January Term, 1874, Richmond.

1. **New Trial—Verdict Contrary to Evidence.***—In a prosecution for rape the verdict and judgment of the court of trial set aside by the appellate court, on the ground that the evidence did not sustain the verdict.
2. **Same—Surprise.**†—The prisoner entitled to a new trial on the ground of surprise; the testimony of the principal witness, as given in court, varying materially from that given before the committing justice; and the justice, who was a physician, having been called away at the time of the trial.

At the July term of the County court of Halifax, Wilson Boxley, colored, was indicted for a rape upon Martha H. Spencer. At the same term of the court he was brought to the bar, and being arraigned pleaded not guilty, and on his motion the case was continued. He was thereupon remanded to the Circuit court of the county for trial at its September term; and on his motion he was allowed to give bail for his appearance at the Circuit court.

At the September term of the Circuit court Boxley appeared, and upon his trial was found guilty by the jury, who ascertained the term of his imprisonment in the penitentiary at ten years. The prisoner thereupon moved the court to set aside the verdict and grant him a new trial on the ground of surprise, and because the verdict was contrary to the evidence; and he 650 filed his *own affidavit and the affidavit of H. B. Melvin, the justice who committed him, to show that the principal witness had varied materially in her evidence before the jury from her statements before the committing justice.

The court overruled the motion and sentenced the prisoner in accordance with the verdict, and the prisoner excepted; and upon his application a writ of error was awarded. The facts are sufficiently stated in the opinion of the court.

Davis, for the prisoner.

The Attorney-General, for the Commonwealth.

Bouldin, J., delivered the opinion of the court.

Several objections have been taken by the counsel for the plaintiff in error to the judgment of the court below in this case, involving questions of both law and fact, and have been argued with much learning and ability; but in the view taken of the case by this court we deem it necessary to consider only the questions arising under the last assignment of error. After the jury had rendered a verdict of guilty and fixed the term of the prisoner's confinement in the penitentiary at ten years, he moved the court to set aside the verdict and awarded him a new trial on the following grounds:

1st. Because the verdict had been obtained by surprise.

2d. Because it was not sustained by the evidence.

The court overruled the motion and sentenced the prisoner to ten years' confinement in the penitentiary. To this ruling the prisoner excepted, and prayed the court to certify the facts proved on the trial, which was done accordingly.

651 *We are of opinion that the Circuit court erred in refusing, under all the circumstances of this case, to grant the new trial.

Without recapitulating or very critically analyzing the testimony, we are compelled to say that the evidence adduced to establish the felonious act—the corpus delicti—is, to say the least of it, of a very doubtful and inconclusive character. It consists exclusively of the statements of the person upon whom the offence is charged to have been committed, and is certified by the court as follows: "On the day of June 1873, it being Sunday, about 12 o'clock M., Miss Martha Spencer was at the spring (which is about one hundred yards from her father's house); had filled her bucket and was sitting down on a rock at the spring; while sitting there some one came up behind her and seized her by the shoulders, pulled her over backwards, her bonnet falling over her eyes; the person making the attack spoke to her in a low tone and told her not to make a noise" (a suggestion which for some reason she seems to have duly respected). "She screamed once" (whether in a similar tone or not does not appear); "but the bonnet was held over her mouth and eyes so that she was unable to make further outcry, and could only catch a glimpse of her ravisher. Her arms were not confined, and she made an attempt to pull the bonnet away from her eyes. She was very weak and nervous, and very much frightened, and notwithstanding her resistance, he accomplished his purpose and ravished her."

This is her own account of the alleged criminal act, and is all we have directly on that subject. She proves no other violence than enough to draw her backwards by the shoulders from her seat, and to hold her bonnet over her face. Her person was examined by two physicians, and whilst they both testified that it was apparent 652 *that she had had recent sexual inter-

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*New Trial—Verdict Contrary to Evidence.—See monographic *note* on "Autrefois Acquit" appended to Page v. Com., 26 Gratt. 943; Lawrence v. Com., 30 Gratt. 845, and *note* and Mings v. Com., 85 Va. 638, 8 S. E. Rep. 474.

†Same—Surprise.—See monographic *note* on "Continuances" appended to Harman v. Howe, 27 Gratt. 676.

course, they also proved that there was nothing to indicate that it had been accomplished by violence; "that no bruises were found about the face, arms or person of the prosecutrix, except a small, almost imperceptible, bruise under each knee."

It was also proved that Miss Spencer was "a large, stout woman," and the accused was a "medium-sized man, about twenty-three years old."

Can we say upon such testimony that the criminal act has been established? It would require a large degree of charity and credulity to believe that at noonday, within one hundred yards of her father's house and within two or three hundred yards of the house of a neighbor (Wm. Spencer), a rape was perpetrated on this large and stout woman, with both her arms perfectly free, by a medium-sized man, who neither threatened her with violence nor did anything to disable her, and who, from her own account, had the use of but one arm, the other being employed in holding her bonnet over her face whilst the act was committed; and that all this had been accomplished with no noise to alarm the families which were so near; with not the slightest indication, from the appearance of the ground, that there had been a scuffle; and with no scratch or bruise on the person of the female to show that her chastity had not been violated without a struggle! Such testimony, we think, exceedingly weak, to say the least of it, to show that a rape had been committed at all, especially when it appears in the record that the accused, who lived at her father's house, had previously, in his kitchen, attempted to take improper liberties with Miss Spencer, which she does not appear to have disclosed or resented.

But conceding the rape to be established, the evidence to connect the accused
653 with the act is yet more doubtful *and unsatisfactory. Although the accused had resided at her father's house for a year or two previous to the occurrence, and was, of course, well known to the witness—voice, features, gestures and person—yet she does not swear to his identity. He spoke to her with his face very near to her's, yet she does not say that she recognized his voice. She says she only caught a "glimpse of the lower part of his face," and only saw his back "at a distance of about fifty or a hundred yards, running away." What she was doing from the time he left her person until he reached the distance of fifty or one hundred yards does not appear; yet when she did see him she seems to have been perfectly cool and collected, for she can tell that he wore a dirty shirt and a black felt hat. She says that, from the glimpse she had of his face, and the sight she had of his back as he ran away, she believed it was the prisoner. And this was all the evidence of identity except the evidence of William Spencer, who lived about two or three hundred yards from the home of the prosecutrix. He proves that he saw, on what day and at what hour does not appear, a man whom he took to be Wilson Boxley, walking very rapidly along the road leading from Banister Spencer's, and now and then looking backwards. He called to him and asked, "What's your hurry?" but received no answer. He was one hundred yards off, and witness was not sure it was Boxley. "The man he saw wore a white chip hat"—not a black felt hat, as proved by Miss Spencer to have been worn by the person who assailed her.

It was further proved that the accused lived about two miles from the home of Miss Spencer, and that he remained at his work as usual for three or four days after the occurrence at the spring, when he was charged with this offence by the brothers of Miss Spencer and beaten by them. He then went to the court-house and
654 *caused a warrant to be issued against them; and it was not until after these proceedings that the present prosecution was commenced. We think the evidence wholly insufficient to identify the prisoner as the guilty party.

Were this not so, the evidence, to say the most of it, leaves the question of identity extremely doubtful, and, under the circumstances, the verdict of the jury should have been set aside and a new trial awarded, to allow the accused the privilege of introducing the testimony set forth in his own affidavit and that of Dr. Melvin, of which he was evidently deprived by surprise.

Dr. Melvin's testimony, as set forth in his affidavit, would have still further weakened the testimony on the question of identity. He was the committing magistrate, and the testimony of Miss Spencer, as detailed by him, is materially variant from her testimony in court; and the facts set forth in the prisoner's affidavit satisfactorily explain his failure to have Dr. Melvin before the court.

Under all the circumstances, this court is of opinion that the court below erred in refusing to set aside the verdict and to award the prisoner a new trial.

As the cause must be remanded to the Circuit court, it becomes necessary to dispose of the objection to the jurisdiction of that court, so earnestly and ably argued at the bar.

The objection was, that as the law stood on the 28th of July 1873, when the case was transferred from the County to the Circuit court, the prisoner had a right to be tried in the County court in which his case was pending, or, at his election, to be sent for trial to the Circuit court; that he did not elect to be tried in the latter court, and therefore his case was never legally pending in that court.

It is certainly true that on the 25th of July 1873 the prisoner had a right to be tried in the County court, where his case was pending; but it is equally true
655 that *the County court had then undoubted authority, on the election of the prisoner or by his consent, to transfer the case to the Circuit court. It is furthermore true, that on the first day of August thereafter the jurisdiction of the County court to try the case would cease; and by

the mandate of the law it would, without the prisoner's consent, be transferred to the Circuit court. On the prisoner's motion the case had already been continued to the next term of the court, and his right to be tried in the County court was, in effect, forever gone, for in three days the new law, depriving the County courts of jurisdiction of the case, would go into effect. This was all well known to the court and to the counsel on both sides, and it is reasonable to conclude that, acting on that knowledge, the transfer to the Circuit court was made with the consent and approbation of the accused. We think so because, under the circumstances then existing, it was manifestly to his interest to give that consent, and because he not only made no objection whatsoever to the transfer, but immediately thereafter applied to be allowed to give bail for his appearance in the Circuit court, which was allowed him and was given; and because he appeared in that court in discharge of his recognizance, and submitted to his trial without indicating the slightest objection to the jurisdiction of the court. He was in fact exactly where he would have been had no transfer been made, with the advantage of a full opportunity to meet the charge in the court in which it was absolutely necessary, under the law, which was just about to go into effect, that he should be tried.

Under such circumstances we are fully justified in reaching the conclusion that the transfer was in fact made with the prisoner's consent, and the Circuit court therefore had jurisdiction. We arrive at
656 this conclusion *the more readily because it is now evidently to the advantage of the prisoner. He must be tried in the Circuit court, and is now in confinement, and it might seriously prolong that confinement were we compelled to go through the inconvenient and useless form of sending the case to the County court, to be by that court immediately sent back where it now is.

The judgment of the Circuit court must be reversed, the verdict set aside, and a new trial awarded.

The judgment was as follows:

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in refusing to grant to the plaintiff in error a new trial: first, because the verdict of the jury was not sustained by the evidence; and, second, because, under the circumstances, the plaintiff in error was entitled to the benefit of Dr. Melvin's testimony. It is therefore considered by this court that the judgment of the Circuit court be reversed and annulled, the verdict of the jury set aside, and a new trial awarded; and the case is remanded to the Circuit court for further proceedings.

Judgment reversed.

657 *Thornton v. The Commonwealth.

January Term, 1874, Richmond.

1. **Felony—Charge of Jury by the Clerk.***—An indictment for murder against T and R contains two counts: the second charges T as principal and R as accessory before the fact; and on the motion of T the second count is struck out. At a subsequent term on the trial of T the clerk reads both counts and charges the jury on both; and then the prisoner excepts. The court then directs the clerk to read the first count, which is done, and the clerk charges the jury upon it; and then the prisoner excepts to the second reading and charge. The second reading and charge was proper, and cures the error of the first.
2. **Same—Same.**—The clerk in his charge did not charge the jury as to the different grades of homicide. The indictment being for murder in the first degree by poison, the prisoner was either guilty of that offence or guilty of no offence which could be punished under the indictment; and therefore it was sufficient to charge the jury to that effect.
3. **Same—Same.**—There is no law requiring the clerk to charge the jury as to the different grades of homicide in any case; and his charge is without authority and nothing, except so far as it may be considered as having received the sanction of the court, and thus become the act of the court.
4. **Same—Same—Verdict.**—The jury find the prisoner guilty of murder in the first degree, as charged in the indictment, without mentioning her name; but in the verdict, as recorded and read to the jury, the name is inserted. The verdict is sufficient.

658 *5. **Same—Indictment.**—In an indictment for murder by poison it is not necessary to state that the accused knew the substance alleged to have been used in producing death was a deadly poison.

6. **Same—Same.**—An accessory before the fact to a felony cannot be convicted on an indictment against him as principal.
7. **Same—Verdict.**—On an indictment for murder by poison, to an enquiry by the jury whether, if they believe from the evidence that the prisoner did administer the poison with intent to kill her husband, and that he died from it, can we find her guilty of anything less than murder in the first degree? The answer must be in the negative.
8. **Same—Instructions.**—To the enquiry of the jury the court replies: If, &c., that she did in person, or through the agency of another acting under her directions, administer poison to her husband, and that she did intend thereby to kill him, and that he did actually die therefrom, the law presumes malice, and you ought to find her guilty of murder in the first degree; if you do not thus believe you will find her not guilty. There was in fact no evidence before the jury of the agency of another in the act, and the prisoner made no objection to the instruction at the time, nor a motion for a new trial, nor was it assigned as error in this court; yet if the instruction was erroneous and could have prejudiced the prisoner, she will be allowed the benefit of it in this court.
9. **Same—Same.**—If the court, in referring to the agency of another, intended to say to the jury that an accessory before the fact to murder might be

*Felony—Charge of Jury by Clerk.—See monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

convicted on an indictment against him as principal, it was error. If the court intended the presence of the prisoner at the time of the commission of the offence through such agency, then it was not error.

10. **Same—Same.**—It is not obvious from all the evidence in the cause that the prisoner could not have been injured by the instruction, though taken in the first sense: and therefore no objection or exception having been taken when the instruction was given, it affords no ground for reversing the judgment and ordering a new trial.

The case is fully stated in the opinion of the court.

John M. Bouldin, for the prisoner.

The Attorney-General, for the Commonwealth.

659 *Moncure, P., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of the county of Charlotte, rendered on the 30th day of September 1873, convicting Susan Thornton of the murder of her hubsand, William Thornton, by poison, and sentencing her to be hung therefor.

The indictment was in the usual form in such cases, and contained two counts. The first was a count charging the said Susan Thornton and one Ed. Robinson jointly with the commission of the offence, as principals in the first degree. The second charged her as principal in the first degree and him as accessory before the fact. On their joint arraignment in the County court, on the 3d of March 1873, they elected to be tried in the Circuit court of said county. Afterwards, in the Circuit court, Susan Thornton, by counsel, moved the court to quash the second count in the indictment, which motion the court sustained; and thereupon she pleaded not guilty, and was tried separately. The jury found her guilty of murder in the first degree, as charged against her in the indictment. Whereupon she moved the court to set aside the verdict and grant her a new trial; which motion the court, after taking time to consider, sustained. Afterwards, to wit: in September 1873, she was again tried, and again found guilty of murder in the first degree, and judgment was rendered accordingly.

The record states that after reading the indictment to the jury, on the second trial, they were charged to enquire "whether the prisoner be guilty of the murder as charged in said indictment or not guilty; and if they find her guilty of murder in the first degree, say so, and no more; but if they find that she attempted to administer poison with intent to kill or injure, she shall be confined in the penitentiary, so that 660 such term be not *less than three nor more than five years; but if they find her not guilty, say so and no more; and hearken to the evidence." Whereupon the prisoner, by counsel, excepted to the reading of the whole of the said indictment to the jury, and the charge given to the jury, for the reason that the second count in the said indictment was quashed on the trial of the prisoner at the last term of this court. Thereupon the court ordered the clerk to read to the jury only the first count in said indictment, and to charge them to enquire whether the prisoner be guilty of the murder as charged in the said first count in the indictment; which was accordingly done. Whereupon the prisoner, by counsel, excepted to the second reading of said indictment and the charge to the jury.

After the second verdict was rendered, the prisoner by counsel moved the court to arrest the judgment; which motion the court overruled; and the prisoner, by counsel, excepted to the said action of the court. Then the prisoner, by counsel, moved the court for a new trial; which motion was also overruled; and the prisoner, by counsel, excepted to the action of the court in that respect also. The five exceptions aforesaid present the questions arising in this cause, which will be considered in the order in which the exceptions were taken.

The questions arising on the first and second bills of exception will be considered together. The first states that the whole indictment, including both counts, which are set out in the bill of exceptions, was read to the prisoner when she was put at the bar for trial, and the jury were charged in the words aforesaid. "And no objection having been previously made to the reading of the indictment and the charge given by the clerk, in manner and form as above stated, the prisoner's counsel here stated that he desired to except to the reading of the said indictment as above stated, 661 and to the charge as above *given, and prayed that this, his first bill of exceptions," might be signed and sealed by the court; which was accordingly done.

The second bill of exceptions states that after the indictment had been read, and the jury charged as specified in the first bill of exceptions, the indictment, including only the first count, was again read to the prisoner, and the jury were again charged as aforesaid. "And no objection having been previously made to the second reading of the indictment and the second charge to the jury, as above specified, the counsel for the prisoner here stated that he desired to except to reading of the indictment as aforesaid the second time, and the charge of the clerk as aforesaid the second time, and prayed that this his second bill of exceptions" might be signed and sealed by the court; which was accordingly done.

The whole indictment, including both counts, having, by mistake, been read to the prisoner, and the jury charged thereupon, though the second count had previously been stricken out, it was of course proper, when the mistake was discovered, to correct it, by reading again the indictment, including the first count only, and again charging the jury thereupon. When this was done, the case stood as if the mistake had never been made. And this dis-

poses of the first bill of exceptions, which may therefore be considered as out of the case. The main question intended to be presented by the first and second bills of exception, and the only one about which there can be any doubt, is thus stated in the petition for a writ of error in the case: "that the charge of the clerk to the jury was contrary to law, in this, that the clerk failed to charge the jury as to the different grades of homicide." We will now proceed to consider that question.

662 *There is no law requiring the clerk to charge the jury as to the different grades of homicide in any case. It belongs to the court to instruct the jury as to the law, whenever they require instruction, or either of the parties request it to be given. It does not appear that they needed any in this case, or that either of the parties required any to be given. It does not appear that they did not thoroughly understand, at least so far as the case required it, the different grades of homicide. The prisoner was obviously defended by skillful counsel, who well understood what the law was, and would have been sure to have the jury fully informed on the subject, if they had been uninformed on any point which the interest of his client required them to understand. He asked for no instruction to the jury; and the presumption therefore is that they needed none. Supposing them to have been already well informed; that the counsel on both sides were agreed about the law, and stated it to the jury with the approbation of the court, would the verdict be set aside or the judgment be reversed because the clerk did not also instruct them? The clerk's instruction or charge is without authority and nothing, except so far as it may be considered as having received the sanction of the court, and thus become the act of the court. As in the case of Allen v. The Commonwealth, 2 Leigh 727, in which the prisoner was indicted for an offence the punishment whereof was imprisonment for not less than one nor more than three years; but the clerk, in charging the jury, stated that if they found the prisoner guilty, his term was to be not less than two nor more than three years. The general court considered this charge as equivalent to an instruction from the court. It was given by an officer of the court, in the usual course of his duty, in the presence and hearing of the court; and not having been cor-

663 rected by the court, *was to be regarded as having been sanctioned by it. Although its effect did not appear, yet it might have induced the jury to agree upon the term of two years for the prisoner's confinement, believing that to be the minimum, when, if they had been correctly informed of the law, they might have ascertained his imprisonment to be one year only. The judgment was therefore reversed, the verdict set aside, and a new trial ordered. 3 Rob. Pr., old ed., p. 175. Suppose that in that case the clerk had given no charge as to the term of imprisonment, but the jury otherwise thoroughly understood it, as must be presumed to be the case in the absence of any evidence to the contrary, would the judgment have been reversed on that ground? Certainly not. To be sure it is usual and proper for the clerk to charge the jury as to the term of imprisonment of an offence to be tried by them, and also of the different grades of the offence, where it admits of grades, as in most cases of felonious homicide. This information is generally needed by the jury, and it is convenient for them to receive it from the clerk, in the presence and with the sanction of the court, when the jury are charged with the prisoner's case. But, as said before, the law does not require it, as a matter of course, to be given, whether needed or not. In this case no such information was needed, or would have been appropriate. The charge was murder in the first degree by poison. The prisoner was either guilty of that offence or guilty of no offence at all. The law expressly declares murder by poison to be murder of the first degree. And if the prisoner was guilty of the murder as charged in the indictment, she must of necessity have been guilty of murder in the first degree. She could, by possibility, have been guilty of nothing else. And it could not, therefore, have been erroneous to charge the jury to that effect. To

664 have charged them as to what *constituted murder in the second degree, or voluntary or involuntary manslaughter, or as to the measure of the punishment of each, could have answered no good purpose, and could have had no other effect, if any, than to confuse the jury or mislead them into error. Indeed it does not appear that the first and second bills of exceptions were taken because the clerk did not charge the jury "as to the different grades of homicide." Nothing is said to that effect in either of those bills. It rather appears that the first was taken only because the whole indictment, including both counts, was read to the jury, and they were charged thereon after the second had been quashed; and that the second bill was taken, only because the first count only was read to the jury, and they were charged thereon after both counts had been read and the jury had been charged thereon, as aforesaid. In each of the said bills it is stated that no objection had been previously made to the reading of the indictment and the charge given by the clerk in manner and form as stated in the said bills respectively. Thus showing that in each case the objection was taken after, and not before, the indictment was read and the charge given to the jury.

That part of the charge, which is to the effect that "if you find that she attempted to administer poison with intent to kill or injure, she shall be confined in the penitentiary, so that such term be not less than three nor more than five years," was certainly unnecessary and not required by anything in the facts of the case. It was intended to apply to the provision in the Code of 1860, ch. 191, § 7, which declares that "if any free person administer, or attempt to ad-

minister, any poison or destructive thing in food, drink, medicine or otherwise," &c., "with intent to kill or injure another person, he shall be confined in the penitentiary 665 not less than three *nor more than five years;" and also to apply to the provision in ch. 208, § 27, which declares that "if a person indicted of felony be by the jury acquitted of part and convicted of part of the offence charged, he shall be sentenced of such part as he is so convicted of, if the same be substantially charged in the indictment, whether it be felony or misdemeanor." But though this part of the charge was unnecessary, it could not possibly have prejudiced the accused, and if it could have had any effect at all, that effect would have been in her favor.

We are therefore of opinion that the Circuit court did not err in regard to the matter stated in the first and second bills of exceptions, or either of them.

And now, as to the third bill of exceptions. That bill states that in the further progress of the case, after the evidence and arguments of counsel had been concluded, and the court, upon the motion of the prisoner's counsel, had instructed the jury as to the law, in terms that were accepted by the counsel on both sides and not objected to by either, the jury retired and in a short time returned into court and rendered the following verdict: "We, the jury, find the prisoner guilty of murder in the first degree, as charged in the indictment." And thereupon the prisoner, by counsel, moved the court in arrest of judgment for the following reasons, viz:

First. Because the said verdict does not specify the prisoner by name.

Second. For the reason specified in the first and second bills of exceptions.

Third. Because the indictment does not charge that the prisoner knew the substance alleged to have been used in producing the death of William Thornton was a deadly poison.

The learned counsel for the accused seems to lay little or no stress upon the 666 ground of error presented by this *bill of exceptions, and we think properly so. As to the first reason assigned in the said bill, the verdict, as recorded, does specify the prisoner by name, and the jury, according to the usual form, is called upon to "listen to the verdict as the court hath recorded it." To be sure, the verdict written by the jury seems not to have specified the prisoner by name. But the whole record indicates conclusively that the plaintiff in error was the "prisoner," who was found by the jury "guilty of murder in the first degree, as charged in the indictment."

As to the second reason assigned in the said bill, being the reasons specified in the first and second bills of exceptions, that objection has already been disposed of.

As to the third reason assigned in said bill, although it may have been the general practice formerly to charge, in an indictment for murder by poison, that the accused knew the substance alleged to have been used in producing death was a deadly poison, yet it was held, as long ago as Mary Blandy's case (1 Hargrave's State Trials, 1), referred to by the attorney-general in this case, that such an averment is unnecessary. She was condemned and executed for murder by poison, and no such averment was contained in the indictment against her. A copy of the indictment may be found in 3 Chitt. Crim. Law, p. 773, marg.: and it may now be considered as well settled that such an averment is unnecessary. See Commonwealth v. Earle, 1 Whart. R., 525, also referred to by the attorney-general. See, also, the form of such an indictment in 1 Arch. Pr. & Pl., with Waterman's notes, p. 944, top, 256 marg., which contains no such averment. There is, certainly, no good reason for requiring such an averment, in addition to the other averments contained in the indictment; and certainly the defect arising from its omission, if such a defect at any time existed, was cured by the healing effect of our 667 broad *statute of jeofails in criminal cases; the objection having been made, for the first time, after verdict.

We are therefore of opinion that the Circuit court did not err in overruling the motion in arrest of judgment.

And now, as to the fourth and last bill of exceptions. That bill states that after the jury had rendered their verdict of "guilty of murder in the first degree," the prisoner, by counsel, moved the court to set aside the verdict and award a new trial: first, because the said verdict is contrary to the law and the evidence; and, second, because of an erroneous statement made to the jury by the court, in this, to wit: After the evidence and argument of counsel were concluded, the jury retired to their room, and after a short time returned into the court-room, and one of the jurors enquired of the court, in the presence of all the jury, the prisoner and the counsel, if they had a right in this case to find the prisoner guilty of any less crime than "murder in the first degree?" The court, understanding the juror as referring to the second count having been quashed, and meaning "if the offence is proven as charged in the indictment," (though he had not said so in terms,) replied, "No; she is charged with nothing else; the second count had been quashed."

The juror who made the enquiry then repeated it more explicitly, as if seeking more fully to understand the court, to the effect: "If we believe, from the evidence, that she did administer the poison with intent to kill her husband, and that he died from it, can we find her guilty of anything less than murder in the first degree?" The court replied, "If you believe, from the evidence, that she did in person, or through the agency of another acting under her directions, administer poison to her husband, and that she did intend thereby to kill 668 him, and that he *did actually die therefrom, the law presumes malice, and you ought to find her guilty of murder

in the first degree; if you do not thus believe, then you will find her not guilty."

The prisoner's counsel expressed no dissent or objection to the question, reply or explanations, and took no exception.

The court overruled the motion to set aside the verdict and award a new trial for the reasons aforesaid.

We will first consider the second reason above assigned, "because of an erroneous statement made to the jury by the court," as aforesaid.

We must take the whole account together, as given in the bill of exceptions, of this alleged erroneous statement made to the jury by the court. If we can suppose it possible that the jury had a right, in this case, in any view of it, to find the prisoner guilty of any less crime than murder in the first degree, certainly they had no such right, understanding the question of the jury to be qualified by the condition "if the offence is proven as charged in the indictment," as the Circuit court understood it. But it was perfectly competent for the juror to explain his own meaning, and he did immediately explain it, and thus placed it beyond all controversy. So explained, the question of the juror ran thus: "If we believe, from the evidence, that she did administer the poison with intent to kill her husband, and that he died from it, can we find her guilty of anything less than murder in the first degree?" Certainly that question could not properly have been answered otherwise than in the negative, and the plainest, and perhaps best answer which could have been made to it was, "No." The court, however, answered the question in detail; and the question is, whether there be anything in that answer which can make the judgment erroneous? If there be, 669 *certainly no objection was taken by the prisoner's counsel on that ground at that time. It is expressly stated in the bill of exceptions that he "expressed no dissent or objection to the question, reply or explanations, and took no exception." Still, if there be anything in that answer which is erroneous, and could have prejudiced the prisoner, it might, and no doubt would be proper for the court to give her the benefit of the error now, though not objected to at the time, nor on the motion for a new trial, nor assigned as error in this court. If there be any such error it consists in supposing, if the answer does suppose, that the prisoner might be guilty only as accessory before the fact, and yet be properly found guilty of murder in the first degree, on the indictment in this case. At common law an accessory could not be convicted on an indictment against him as a principal felon, nor could the accessory be convicted until after the conviction of the principal, though he might be included in the same indictment, and tried at the same time, with the principal. Our statute has made very material changes in the law, in regard to accessories before the fact, in cases of felony. The Code of 1860, p. 813, ch. 199, § 7, provides that "in the case of every felony, every principal in the second degree, and every accessory before the fact, shall be punishable as if he were the principal in the first degree." And Id., § 9, provides that "an accessory, either before or after the fact, may, whether the principal felon be convicted or not, or be amenable to justice or not, be indicted, convicted and punished in the county or corporation in which he became accessory, or in which the principal felon might be indicted. Any such accessory before the fact may be indicted, either with such principal or separately."

Far as these changes have gone, 670 they seem not to have *gone far enough to make an accessory before the fact to felony liable to be convicted on an indictment against him as principal. In England the statute of 11 and 12 Vict. c. 46, s. 1, has gone to that extent, in declaring that "if any person shall become an accessory before the fact to any felony, whether the same be felony at common law or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted and punished, in all respects as if he were a principal felon." "In all cases of felony," in England, "therefore, the accessory is punishable in the same manner precisely as the principal felon; and he may now be indicted, either as a principal—that is, he may be charged in the indictment with having actually committed the offence as principal in the first degree—or he may be indicted as accessory, as for a substantive felony—or he may be indicted as accessory, with the principal, at the option of the prosecutor." 1 Arch. Cr. Pr. and Pl., by Waterman, top 77, marg. 16. So also in Mississippi the statute has gone to that extent, in declaring that "every person who shall be accessory to any murder or other felony before the fact shall be deemed and considered as principal, and indicted and punished as such; and this, whether the principal has been previously convicted or not." Rev. Code 572, art. 2; Josephine (a slave) v. The State, 39 Miss. R. 647. The statutes of some of the other States have no doubt gone to the same extent. But ours, as before stated, have not yet gone so far.

If, therefore, the Circuit court in this case, in saying to the jury that if they believed from the evidence that the prisoner did, in person or through the agency of another acting under her directions, administer poison, &c., to her husband, &c., intended to say to them that an accessory before the fact to murder might be convicted on an indictment against him as a principal, 671 we think the court *erred in that respect. The words "through the agency of another, acting under her direction," are equally consistent with the idea of the absence or presence of the prisoner at the time of her commission of the offence through such agency. If they were used by the Circuit court in the latter sense, and they could be properly construed in that sense, then there was no error. For a person present, directing, aiding or abetting in the com-

mission of a felony, is a principal in the second degree, between whom and a principal in the first degree there is no substantial difference, and both may be indicted and convicted as principal in the first degree.

But assuming, as it may be proper to assume, that the words were used in the former sense, or at least in either sense indifferently, and that the court erred in thus using them, is it an error for which the judgment ought to be reversed? It was not excepted to at the time it is supposed to have been committed, nor until after verdict, and on the motion for a new trial. In fact the objection that the words in question convey, and were intended to convey, the idea that the prisoner was, or may have been, a mere accessory before the fact, never has been taken by the prisoner or her counsel, either in the court below or in this court. No doubt because no such idea ever entered the mind of either. In truth there was nothing in the evidence to afford any foundation for such an idea, and an instruction assuming that the prisoner was a mere accessory before the fact would have been an abstraction, without any sufficient warrant in the evidence for its support. It is therefore at least doubtful whether the objection would have been of any avail if taken in due time. But not having been taken in due time, the question whether it is now available is a very different one from what it would have been if the objection had been taken in time. The princi-
672 ples applicable to such a case *were declared by this court in Bull's case, 14 Gratt., 613. There was a motion in that case to set aside the verdict for misdirection in giving an instruction which was not objected to at the time. "It does not appear," said the court, "that the prisoner was dissatisfied with this instruction at the time it was given, but the contrary is to be presumed. He did not except to it nor save the point, but asked the court further to instruct the jury; which further instruction the court gave in the very words in which it was asked. It cannot be expected that a court, in the hurry of a criminal trial, can be always ready to define a crime, or discriminate between the different grades of a crime in the same accuracy of language which would be used by a writer on criminal law. If a party be dissatisfied with an instruction he ought to state his objections at the time in order that the court may have an opportunity of removing them. If no objection be made at the time, nor any exception be then taken on the point saved, but objection be made for the first time after verdict, and in the form of a motion to set it aside, the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction, and if of opinion that a just verdict has been rendered according to the law and the evidence, will not set it aside on account of that objection. Viewing the case in that aspect, this court certainly cannot say that the Circuit court erred in refusing to set aside the verdict for misdirection." These principles are at least as applicable to this case as they were to that in which they were declared, and we may well conclude what we have to say on this subject in the words in which the above quotation is concluded, that, "viewing the case in that aspect, this court certainly cannot say that the Circuit court erred in refusing to set aside the verdict for misdirection."

We will now consider the only re-
673 maining question in *this case, whether the verdict was contrary to the law and the evidence? being the first reason assigned in the fourth bill of exceptions for setting aside the verdict and awarding a new trial.

The facts proved on the trial are certified on the record, and are substantillay as follows:

The prisoner, Susan Thornton, was the wife of William Thornton, and resided with her said husband on the land of Mr. Douglas Hancock, near the Red House, in the county of Charlotte. They lived unhappily together in consequence of an improper intimacy and intercourse between the prisoner and a colored man named Ed. Robinson, who lived on the same place, in a house to himself in Mr. Hancock's yard. Prisoner was the cook of Mr. Hancock, and, when the day's work was over, usually returned home to the house of her husband, about one-fourth of a mile distant, though she often stopped at Ed. Robinson's house, where she sometimes remained with him all night; was frequently seen there at various hours in the night, and sometimes about daylight. She washed for Ed. Robinson. Their intimacy having become generally known in the community, she and Ed. Robinson were summoned before the church of which they were members, the first Sunday in July 1872, admonished of the impropriety of their course, and urged to abandon it; and upon refusal, were each turned out of the church, and their names stricken from the list of members. Prisoner told the church members, when she was thus arraigned, that her husband was too old for her, could not attend to her, and she meant to get rid of him, and if Ed. Robinson wanted her she would have him, and no one could prevent her.

William Thornton was sixty or sixty-five years old, was jealous of his wife's intimacy with Ed. Robinson, and he and his wife did not live agreeably together
674 on *that account, though she continued to be recognized and treated by him as his wife, having free access to him and his house as her home. She absented herself more frequently and for longer periods after she was turned out of the church. No one lived in the house with them except the children and a colored girl who was hired to assist in taking care of the children during the absence of the prisoner.

On Friday the 25th of October prisoner went to the store of Mr. Musgrove, at the Red House, and bought of him two table-

spoonsful of arsenic; said she wanted it for her hogs, to prevent them from being stolen. The merchant, Musgrove, told her it was a dangerous and deadly poison, and cautioned her about its use, lest some person might be poisoned by it. During that week William Thornton was working at Mr. J. D. Hancock's took his meals from Mr. Hancock's table, left there as well as ever on Saturday evening, 26th October, about an hour or an hour and a half by sun, to return home, and was taken violently ill during that night, with sick stomach and violent pain in the region of the bowels, with bloody discharges, and with indications of inflammation, and such symptoms as would be produced by poison, but might have been produced by other causes. At that time the colored hired girl was absent, on a visit to her relations about eight miles off; several persons called to see him the next day and for a day or two thereafter; among others Mrs. Hancock, who administered to him a glass of brandy; his wife was there during his illness; he died the following Thursday, and was buried in a substantial coffin in the usual way on the following Friday.

Prisoner was called upon by Mr. Hancock and others; went to Ed. Robinson's house, of which she had the key, and took out a brown paper containing a small por-
675 tion *of a white substance supposed to be arsenic, and delivered it up.

She afterwards left the neighborhood; an officer, Mr. Ford, was sent with process to the county of Halifax to arrest her, and was accompanied by Mr. Hancock; they found her, and as they entered the house she threw herself quickly on the bed, with her back to them. Mr. Hancock took hold of her, addressed her by name, when she denied that she was Susan Thornton, or that she knew Mr. Hancock or his father, and other persons in the neighborhood of the Red House, about whom she was asked; said her name was Sarah Rice, and that she was raised in Halifax; she did not appear much frightened; afterwards acknowledged that she was Susan Thornton; knew Mr. Hancock and his father, her former master who raised her, and many in the neighborhood about whom she was asked; was fully identified, carried back under arrest to Charlotte and committed to jail.

The body of William Thornton was disinterred about four days after his burial; an experienced physician was present and opened the stomach. There were signs of much inflammation; the liver, lungs and bowels were greatly inflamed. The stomach indicated the presence of some kind of poison, but what kind could not be ascertained by the inspection that was then given. The stomach was afterwards taken out and carried to a chemist, who carefully examined it, subjected its contents to several well known tests, and was fully satisfied of the existence of arsenic therein. The examination of the stomach and analysis of its contents was conducted with great care by Dr. Michie, who had made himself familiar with the mode of detecting the presence of poison, and was fully satisfied of the presence of arsenic in that stomach in sufficient quantity to produce death.

Such being the facts of the case,
676 (which speak plainly *enough for themselves without any comment,) are they sufficient to sustain the verdict of the jury? Or rather, are they so plainly insufficient as to warrant this court in reversing the judgment of the Circuit court for overruling the motion of the prisoner to set aside the verdict and grant a new trial, on the ground that the verdict was contrary to the law and the evidence? For that is the true and only question which we have to decide on the subject now before us.

We are clearly of opinion that, according to the well-settled authorities on the subject, we would not be warranted in reversing the judgment on that ground. In Grayson's case, 6 Gratt. 724, the rules of law in regard to new trials are briefly and clearly laid down. Under the third head, the court say, that "where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court, if upon the jury, would have given a different verdict. To warrant a new trial in such cases the evidence should be plainly insufficient to warrant the finding of the jury. And this restriction applies, a fortiori, to an appellate court." Without referring in detail to the many decisions of this court on the subject, it is sufficient to refer to Read's case, 22 Gratt. 924, 941, 945, where all those decisions are cited, and most of them briefly stated. In this case two juries concurred in finding the prisoner guilty of murder in the first degree; and the judge who presided at the trial refused to set aside the last verdict, and rendered judgment thereupon.

We think there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

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ADVANCEMENTS.

1. W died in 1857. By his will he gave his estate to his wife W for her life, to be used and controlled by her at her entire discretion; but as certain of his children came of age or married she was at liberty to give them or either of them, as also to his daughter Mrs. C. such part of his estate as she could conveniently spare, she to be the sole judge of it. And at her death he gave his estate equally among his children named, each of whom was to account for what they had or might receive. In 1858 W has a tract of land and a number of slaves divided and valued, to allot a part to each, to whom she was authorized to make advancements, and she conveys and delivers one of the parts to each of said children, except Mrs. C. Her part is retained by W until January 1865, when it is delivered to the guardian of Mrs. C.'s children, she being dead. HELD:

1. The advancements made to the children in 1858 are to be taken at the valuation then put upon them, but without interest during W's life.

Puryear & als. v. *Cabell & als.*, 260

2. The advancement to Mrs. C's children is to be valued as at the time it was delivered to their guardian. *Idem*, 260

3. The slaves in this lot were not then free, and are to be valued at what they were then worth to the children of Mrs. C. *Idem*, 260

4. The husband of one of the children having cut timber off another tract, which he and W intended should be accounted for, its value is to be charged to him and his wife in the division. *Idem*, 260

ADVERSARY POSSESSION.

1. In an action by F against B, for injury to his land, by B's continuing a dam across a stream which had been erected by a previous owner, the defence of B is adversary possession. What F may prove to rebut the presumption arising from possession.

See *Mill Dams*, No. 1, 2, 3, 5, and *Field* v. *Brown & al.*, 74

2. Proof of adversary possession for twenty years, such as would create a presumption of a grant, is only presumptive, and not conclusive, and may be rebutted by evidence showing that the adversary possession relied on was not acquiesced in, but the right thereto was contested. And any evidence tending to show such resistance is proper evidence to rebut the presumption. *Idem*, 74

AMENDMENTS.

1. What such a variance between the pleadings and the proofs as may be cured by amendment according to ch. 177, s. 7. of the Code of 1860.

Beasley v. *Robinson & als.*, 325

2. In an action on a policy of insurance the declaration omitted one of the conditions endorsed upon it; and on the trial when the policy is offered in evidence, it is objected to for variance. The court may allow the plaintiff to amend the declaration by inserting the omitted condition, and proceed with the trial.

New York Life Ins. Co. v. *Hendren*, 536

APPEALS.

1. Judgment in June 1866 in the 678 *County court. July 26th, 1866, defendant presents to a judge of the Circuit court his petition for a *supersedeas* to the judgment rendered against him; and the judge awards it, and fixes the penalty of the *supersedeas* bond at $15,000. Afterwards, on the 18th December 1868, the petitioner applies to the same judge to reduce the penalty of the bond; which is done; and the appeal is perfected. It was competent for the judge to modify his first order, and it did not annul or impair the petitioner's right to the *supersedeas* which had been awarded to him in July 1866.

Effinger v. *Kenney, Trustee*, 116

APPELLATE COURT.

1. In a case of a decree upon a Confederate debt, the Circuit court scales it. Upon appeal by the debtor, the appellate court will presume, in the absence of any objection in the court below, that the court had before it a broker's scale, which was universally adopted by the courts, as proof of the value of Confederate money.

Smyth v. *Sutton & als.*, 191

2. Where an instruction is given to the jury, as to which the evidence furnishes no ground for the hypothesis upon which it is based, whether the instruction be correct or erroneous it furnishes no ground for reversing the judgment.

Poore v. *Magruder*, 197

3. When an objection to an account not taken before the commissioner, or the court below, will not be regarded in the appellate court. See *Executors and Administrators*, No. 21, and

Chapman's adm'rs v. *Shepherd's adm'r & als.*, 377

4. When objection to the proceedings before a commissioner, in taking an account, will not avail in an appellate court. See *Executors and Administrators*, No. 21, and *Idem*, 377

5. See *Practice at Common Law*, No. 8, and

New York Life Ins. Co. v. *Hendren*, 536

6. When appellate court may reverse a judgment, though no motion in arrest of judgment has been made in the court below. See *Criminal Jurisdiction and Proceedings*, No. 17, and *Randall's case*, 644

7. In a prosecution for rape the verdict and judgment of the court of trial set aside by the appellate court, on the ground that the evidence did not sustain the verdict.
Boxley's case, 649

8. Where an instruction is given, which may be understood in two senses, in one correct and erroneous in the other, yet no exception or objection having been taken when the instruction was given, and it being obvious, from all the evidence, that the prisoner could not have been injured by the instruction, it affords no ground for reversing the judgment and ordering a new trial. *Thornton's case*, 657

AWARDS.

1. If an arbitrator, intending to decide the questions submitted to him according to law, states in his award two propositions of law, one of which is erroneous, and the other is correct upon the facts as he may consider them to be, a court, in passing upon the validity of the award, will presume that his award is based upon the latter; and the court cannot enquire whether he took a correct view of the facts.
Willoughby v. *Thomas*, 521

2. An award held to cover all the matters submitted. *Idem*, 521

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See *Practice at Common Law*, No. 1, 2, 3, 4, and
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1. Under the circumstances, bonds of P paid off by M and held by him continue to be bond debts, and not barred by the statute of limitations.
Moss & wife & als. v. *Moorman's adm'r & als.*, 97

2. See *Vendor & Purchaser*, No. 2, 3, and
Effinger v. *Kenney, Trustee*, 116

3. For validity of bond given for the price of slaves sold January 1st, 1864, see *Slaves*, No. 1, 2, and
Rives v. *Farish's adm'r*, 125

4. A bond which is a complete and perfect instrument on its face, at the *time of its delivery to the obligee, was executed by persons as sureties, upon the condition that it should not be delivered until executed by other persons; and it was placed in the hands of the principal obligor, and without being so executed it was delivered by the obligor to the obligee, who was not informed of the condition. The bond is the valid bond of the sureties; and they cannot set up the condition against the obligee.
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Nash v. *Fugate & als.*, 202

5. A joint and several bond is executed by several persons, and delivered to the obligee; and afterwards, with the consent of the obligee, but without the knowledge of the obligors, another person executes it. As to those who first signed it, it is joint as between themselves, and several as to the person last executing it. *Idem*, 202

6. A bond on its face bears interest, and is secured by a deed of trust on land, and the obligor and obligee live near each other, and within the Confederate States during the war; and sums about equal to the interest upon the bond are paid upon it annually until after the war. The bond is properly chargeable with interest during the war.
Crenshaw v. *Seigfried*, 272

7. In relation to official bonds of sheriffs of counties and sergeants of corporations, see *Sheriffs*, No. 6, 7, and
Corprew & als. v. *Boyle & als.*, 284

CHURCH PROPERTY.

Two lots of ground are conveyed to certain persons and their successors, in trust for the Methodist Episcopal Church of Petersburg. It is built upon and used by the church until 1842, when the church built upon W. street; and in 1844 resolved that the first building should be appropriated to the use of the colored congregation; which was constituted of persons who were members of the Methodist church of Petersburg. These continued to worship there, and to be connected with the W. street church until 1865, when they connected themselves with the African Methodist Episcopal Zion Church. After this change was made, in the year 1866, the then trustees of the Methodist church property, who were the regularly constituted successors of the original trustees, agreed with the trustees of the colored congregation, that until the said property should be required for the use of the Methodist Episcopal Church South, the said first trustees would permit the said trustees and congregation to occupy the same as a place of worship without rent, they paying the insurance and repairs; and under this agreement the said trustees and congregation held the property until 1871, claiming no other right thereto. In 1871 the trustees of the colored congregation resigned, and others were elected; and then the judge of the Circuit court of Petersburg made an order appointing the persons elected trustees of said church, in whom the legal title to the land owned by said congregation should be vested. And these trustees from that time claimed the property and the legal title thereto. The trustees of the property thereupon demanded possession of it, which was refused; and they brought unlawful detainer to recover it. HELD:

1. The defendants or their predecessors, having been put in possession of the premises by the plaintiffs or their predecessors and having acknowledged the title of the latter, the possession of the former is the possession of the latter, until the former, as such tenants, by some act disclaim to hold of the latter as their tenants.
Allen & als. v. *Paul & als.*, 332

2. The defendants cannot set up any right or title adverse to the plaintiffs, unless they prove that they disclaimed to hold them, or *bona fide* abandoned possession of the premises, or asserted and claimed an adverse right to the premises, with notice thereof to

the plaintiffs or their predecessors three years before the institution of the suit. And *quære* if the mere disclaiming the landlord's title and claiming to hold in fee for three years is sufficient to defeat the plaintiff's recovery. *Idem*, 332

3. The defendants having disclaimed to hold as tenants of the plaintiffs, and claimed to hold the premises in fee, no notice 680 was necessary to entitle *the plaintiffs to proceed immediately to recover the property. *Idem*, 332

4. The plaintiffs, as regularly appointed successors of the original trustees in the deeds conveying the property, may maintain an action to recover possession of the premises, against the defendants, who claim to be the trustees of the A. M. E. Zion church in Petersburg, and to be invested with the title to the property belonging to said church; and as such to be in possession of the property in controversy. *Idem*, 332

5. It is immaterial to the support of the action, whether the plaintiffs acquire any personal ownership in the property by the deeds; it not being competent for the defendants, who claim to hold as successors to the plaintiffs' tenants, to deny the plaintiffs' title. *Idem*, 332

6. Although the order of the court was legal and was binding, so far as it constituted the defendants trustees; and the regularity and validity of this order, or the appointment of the defendants as trustees, cannot be enquired into in this suit, yet the said order does not vest in them the legal title to the property for the time, or for an instant, unless the congregation which they represent are the owners of it. And the predecessors of the defendants having acknowledged the title of the plaintiffs, and held under them, the defendants claiming through them, as their successors, cannot deny the plaintiffs' title. *Idem*, 332

7. That the defendants and those under whom they claim have held possession of the premises for more than three years will not defeat the plaintiffs' action unless such possession was adversary. *Idem*, 332

8 The resolution of 1844 implies that the title and ownership of the property is retained by the Methodist Episcopal Church, and the use of it only given to the colored congregation; which the owners had at any time the right to recall. *Idem*, 332

CONDITIONAL SALES.

1. What is not a conditional sale, but a mortgage.

See *Confederate Contracts*, No. 4, and *Earp* v. *Boothe*, 368

CONFEDERATE CONTRACTS.

1. Land was assessed before the war at $80 per acre, and it was not worth more than $100 per acre. In March 1863 it is sold at auction by a trustee for creditors, and bought by E for $210 per acre; nothing being said at the sale as to the kind of money to be paid. E pays two-thirds of the purchase money in cash in Confederate notes, and gives his note for the balance, payable in two years, with interest; and the money paid is received by the creditors for ante-war debts at its par value. This money was then at the rate of five for one of gold, though in land sales it was rating at two or three for one. It was a Confederate contract, and should be scaled.

Effinger v. *Kenney, trustee*, 116

2. See *Vendor and Purchaser*, No. 3, and *Idem*, 116

3. R executes to M his bond for $3,000, bearing date the 11th of July 1862, and payable on demand. In a deed of trust given at the same time, by R, to secure the debt, it is provided, that if R will pay punctually the interest on the debt semi-annually, the debt shall not be collected for five years. R pays the interest until July 1864. HELD: The bond being payable on demand, the provision in the deed for time does not change its character in that respect, and it must be scaled as of its date.

Moon v. *Richardson*, 219

4. E owes B $700 for land purchased before the war. In December 1862 E makes a contract with S, that S shall have thirty-five acres of the land at the price he gave, in consideration that S will advance the $700 to pay B, and allow E three years to pay the balance. And if E shall fail to pay S said balance with interest, E binds himself to convey title to the residue of the tract to S. S pays the $700 to B, who receives it in Confederate money. E does not pay the money or any part of it in the three years. This is a Confed- 681 erate contract, *and the amount due is to be scaled as of the date of the contact. *Earp* v. *Boothe*, 368

CONFESSIONS.

1. Prisoner charged with murder makes a confession to a police officer on the morning of the day he is examined by the police justice. Before the examination he has employed counsel, and he is warned by his counsel and the police justice against making any statement or confession. Being committed by the justice, on getting to the jail he appears to be very much frightened and agitated; and upon getting there he makes a confession, and again on the same day confesses the deed to a woman of his acquaintance who is in the jail. Though the confession to the police officer was properly excluded, the confession made after the warnings given him are proper evidence.

Venable's case, 639

CONSTITUTIONAL LAW.

1. The act of March 7, 1862, which repeals the act of March 30th, 1871, so far as it authorizes the issue of coupon bonds with coupons attached receivable for taxes and other dues to the State, is constitutional so far as it applies to bonds not presented to the 2d auditor before the passage of the repealing act.

Wise Bro. &c., Agents v. *Rogers, 2d Aud.*, 169

Maury & Co. v. *Rogers, 2d Aud.*, 169

2. The obligations created in the name of the State of Virginia by the general assembly which sat in Richmond, at its session of 1861-62, are embraced by article 10, s. 10, of the constitution of Virginia, which forbids that any provision shall be made for their payment.

Meredith and others v. *Rogers*, 2d *Aud.*, 172

3. The act of October 7, 1870, amending s. 1, ch. 12, Code of 1860, requiring any person engaged in a duel to testify, is unconstitutional. *Cullen's case*, 624

CONTRACTS.

1. On the 1st of February 1865 B representing himself to be the agent of the Confederate States Government, to take tobacco into Maryland and exchange it for bacon, applied to D, living near the Potomac river in W. county, to store for him in D's barn for the night 84 boxes of tobacco. D being unwilling to do it, B agreed with him, that if he would receive the tobacco in his barn, and should sustain any damage or injury from the forces of the United States in consequence of the tobacco being there deposited, B would make good all losses he might sustain thereby. Under this agreement the tobacco was deposited in D's barn, where it remained until the 17 of March; B undertaking to pay any loss D might sustain thereby. At that time the enemy's gun-boats on the river approaching D's house, he removed and concealed the tobacco, and his houses and out-buildings were destroyed by the enemy; his loss amounting to $6,352. HELD:

1. B being the agent of the Confederate government, which could enforce obedience upon all within its jurisdiction, the contract was valid, and B is bound to pay D for the loss which he sustained.

Bier & Mann v. *Dozier*, 1

2. If B was not the agent of the Confederate government, and was prosecuting a private enterprise, against the laws and policy of that government, D is not a *particeps criminis* with B in an equal degree, if at all, and he is entitled to recover. *Idem*, 1

3. To make a contract unlawful as being against public policy or law, it must be manifestly and directly so; and it is not enough that the contract is connected with some violation of the law, however remotely or indirectly. *Idem*, 1

2. A note given by an agent of the late Confederate States government, and binding himself for the price of cattle purchased for the support of the armies of said government, and for the purpose of aiding in carrying on the war against the United States, is a valid contract, and may be enforced against the obligor after the end of the war.

Ruckman & al. v. *Lightner's ex'ors*, 19

682 *3. For the validity of a contract for the sale of slaves in January 1864.

See *Slaves*, No. 1, 2, and

Rives v. *Farish's adm'r*, 125

4. In December 1863 R, by an agent, bought of S of King & Queen, his crop of corn, to be delivered at a certain landing on York river on the first of February 1864, and to be paid for on delivery, at the price of $40 per bushel. R engaged a vessel to go for the corn, and sent bags in which to put it. The vessel arrived in time, and the corn was delivered on board; but R or his agent not appearing to pay the money, S sent the corn on his own account to W & Co. of Richmond. The agent of R started down to the place of delivery, having a blank check of R to pay for the corn, and intended and expected to get there in time; but he failed to do so. HELD:

1. The corn being to be paid for on delivery, and R, or his agent, not being present to pay for it, S may terminate the contract; and this especially as a very brief delay at the place might have subjected it to capture by United States vessels in the river.

Smyth v. *Sutton & als.*, 191

2. If the agent had arrived at the place in time, he not having the money, but only a blank check of R, S might have refused to accept payment by the check.

Idem, 191

5. After the corn arrives in Richmond, R obtains an injunction to prevent W & Co. and S from selling it, claiming that he had bought it. S answers the bill, and by consent, under a decree of the court the corn is sold, and the proceeds deposited in bank, where they remain until the end of the war, when the bank fails, and they are lost. The proceeds of the sale of the corn having been lost by the improper interference by R with the sale of it by W & Co., he is liable to S for the price for which it was sold.

Idem, 191

6. The act of March 1st, 1867, entitled "An act to authorize the James River and Kanawha Company to borrow money," though when accepted by the company it creates a contract between the company and the State, does not create a contract between the company and the holders of the $180,000 of State bonds therein mentioned; and a holder of one of these bonds cannot maintain an action thereon against the company.

Stuart v. *James River & Kan. Co.*, 294

7. Though the company has executed a mortgage on its property to secure the money authorized to be borrowed by said act, yet if the company has not borrowed the money, or made use of the bonds intended to be secured by the mortgage, it cannot be held to have accepted the terms of the act, or become liable under its proviso, in relation to said $180,000 of State bonds.

Idem, 294

8. $5,000. N., Va., Sept. 26, 1859.

I have this day borrowed of Mrs. P five thousand dollars in stock of the State of Virginia, on which interest is payable semi-annually; and for the repayment of the same with accruing interest, I bind myself, my heirs, &c. Witness, &c. K. The stock was borrowed to be converted into money,

and was sold in November for $4,775. *Held:* P is entitled to the value of the stock at the time of the loan.

Davis, trustee, v. *Knight*, 406

9. C, a manufacturer of tobacco, in 1849 employs G in his business, and agrees to give him one-fourth of the net profits of all the tobacco manufactured by C. G dies in January 1860. C has on his books an account called the "factory account," which he says shows correctly the net profits of the business; but it comes down but to the end of 1858, the business of 1859 not being closed. C and G's administrator agree to a mode of settlement based upon the "factory account;" and they agree that the account of 1859 shall be settled upon the same principles. A lot of tobacco manufactured in 1858 and 1859 C claims is not within the terms of the agreement. As G was to have one-fourth of the net profits on all tobacco manufactured, the account of 1859 must be so settled as in effect to bring this lot into the factory account, and *allow G one-fourth of the profits of it.

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Chieves & Osborne v. *Gary's adm'r*, 414

10. By bond dated July 7th, 1863, B promises to pay to W, three years after date, $2,000, without interest, in funds current in the State of Virginia, being money borrowed. Held:

1. Parol evidence is admissible to prove the consideration of the bond and the character of the contract.

Wrightsman v. *Bowyer & als.*, 433

2. The evidence showing it was a contract of hazard, and that the parties contemplated the possibility, though not the probability, of the failure of the Confederacy, and intended that the bond should be discharged in the currency in use when it fell due, W is entitled to recover the value of $2,000 in the U. S. currency then in use in Virginia on the day it fell due, with interest from that date. *Idem*, 433

11. Though in a sale of real estate in October 1862, the price is fixed with reference to Confederate States treasury notes, it may be shown by parol evidence that the deferred payments were not to be discharged in that currency. *Stearns* v. *Mason*, 484

12. In such case the bonds for the deferred payments say that they are to be paid "in current money of Virginia." It being shown that they were not to be paid in gold nor in Confederate currency, they are to be scaled as of the value of the Confederate currency at the time of the contract. *Idem*, 484

13. The purchaser claiming that the bonds were to be paid in Confederate currency, tendered payment in that currency, and the vendor refused to receive it. As it was uncertain what amount, if any, was due upon the bonds, interest will only be allowed from the date of the decree. *Idem*, 484

14. W contracts with T to hire his services for a year, for a fixed sum. In the course of the year W dismisses T from his employment without sufficient cause for the dismissal. It is error to hold that T, if entitled to recover at all upon the contract, is entitled to recover the hire or wages for the whole year. His right of recovery in case of a discharge without cause, should be limited to the amount of damages actually sustained by such illegal discharge. *Willoughby* v. *Thomas*, 521

CORPORATIONS.

1. The negligence of an officer of a corporation, in allowing a judgment to be rendered against his corporation as garnishee, when the debt had been previously assigned to another party, and notice thereof had been given to another officer, will exclude the corporation from relief in equity against the judgment.

Richmond Enquirer Co. v. *Robinson & als.*, 548

COUNTY ORGANIZATION.

1. Warrants issued by the board of supervisors of a county upon the treasurer are to be paid in the order in which they are registered. *Anable's case*, 563

COURTS.

1. A corporation court has authority to direct jurors to be summoned from without the limits of the corporation, for the trial of a prisoner indicted in that court, when an impartial jury cannot be obtained within the corporation. *Craft's case*, 602

2. How the County court shall proceed upon appeal by the accused from the judgment of a justice in a case of petit larceny. *See Criminal Jurisdiction and Proceedings*, No. 8, 9, 10, 11, and *Read's case*, 618

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. An indictment against J is for stealing from A six dollars of "United States treasury notes." Upon an exception to the refusal of the court to grant J a new trial, the certificate of facts states that A was holding "some money," &c. The facts certified do not sustain the verdict. *Johnson's case*, 555

2. Upon an indictment for larceny, proof that the accused obtained money *by false pretences will sustain the indictment. *Anable's case*, 563

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3. What is not larceny of a check given in payment for a warrant upon a county treasurer. See *Larceny*, No. 4, and *Idem*, 563

4. Where a prisoner has been convicted of a felony, and a new trial is granted him, the court may proceed to try him at the same term against his consent.

Craft's case, 602

4. If a prisoner receives a copy of the indictment and of the list of jurors, at any time before the trial is commenced, though not until the case is called, it would be proper to give him a reasonable time to examine the indictment and the list of jurors, if he asks it; but it is not a ground for continuing the cause until the next term of the court. *Idem*, 602

5 In directing jurors to be summoned from another county, the court may make an order directing its officer to summon them, or may direct the clerk to issue a *venire facias* requiring the officer to summon them.
Idem, 602

6. During the recess of the Corporation court, the sergeant appoints a deputy without the consent in writing of the judge of the court; but the deputy takes the oath of office before the judge, which is in writing and signed by the deputy, and is certified in writing by the judge. This is a sufficient consent in writing by the judge, and the deputy has authority to execute a writ of *venire facias* directed to his principal.
Idem, 602

7. A Corporation court has authority to direct jurors to be summoned from without the limits of the corporation, for the trial of a prisoner indicted in that court, when an impartial jury cannot be obtained within the corporation. *Idem*, 602

8. In the sense of the law all parts of the adjoining county, outside of the limits of a corporation, is remote from the place where the offence is alleged to be committed, if it is alleged to be committed within the limits of the corporation. *Idem*, 602

9. When jurors are directed to be summoned from an adjoining county, and it appeared that one of the panel had been summoned, by mistake or misapprehension of the law or otherwise, from a place near to, instead of remote from the vicinage, the objection, if valid, instead of being made to the array of jurors, should be made to the individual juror so summoned *Idem*, 602

10 If a person has the constitutional qualifications of a voter, though he has not registered and has not voted, he is a qualified juror. *Idem*, 602

11. Upon the trial of a prisoner for murder, before the introduction of the evidence is commenced, the attorney for the commonwealth may, with the permission of the court, and under its supervision, make a statement to the jury touching the several grades of homicide, and the law in reference thereto.
Idem, 602

12. When a person is tried by a justice of the peace for a petit larceny and convicted, he has an absolute right of appeal to the County court; and in that court the cause is to be heard *de novo* upon the evidence; and the accused is entitled to be tried by a jury, as in like cases originating in that court.
Read's case, 618

13. In such a case it is error in the County court to reverse the judgment of the justice and remand the case to the justice to be tried by him; and any subsequent trial of the case by the justice is null and void.
Idem, 618

14. In such a case the justice again tries and convicts the accused, and he again appeals to the County court. The proceedings before the justice on the second trial being null, the accused is in the County court upon the first appeal, and is to be tried by a jury as if the case had originated in that court.
Idem, 618

15. The accused having been tried by a jury in the County court, and found guilty and sentenced, the errors in the proceedings of the justice on his second trial cannot affect the judgment of the County court.
Idem, 618

16. Upon an indictment under the act concerning malicious and unlawful shooting, &c., (Code of 1860, ch. 171, s. 9,) which charges that the prisoner did unlawfully shoot,
685 &c., with set *purpose and malice aforethought to kill and murder, &c., the jury find the prisoner guilty of malicious shooting, without saying who he shot, and fix the term of his imprisonment in the penitentiary at five years. No judgment can be entered on the verdict.
Randall's case, 644

17. The indictment and the verdict being fatally defective, the judgment may be reversed in the appellate court, though no motion in arrest of judgment was made in the court below. *Idem*, 644

18. The proceedings in the case will not prevent the finding of another indictment against the prisoner for the same offence, after the attorney for the commonwealth has, with the consent of the court, entered a *nolle prosequi* upon the pending indictment.
Idem, 644

19. See *Rape*, No 2, and
Boxley's case, 649

20. An indictment for murder against T and R contains two counts: the second charges T as a principal and R as accessory before the fact; and on the motion of T the second count is struck out. At a subsequent term, on the trial of T the clerk reads both counts and charges the jury on both; and then the prisoner excepts. The court then directs the clerk to read the first count, which is done, and the clerk charges the jury upon it; and then the prisoner excepts to the second reading and charge. The second reading and charge was proper, and cures the error of the first. *Thornton's case*, 657

21. The clerk, in his charge, did not charge the jury as to the different grades of homicide. The indictment being for murder in the first degree by poison, the prisoner was guilty of that offence, or guilty of no offence which could be punished under the indictment; and therefore it is sufficient to charge the jury to that effect. *Idem*, 657

22. There is no law requiring the clerk to charge the jury as to the different grades of homicide in any case; and his charge is without authority and nothing, except so far as it may be considered as having received the sanction of the court, and thus become the act of the court. *Idem*, 657

23. The jury find the prisoner guilty of murder in the first degree, as charged in the indictment, without mentioning her name; but in the verdict, as recorded and read to the jury, the name is inserted. The verdict is sufficient. *Idem*, 657

24. An accessory before the fact to a felony cannot be convicted on an indictment against him as principal. *Idem*, 657

DEDICATION TO THE PUBLIC.

1. In a controversy between the city of Richmond and P, the owner of a lot on F street, as to the line of F street, P and those under whom he claims having been in possession by actual enclosure for more than sixty years, and there being no proof of the actual dedication by R, the original owner of the land, such dedication cannot be shown by proof of the existence of stones at the corners of the cross streets on the line claimed by the city; it not appearing by whom they were placed there, or that R recognized them as marking the line; nor by maps of the ground laid off by R, copied by order of the city, from an old map in the county clerk's office, since lost; it not appearing that R had any knowledge of said old map; nor by the records of the proceedings of the council of the city, reciting an acknowledgment of a previous owner of the lot, that his enclosure encroached upon the street, and giving him permission to continue it for the present.
City of Richmond v. *Poe, trustee*, 149

DEPOSITIONS.

1. The deposition of a plaintiff in an action is taken in his own behalf, and he is cross-examined by the defendants. They cannot have the questions and answers on the cross-examination struck out, though they may refer to the acts and declarations of a deceased person under whom the defendants claim.
Field v. *Brown and al.*, 74

686 *DUELLING.

1. See *Witnesses*, No. 4, 5, 6, and *Cullen's case*, 624

2. Under the principles of the common law and the statutes against duelling, it may well be apprehended that the surgeon of a party to a duel would be regarded in law as being concerned in or aiding and abetting the duel.
Idem, 624

EJECTMENT.

1. T sells land to H and puts him in possession of it, but does not convey it to him. H having failed to pay any part of the purchase money, T brings ejectment against him to recover the land, without giving H notice to surrender it. The notice was essential to sustain the action, and T must therefore fail in his action.
Twyman, trustee, v. *Hawley*, 512

2. In ejectment by T against H, the declaration states that plaintiff has title in fee simple to the land, and describes it by quantity and as bounded by certain roads and coterminous owners. The issue is upon the plea of not guilty, and the verdict of the jury is, we, &c., "upon the issue joined, find that the defendant is guilty in manner and form as the plaintiff in his declaration hath complained." The judgment is "that the plaintiff recover the lands and tenements in the declaration mentioned," &c. *Held*:

1. The verdict finds the title in fee in the plaintiff, as alleged in the declaration, and is sufficient though informal.
Hawley v. *Twyman, trustee*, 516

2. The judgment gives to the plaintiff the land in fee. *Idem*, 516

3. The description of the land in the declaration is sufficient. *Idem*, 516

EQUITABLE DEFENCES.

1. When a deed is procured by fraudulent misrepresentations, the defence can only be made at law, in the mode provided by the statute, Code of 1860, ch. 173, s. 5; and the defendant should file a special plea averring the fraud, or the special circumstances, which entitle him to relief in equity. And the facts should be set forth with sufficient precision and certainty to apprize the plaintiff of the character of the defence intended to be made; and to enable the court to decide whether the matter relied on constitutes a valid claim to equitable relief. *Burtners* v. *Keran*, 42

EQUITABLE JURISDICTION AND RELIEF.

1. A plaintiff having brought the defendant into equity by an injunction claiming property, and the defendant having answered, and the case having been submitted to the court upon full proofs on the issue thus made, and the defendant having established an equitable demand against the plaintiff, there is no reason why the court should stop with the dissolution of the injunction. On the contrary it was competent and proper for the court to dispose of the whole case, and adjust completely the respective rights and obligations of the parties as established by the proofs before it. *Smyth* v. *Sutton & als.*, 191

2. There is a joint covenant by four to pay to R $300 a year for her life. To secure which annual payment each was to execute his bond with surety, binding him to pay $75 a year; but this is not done; nor is the annuity paid to her. After the death of R one of the four joint obligors qualified as her administrator with the will annexed, and then files his bill in equity against the obligors to recover the amount due to her. The administrator being one of the joint obligors could not sue the others at law, and therefore the court of equity has jurisdiction to enforce the payment of the money.
Rodes' Adm'r v. *Rodes & als.*, 256

3. A bond secured by deed of trust on land is assigned, and passes through numerous hands; and besides payments of interest, there are other payments upon it. The trustee having advertised the land to be sold under the deed for the payment of the balance of the debt, the obligor may go into equity to ascertain the amount *due upon the bond, and who is the owner of it. 687
Crenshaw v. *Seigfried*, 272

4. The court having possession of the case, may in its discretion, after ascertaining the amount due, and who is the owner of the bond, either dissolve the injunction as to the

amount due, and dismiss the bill, or may retain the case and have the trust executed under its own direction. *Idem*, 272

5. The court may appoint a commissioner to make the sale; but must pursue the provisions of the deed as to the terms of sale. *Idem*, 272

6. The deed providing for a sale for cash, the commissioner may, at the request of the owner of the land, sell a part of it if that will bring enough in cash to pay the expenses of sale and the balance due upon the bond. *Idem*, 272

7. Equity will only relieve against a judgment at law if the omission of the defendant to avail himself of his defence at law was unmixed with any neglect of himself or his agents.

Richmond Enquirer Co. v. *Robinson & als.*, 548

8. The negligence of an officer of a corporation, in allowing a judgment to be rendered against his corporation as garnishee, when the debt had been previously assigned to another party, and notice thereof had been given to another officer, will exclude the corporation from relief in equity against the judgment. *Idem*, 548

EVIDENCE.

1. R executes his promissory note to L, by which he promises to pay L a certain sum of money. There is nothing on the face of the note to indicate that R was acting as agent or what was the consideration of the note. Parol evidence is not admissible to prove that R was acting as the agent of the Confederate States government, and that the note was given for the price of cattle purchased for that government.

Ruckman & al. v. *Lightner's ex'ors*, 19

2. Where a suit in another State has been proceeded in against an absent defendant, according to the laws of that State, the record of the suit is evidence against such absent defendant, though he had no notice of the suit. *Burtners* v. *Keran*, 42

3. In this case the suit was in equity in relation to the title to land. The court being a court of general jurisdiction, this court must presume that the foreign court had jurisdiction to try the cause in equity; and the record cannot be objected to as evidence on that ground. *Idem*, 42

4. What a plaintiff in an action at law may prove, and what he may not prove. See *Witnesses*, No. 1, 2, 3, and

Field v. *Brown & al.*, 74

5. What evidence may be introduced to rebut the presumption arising from adversary possession for twenty years. See *Mill Dams*, No. 1, 2, 3, 5, and *Idem*, 74

6. A witness for the defendant who had been examined at a previous trial of the cause, not being able to be present when the case is again tried, sends a written statement of what his evidence would be if he was present, and this is introduced in evidence by the defendant with the consent of the plaintiff. The defendant will not be allowed to prove that the witness has omitted one material fact testified to by him on his former examination. *Idem*, 74

7. When in an action by a high sheriff against his deputy and his sureties parol evidence may be introduced to prove the deputy was present and aiding in the defence of the action against the high sheriff. See *Sheriffs*, No 4, and

Crawford & als. v. *Turk, sheriff*, 176

8. A notice is addressed by B to R, late sheriff, and his sureties by name, survivors of themselves and James Sims. On the trial B introduces the bond which is signed by R and all the surviving sureties; but it is objected to as evidence because the name described in the address of the notice as James Sims is written Jos. Sin. This is not a material variance, and the bond should be admitted as evidence.

Beasley v. *Robinson & als.*, 325

9. The court having excluded the bond for variance, B proposes to introduce the record of the court, setting out the qualification of R as sheriff, and the names of his sureties, of *whom James Sims is one, who signed, sealed and acknowledged the bond. But the defendants object to the introduction of said evidence and the admission of said bond. The record is proper evidence, and should be admitted. *Idem*, 325

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10. If it could be considered a variance between the pleadings and the proofs, it is such a one as might and should be cured by an amendment according to the Code of 1860, ch. 177, § 7. *Idem*, 325

11. When parol evidence is admissible to prove the consideration of a bond and the character of the contract. See *Parol Evidence*, No. 3, and

Wrightsman v. *Bowyer & al.*, 433

12. See *Witnesses*, No. 4, 5, 6, and *Cullen's case*, 624

13. See *Confessions*, No. 1, and *Venable's case*, 639

EXECUTIONS.

1. When an execution in placed in the hands of a sheriff, the presumption of law is, that he has levied it and made the money; and in the absence of evidence that he did not levy it, he and his sureties will be liable for the debt to the creditor.

O'Bannon & al. v. *Saunders*, 138

If the sheriff fails to levy the execution when he might do it, he and his sureties are liable for the debt. *Idem*, 138

3. What presumption will be made against a sheriff and sureties, see *Sheriffs*, No. 3, and *Idem*, 138

EXECUTORS AND ADMINISTRATORS.

1. A personal representative is not warranted in receiving a specie debt due the decedent's estate in a greatly depreciated currency, such as was Confederate currency in May and July 1863, unless there be something in the condition of the debt, or in the state of the demands of creditors or legatees

of the estate, or otherwise, which makes it the interest of the estate that the debt should be so received.

Moss & wife & als. v. *Moorman's adm'r & als.*, 97

2. An administrator, out of Confederate moneys collected by him in the course of his administration, pays off specie debts of his decedent. He is to be credited in the settlement of his account with the debts so paid at their nominal amount. *Idem*, 97

3. There is a decree against an administrator and his sureties; and on appeal by plaintiffs the decree is reversed, and the administrator is held liable for a larger amount than was decreed against him; though the decree is also reversed in favor of a purchaser of land from the administrator. Whilst the appellate court reverses the decree as far as it is erroneous, it will affirm it so as to continue the lien of the decree for the security, *pro tanto*, of the amounts which may be found due by the parties respectively against whom said decree was rendered. *Idem*, 97

4. A private sale of land by an administrator c. t. a. made *bona fide*, held valid, and the purchaser entitled to a conveyance. *Idem*, 97

5. S made his will in February 1861 and died in July. He directs "that all of my estate be sold as soon as the times seem to justify a sale without a sacrifice, and the proceeds, without regard to any advancement heretofore made, be equally divided amongst my children," &c. The discretion as to the time of the sale is given by the testator to the executor, and he acting in good faith, the sale is valid, whether his judgment that a sale could then be made without a sacrifice was reasonable or not.

Staples & als. v. *Staples & als.*, 225

6. In such case, even if the executor acted in bad faith, yet if the purchasers at the sale had no knowledge of the fact, but acted in good faith in making and completing their purchasers at the sale had no knowledge of the fact, but acted in good faith in making and completing their purchases, they acquired a good title to the land purchased by them respectively. *Idem*, 225

7. That the sale was made for Confederate money in July 1862 cannot affect the *bona fides* of the executor, or the validity of the sales. *Idem*, 225

8. Upon the question whether the property sold for fair prices, the mode of considering the price is, to estimate the value of the price in Confederate money as at the time of the sale. *Idem*, 225

689 *9. An executor or other trustee can lawfully purchase for his own benefit, property, though it may have been purchased by his vendor of himself, as such executor or trustee; provided that the transaction be real and *bona fide*. *Idem*, 225

10. If the sale by the executor is a sham sale, it is fraudulent; and if not absolutely void, it cannot enure to the benefit of the executor, but only to that of the legatees to whom the proceeds of the sale are given by the testator. *Idem*, 225

11. The sale having been made in July 1862 upon the terms of one-third cash, and the balance in one and two years, the executor did not commit a breach of trust in receiving Confederate money in payment of the deferred instalments of the purchase money of the real estate at the maturity of these instalments. *Idem*, 225

12. Some of the legatees living in the State and others in Missouri, the executor pays to the resident legatees their shares of the estate sold. These were rightful and proper payments, and cannot be recalled at the suit of the non-resident legatees. *Idem*, 225

13. Under an order of the court, the executor deposited in a savings bank the shares of the non-resident legatees in their names. The executor committed no breach of trust by retaining in his hands, as he did, their shares, and in depositing the same in the savings bank under the order of the court, as he did; and incurred no liability in regard to the same, except for the depreciation of the money so deposited between the time it ought to have been deposited and the time it was actually deposited. *Idem*, 225

14. The loss arising from the depreciation of the portions retained by the executor and deposited in the savings bank for the non-resident parties as aforesaid, ought to fall on them alone, and not on all the legatees equally, including those residing in the State. *Idem*, 225

15. The proceeds of the sale of property made since the war, and which are still in hand, should be divided equally among all the legatees. *Idem*, 225

16. Executors who fail by their negligence to collect a debt due to their testator by bond under a penalty, the debtor being good for the money at the death of the testator, and continuing good for fourteen years, when he fails, are chargeable with the principal and the interest thereon up to the time of the failure of the debtor; but they are not chargeable with interest since that time. But see now Code of 1849, ch. 132, s. 6.

Chapman's admr's v. *Shepherd's adm'r & als.*, 377

17. Under the act of February 16, 1828, Sup. R. C. 217, it was the duty of the fiduciary to return to the court the settlement of his account made by the commissioners in the time prescribed, or to see that the commissioners returned it; and if this was not done he forfeited his commissions. *Idem*, 377

18. In 1849 a suit is brought against the administrators of an executor for the settlement of his account of the administration of his testator's estate. The account is brought down to October 1851, when a large sum of principal and a large sum of interest is found due from the executor. In stating the accounts with the legatees the principal and interest is not to be aggregated, and interest charged upon the whole against the executor; but interest is only to be charged

upon the principal up to the date of the decree disposing of the fund, and then upon the whole fund from that date. *Idem*, 377

19. Though the bill does not surcharge and falsify the accounts of the executor settled before the commissioners, yet as there were errors on the face of these accounts, and they did not purport to be final or to embrace all the transactions of the executor, it was proper to refer the accounts to a commissioner, to be settled and adjusted. *Idem*, 377

20. If any charge against the executor, which was not in his settled account, is produced before the commissioner, the administrators of the executor may make any explanation thereof or defence thereto by affidavit, which will have the effect of an answer. *Idem*, 377

21. If no objection is made by the
690 *defendants, before the commissioner, to the proceeding, and a fair and full investigation is had, no objection to the proceeding can avail before the appellate court. *Idem*, 377

FELONIES.

1. All offences for which the penalty is confinement in the penitentiary are felonies, and the indictment for such an offence must describe it as having been done feloniously. *Randall's case*, 644

FIDUCIARIES.

1. See *Executors and Administrators*, No. 17, 18, 19, 20, and

Chapman's adm'rs v. *Shepherd's adm'r & als.*, 377

GUARDIAN AND WARD.

1. The chancery courts of this State having always had the power to appoint guardians, the power is not taken from them by the statute, ch. 129, § 11 of the Code of 1849. *Durrett* v. *Davis' guardian & als.*, 302

2. But if the chancery courts have no power to appoint guardians in the first instance, but only to remove and appoint, yet, when they have appointed, the validity of the appointment cannot be questioned in a collateral proceeding. No other court, unless it be an appellate tribunal, is authorized to examine the records to ascertain whether the occasion was one for the exercise of the power. *Idem*, 302

HUSBAND AND WIFE.

1. Testator says: All the rest and residue of my estate, of whatsoever nature, kind or description, not hereinbefore disposed of, including all my slaves, &c., on the death or marriage of my wife I give to my daughter E G and her children, including her child by her first husband R, to and for her and their sole and separate use and benefit, and not to be subject to or liable in any way whatsoever for the debts of her husband H G. At the time of the will the oldest child of E G was twenty years old; the two daughters and two sons by her last marriage were infants of ten years and under. The property left to the grandchild is not left to her exclusive use and benefit so as to defeat the marital rights of her husband. *Buck & als.* v. *Wroten and wife*, 250

2 Courts of equity will not deprive the husband of his rights at law, unless the words relied upon to create a separate estate, of themselves leave no doubt of the intention to exclude him. *Idem*, 250

3. It is settled law in this State, that if a married woman relinquishes her claim for dower on the faith of a settlement of other property made by her husband, or even if she make the relinquishment under a mere promise that other property shall be settled upon her as a compensation, in either case such settlement in her favor will be held good to the extent of a just compensation for the interest so relinquished. *Burwell's ex'or* v. *Lumsden & als.*, 443

4. If the value of the property exceeds the value of the dower or other interest relinquished by the wife, the deed will be vacated as to the excess, and supported as to the residue. *Idem*, 443

5. In the absence of fraud, the settlement will not be disturbed unless it appears to be grossly excessive. *Idem*, 443

INDICTMENTS.

1. All offences for which the penalty is confinement in the penitentiary are felonies, and the indictment for such an offence must describe it as having been done "feloniously." *Randall's case*, 644

2. In an indictment for murder by poison it is not necessary to state that the accused knew the substance alleged to have been used in producing death was a deadly poison. *Thornton's case*, 657

INFANTS.

1. For sale of the lands of infants, see *Judicial Sales*, No. 1 to 10, and

Durrett v. *Davis' guardian & als.*, 302

691 *INSURANCE.

1. A policy of life insurance providing for the payment of annual premiums, under penalty of forfeiture of all payments and all interests in the policy for non-payment, is not such a contract of continuing performance as is abrogated by a state of war, when the underwriter is a citizen of one of the hostile communities and the insured is a citizen of the other. It is not abrogated, but merely suspended.

Mutual Benefit Life Ins. Co. v. *Atwood's adm'x*, 497

2. In 1846 A insured his life for the benefit of his wife S. S died in about two years, and A married again, and continued to pay the premiums on the policy for thirteen years after the death of S. when he died. His administratrix is entitled to recover the money due on the policy for the benefit of his estate. *Idem*, 497

3. The refusal of the agent of a New Jersey

insurance company to receive a premium which fell due during the war will not avoid the policy. *Idem*, 497

4. It is now settled law in Virginia that contracts of life insurance entered into before the late war are not abrogated, but only suspended by the war.

The N. Y. Life Ins. Co. v. *Hendren*, 536

5. In action on a life insurance policy issued in 1856, the jury found a verdict for the whole amount of the policy, with interest from February 1870. The person insured died in August 1862, and notice of his death was given December 2d, 1869. If the premiums after February 1861 were not paid, the interest on the policy from the time it should have been paid was more than the unpaid premiums, and therefore the verdict was not excessive. *Idem*, 536

6. In an action on a policy, the declaration omitted one of the conditions endorsed upon it; and on the trial when the policy is offered in evidence, it is objected to for the variance. The court may allow the plaintiff to amend the declaration by inserting the omitted condition, and proceed with the trial.

Idem, 536

INTEREST.

1. A bond on its face bears interest, and is secured by a deed of trust on land. The obligor and obligee live near each other, and within the Confederate States during the war; and sums about equal to the interest upon the bond are paid upon it annually until after the war. The bond is properly chargeable with interest during the war.

Crenshaw v. *Seigfried*, 272

2. When interest on bonds given for land in October 1862 will not be allowed. See *Contracts*, No. 13, and

Stearns v. *Mason*, 484

JAMES RIVER AND KANAWHA COMPANY.

1. The act of March 1st, 1867, entitled "an act to authorize the James River and Kanawha Company to borrow money," though when accepted by the company it creates a contract between the company and the State, does not create a contract between the company and the holders of the $180,000 of State bonds therein mentioned; and a holder of one of these bonds cannot maintain an action thereon against the company.

Stuart v. *James River and Kan. Co.*, 294

2. Though the company has executed a mortgage on its property to secure the money authorized to be borrowed by said act, yet if the company has not borrowed the money or made use of the bonds intended to be secured by the mortgage, it cannot be held to have accepted the terms of the act, or become liable under its proviso, in relation to said $180,000 of State bonds. *Idem*, 294

JUDGMENTS.

1. Equity will only relieve against a judgment at law, if the omission of the defendant to avail himself of his defence at law was unmixed with any negligence in himself or his agents.

Richmond Enquirer Co. v. *Robinson & als.*, 548

2. When negligence of an officer of a corporation will exclude relief to the corporation against the judgment. *See *Equitable Jurisdiction and Relief*, No. 8, and 692 *Idem*, 548

JUDICIAL SALES.

1. There has been a sale of the land of an infant under the decree of the proper court in 1860, and a payment of the purchase money. In 1870 the infant, by his next friend, files his petition in the cause to set aside the decree and sale, on various grounds. HELD:

1. Although a purchaser at a judicial sale may be required to see to the regularity of the proceedings upon which the jurisdiction of the court is founded, he is not bound to investigate the truth of the matters stated in the bill and deposed to by the witnesses, touching the estate owned by the infant. His title cannot be affected because the case made by the record happens not to be warranted by the facts.

Durrett v. *Davis' guardian & als.*, 302

2. The guardian of an infant who brought the suit is one of the persons who would be entitled to the estate if the infant died under age, and he is not a party as such. At the same term at which the decree for the sale of the land was made the guardian resigned his guardianship, and it was ordered that the suit abate as to him, and that it should proceed in the name of the second guardian, who had qualified. At the sale of the land the first guardian became the surety of the purchaser of the land for the purchase money. He could never be heard to impeach the decree or the title acquired under it. But if he could, though the purchaser might object, the infant cannot object because the purchaser has not acquired a good title.

Idem, 302

3. The answer filed by the guardian *ad litem* of the infant purports to be the answer of the infant by his guardian *ad litem*; but it is signed by the latter. It is the opinions, statements and responses of the guardian that are given; and it has the same effect as if it had been designated and filed as the answer of the guardian in his proper person. *Idem*, 302

4. The decree reciting that the cause came on to be heard upon the answer of the guardian *ad litem*, it will be presumed that the answer was sworn to, though there is not now any evidence of the fact in the record. *Idem*, 302

5. The statute requires that the bill shall be verified by the oath of the guardian of the infant. Though it may be most regular that this should be done when the bill is filed, this is not indispensable, and it is

sufficient if it is sworn to at any time before the court acts upon it and decrees a sale.
Idem, 302

6. The decree reciting that the cause came on as to the defendants who had not answered, upon the return of the subpœnas executed, it will be presumed that the bill was filed at the proper time.
Idem, 302

7. It is no valid objection to the proceedings, that the depositions were taken before the same person as commissioner who was guardian *ad litem* of the infant.
Idem, 302

8. It is no objection to the proceedings, that the dower of the widow in the land was not laid off, or provided for before the sale; the widow having answered and assented to it. *Idem*, 302

9. In determining whether the sale was a beneficial one for the infant, we must look to the circumstances as they existed at the time it was made, and not to subsequent events. *Idem*, 302

10. That the guardian of the infant was appointed by the Chancery court is no objection to the proceedings. The power to appoint is not taken from the Chancery court; and if it was, that court having the power to remove and appoint, the validity of the appointment cannot be questioned in a collateral proceeding.
Idem, 302

11. In August 1860 D, as commissioner, sold land to M on a credit of one, two and three years. In October 1861, on the application of M, the court authorized him to deposit in the B bank the amount
693 of his first *and second bonds; which M does. D afterwards collects the third bond and deposits in the same bank, and reports it to the court; and his report is afterwards confirmed. The court must be presumed to have known, when the reports were confirmed, that the deposits were made in Confederate money, and neither M nor D are liable to repay the money so deposited.
Mead v. *Jones & als.*, 347

JURORS.

1. If a person has the constitutional qualifications of a voter, though he has not been registered and has not voted, he is a qualified juror. *Craft's case*, 602

2. As to summoning jurors out of the county for a criminal trial in a corporation court. See *Criminal Jurisdiction and Proceedings*, No. 5, 6, 7, 8, 9, and *Idem*, 602

LANDLORD AND TENANT.

1. See *Church Property, passim.*

2. When tenants disclaim to hold of their landlords, no notice to quit is necessary to entitle the landlords to maintain an action to recover the premises.
Allen & als. v. *Paul & als.*, 332

LARCENY.

1. A was standing in a street in R, holding six dollars in his open hand, which he was counting, and J passing by took the money out of his hand and walked off; no force being used beyond what was necessary to withdraw the money. A asked J for it several times as she walked off, but she would not return it. This is grand larceny under the statute, if done *animo furandi*. Sess. Acts 1866-67, ch. 283, s. 14.
Johnson's case, 555

2. The indictment against J is for stealing six dollars of "United States treasury notes." Upon an exception to the refusal of the court to grant J a new trial, the certificate of facts states that A was holding "some money," &c. The facts certified do not sustain the verdict. *Idem*, 555

3. Upon an indictment for larceny, proof that the accused obtained money by false pretenses will sustain the indictment.
Anable's case, 563

4. A was the secretary of the board of supervisors of the county of H, and there was to his credit on the books of the treasurer, for claims held by him against the county, $1,649. Blank warrants signed by the chairman of the board were left with him, and he filled up and sold warrants to a considerably larger amount than the sum due to him. Warrants to near the amount due are registered, and among these one for $350, sold to W; but there were other warrants sold before the one sold to W, and if they had been registered before W's the fund would have been exhausted, and would have left nothing to be applied to W's warrant. Upon an indictment of A for the larceny of the check given by W for payment of the warrant: *Held:* The warrants are to be paid in the order in which they are registered, and there being sufficient to pay W's warrant as well as all the warrants registered before it, A is not guilty of the larceny of W's check. *Idem*, 563

5. For proceedings before a justice on a trial for petit larceny, and upon appeal to the County court, see *Criminal Jurisdiction and Proceedings*, No. 12, 13, 14, 15, and
Read's case, 618

LEGACIES AND LEGATEES.

1. In July 1872 an executor sells real estate at public auction for Confederate money; and the sale is sustained as proper. Some of the legatees who are to receive the money live in the State, and others live in Missouri; and the executor pays to the resident legatees their shares of the estate sold. These were rightful and proper payments, and cannot be recalled at the suit of the non-resident legatees.
Staples & als. v. *Staples & als.*, 225

2. Under an order of the court the executor deposited in a savings bank the shares of the non-resident legatees in their names. The executor committed no breach of trust by retaining in his hands, as he did, their

shares, and in depositing the same in the savings bank under the order of the court, as he did; and incurred no liability in
694 *regard to the same, except for the depreciation of the money so deposited between the time it ought to have been so deposited and the time it was actually deposited. *Idem*, 225

3. The loss arising from the depreciation of the portions retained by the executor and deposited in the savings bank for the non-resident legatees, as aforesaid, ought to fall on them alone, and not on all the legatees equally, including those residing in the State. *Idem*, 225

4. The proceeds of the sale of property made since the war, and which are still in hand, should be divided equally among all the legatees. *Idem*, 225

5. How advancements are to be valued. See *Advancements*, No. 1, and

Puryear & als. v. *Cabell & als.*, 260

6. O married M, who owned fifty shares of Clover Hill railroad stock. By a resolution of the company, the fifty shares is made seventy, and a certificate for the whole is issued to O. O having no children, makes his will, and after giving to his wife his whole estate for her life, says: "I give to her in fee her Clover Hill stock." HELD: Looking to all the provisions of the will and the surrounding circumstances, M took the seventy shares of stock.

Osborne v. *Osborne's ex'or*, 392

LIENS.

1. When a decree, though reversed by the Court of appeals, will be still held to be a lien. See *Executors and Administrators*, No. 3, and

Moss & wife & als. v. *Moorman's adm'r & als.*, 97

LIMITATIONS—STATUTE OF.

1. Under the circumstances, bonds of P, paid off by M and held by him, continue to be bond debts, and not barred by the statute of limitations.

Moss & wife & als. v. *Moorman's adm'r & als.*, 97

MANDAMUS.

1. A holder of old State bonds, entitled to have them transferred and funded, may proceed by *mandamus* to compel the 2d auditor to transfer and fund them; his act in doing so being merely ministerial.

Robinson v. *Rogers*, *2d auditor*, 319

MILL DAMS.

1. In an action by F against B, for injury to his land by B's continuing a dam across a stream which had been erected by a previous owner, the defence of B is, that of adversary possession by him, or those under whom he claims, for more than twenty years. To rebut the presumption arising from the possession, F may prove what passed between his agent and M, a former occupant of the premises of B, showing that the agent of F denied the right of M to raise the dam, and that M asked it as a privilege for a short time.

Field v. *Brown & al.*, 74

2. Proof of adversary possession for twenty years, such as would create the presumption of a grant, is only presumptive, and not conclusive, and may be rebutted by evidence showing that the adversary use and enjoyment relied on was not acquiesced in, but the right thereto was contested; and any evidence tending to show such resistance is proper evidence to rebut the presumption. *Idem*, 74

3. To rebut the defendant's evidence of adversary possession for twenty years, under such circumstances as would give him a prescriptive right to a dam across a stream, the record of a suit by the plaintiff against the administrator of a former owner of the premises, under whom the defendant claims, brought within twenty years from the date of the raising of the dam, for the injury sustained by the same, and in which the plaintiff recovered damages, is competent evidence for the plaintiff. *Idem*, 74

4. Instructions asked by the plaintiff, based upon the assumption that there can be no legal dam across a water-course unless established by legal proceedings under the act of assembly, ignoring entirely rights acquired by actual grant, by permission and by presumptive right derived from long use and enjoyment, when there is any evidence in respect to such rights, were properly refused. *Idem*, 74

695 *5. The fact that a dam was built in 1824 by G, and from that time he and those claiming under him have claimed and held the possession and use thereof, and of the water-power of the stream afforded by said dam used in working the mill for the use of which it was built, adversely and uninterruptedly as to the plaintiff and those under whom he claims, for twenty years from the building of the dam, is not conclusive of the right of the defendant to continue said possession and use of said dam and mill; but is only presumptive, and may be rebutted by circumstances. *Idem*, 74

6. In 1824 G built a dam across H river, and that did the land of F on H, above the dam, no injury. But in 1845 G raised his dam, and that did injure the land of F. F sues B, who claims under G, for continuing the dam to the injury of his land, and in his declaration recites that G erected the dam without authority of law. Under this declaration F may prove that the dam was raised in 1845, and the injury to his land done by raising it. *Idem*, 74

MORTGAGES.

1. What is not a conditional sale, but a mortgage. See *Confederate Contracts*, No. 4, and *Earp* v. *Boothe*, 368

MURDER.

1. See *Criminal Jurisdiction and Proceedings*, No. 20, 21, 22, 23, 24, and

Thornton's case, 657

2. In an indictment for murder by poison it is not necessary to state that the accused knew the substance alleged to have been used in producing death was a deadly poison. *Idem*, 657

3. On an indictment for murder by poison, to an enquiry by the jury whether, if they believed from the evidence that the prisoner did administer the poison with intent to kill her husband, and that he died from it, can we find her guilty of any thing less than murder in the first decree. The answer must be in the negative. *Idem*, 657

PAROL EVIDENCE.

1. When not admissible in action on a note. See *Evidence*, No. 1, and
Ruckman & al. v. *Lightner's ex'ors*, 19

2 When parol evidence may be introduced in an action by a high sheriff against his deputy and his sureties, to prove the deputy was present and aided in the defense of the action against the high sheriff. See *Sheriffs*, No. 5, and
Crawford & als. v. *Turk, sheriff*, 176

3. When parol evidence is admissible to prove the consideration of a bond, and the character of the contract. See *Contracts*, No, 11, and
Wrightsman v. *Bowyer & al.*, 433

4. Though in a sale of real estate in October 1862, the price is fixed with reference to Confederate States treasury notes, it may be shown by parol evidence that the deferred payments were not to be discharged in that currency. *Stearns* v. *Mason*, 484

PLEADING—AT COMMON LAW.

1. As to pleas in cases of equitable defences. See *Equitable Defences*, No. 1, and
Burtners v. *Keran*, 42

2. If a defendant pleads several distinct matters of defence in one plea, the plaintiff may reply generally to it; the defendant being guilty of the first fault.
O'Bannon & al. v. *Saunders*, 138

3. In ejectment what is sufficient description of the land in the declaration. See *Ejectment*, No. 1, and
Hawley v. *Twyman, trustee*, 516

PRACTICE—AT COMMON LAW.

1. A *scire facias* upon a recognizance is made returnable to the term of the court. It is properly placed upon the docket at that term.
Bolanz & al. v. *Commonwealth*, 31

2. Prisoner charged with a felony in the County court, appears at the August term, and on his motion his case is continued until the first day of the October term; passing over the September term. This is not error. *Idem*, 31

696 *3. Prisoner is indicted for embezzlement, which is a felony, and he is admitted to bail. The recognizance is conditioned for his appearance to answer an indictment for embezzlement. The *scire facias* upon the recognizance recites it, that he was to appear "to answer of a certain felony whereof he stands accused." This is not a variance. *Idem*, 31

4. The fact that after the recognizance was executed by his sureties, the prisoner was appointed a deputy United States marshal, and continued to act as such until the time for his appearance in court, does not relieve his sureties in the recognizance from their liability. *Idem*, 31

5. In an action upon a warranty, if fraud in the procurement of the warranty is not put in issue before the jury, though evidence of the fraudulent representations has been introduced without objection, the court, on the motion of the plaintiff, may properly instruct the jury to disregard it.
Burtners v. *Keran*, 42

6. If a defendant pleads several distinct matters of defence in one plea, the plaintiff may reply generally to it, the defendant being guilty of the first fault.
O'Bannon & al. v. *Saunders*, 138

7. What variance between the pleadings and the proofs may be cured by amendment, according to the Code of 1860, ch. 177, s. 7.
Beasley v. *Robinson & als.*, 325

8. In an action on a policy of insurance the declaration omitted one of the conditions endorsed upon it; and on the trial when the policy is offered in evidence it is objected tc for the variance. The court may allow the plaintiff to amend the declaration by inserting the omitted condition, and proceed with the trial.
New York Life Ins. Co. v. *Hendren*, 536

9. Instructions are asked by the defendant, and refused by the court. As whether correct or not, the plaintiff was entitled to recover upon the evidence in the record, independent of that referred to in the instructions, the refusal to give them is not ground for reversing the judgment. *Idem*, 536

10. See *Mill Dams*, No. 6, and
Field v. *Brown & al.*, 74

PRACTICE—IN CRIMINAL CASES.

See *Criminal Jurisdiction and Proceedings*, *passim*.

PRACTICE IN CHANCERY.

1. See *Equitable Jurisdiction and Relief*, No. 4, 5, 6, and
Crenshaw v. *Seigfried*, 272

2. See *Judicial Sales*, No. 1 to 10, and
Durrett v. *Davis' guardian & als.*, 302

3. When objections not taken before a commissioner or in the court below, will not avail in the appellate court.
Chapman's adm'rs v. *Shepherd's administrator & al.*, 377

PRESUMPTIONS.

1. By what evidence a presumption of title from length of possession may be rebutted. See *Mill Dams*, No. 1, 2, and
Field v. *Brown & als.*, 74

2. A presumption of a grant from twenty years' adversary possession, is only presumptive, and not conclusive and may be rebutted by evidence showing that the adversary possession was not acquiesced in.
Idem, 74

3. Where a bond for purchase of land was executed March 30th, 1863, payable in two years, in the absence of anything on the face of the bond to indicate the kind of money in which it was to be paid, under the statute there is no presumption of law on the question. The only presumption is a presumption of fact from the circumstances proved; and is a question for the jury.
Effinger v. *Kenney, trustee*, 116

4. When it will be presumed a foreign court had jurisdiction to decide a cause. See *Evidence*, No. 3, and
Burtners v. *Keran*, 42

5. When an execution is placed in the hands of a sheriff, the presumption of law is, that he has levied it and made the money; and in the absence of evidence that he did not levy it, he and his sureties will be liable for the debt to the creditor.
O'Bannon & al. v. *Saunders*, 138

6. What presumption will be made against a sheriff and his sureties as to
697 *the time he received money. See *Sheriffs*, No. 3, and
Idem, 138

PRINCIPAL AND AGENT.

1. Neither the declarations of a man nor his acts can be given in evidence to prove that he is the agent of another.
Poore v. *Magruder*, 197

PROMISSORY NOTES.

1. A note given by an agent of the Confederate States government, and binding himself for the price of cattle purchased for the support of the armies of that government, and for the purpose of aiding in carrying on the war against the United States, is a valid contract, and may be enforced against the obligor, after the end of the war.
Ruckman & al. v. *Lightner's ex'ors*, 19

2. R executes his promissory note to L, by which he promises to pay L a certain sum of money. There is nothing on the face of the note to indicate that R was acting as agent, or what was the consideration of the note. Parol evidence is not admissible to prove that R was acting as the agent of the Confederate States government, and that the note was given for the price of cattle purchased for that government. *Idem*, 19

PUBLIC LAW.

1. During the war neither the law of the United States nor any policy of their government was in force in any part of the Confederate States not in the possession or under the control of the United States.
Bier & Mann v. *Dozier*, 1

PURCHASERS FOR VALUE, &c.

1. See *Trusts and Trustees*, No. 3, *Vendor and Purchaser*, No. 12, *Registry*, No. 1, and
Briscoe v. *Ashby & als.*, 454

RAPE.

1. In a prosecution for rape the verdict and judgment of the court of trial set aside by the appellate court, on the ground that the evidence did not sustain the verdict.
Boxley's case, 649

2. The prisoner entitled to a new trial on the ground of surprise; the testimony of the principal witness, as given in court, varying materially from that given before the committing justice; and the justice, who was a physician, having been called away at the time of the trial. *Idem*, 649

RECORDS.

1. Where a suit in another State has been proceeded in against an absent defendant, according to the laws of that State, the record of the suit is evidence against such absent defendant, though he had no notice of the suit. *Burtners* v. *Keran*, 42

2. In this case the suit was in equity in relation to the title to land. The court being a court of general jurisdiction, this court must presume that the foreign court had jurisdiction to try the cause in equity; and the record cannot be objected to as evidence on that ground. *Idem*, 42

3. What record may be introduced in evidence to rebut the presumption arising from twenty years' adversary possession. See *Mill Dams*, No. 3, and
Field v. *Brown & al.*, 74

REGISTRY.

1. Land held in trust for A and her children in F county is sold under the decree of the Circuit court of F, and the proceeds directed to be invested in land in C county. J, the trustee, buys land in C, sold under a decree of the Circuit court of C, and pays for it by the proceeds of the land in F, except a small amount, which is unpaid; and this purchase is approved by the F court. J purchased the C land in his own name, and without its being conveyed to him he sold and conveyed it to T, who paid him for it; and T sold and conveyed it to B. A and her children petitioned the C court to have the land conveyed to them. T and B claimed as purchasers for value without notice. HELD:

1. Mrs. A and her children, claiming under the decree of the F court, the case
698 does not come within the *registry act, Code of 1860, ch. 119, s. 4 and 5; and the decree not necessary to be recorded in C, to protect them against the claim of T and B, claiming to be purchasers for value without notice.
Briscoe v. *Ashby & als.*, 454

2. Nor is the decree of the F court such a decree as is required to be recorded by the 1st and 8th sections of ch. 186, Code of 1860. *Idem*, 454

3. Nor does the 5th section of said ch. 186, which requires a *lis pendens* to be recorded, apply to the decree in the F suit.
Idem, 454

RICHMOND.

1. See *Dedication to the Public*, No. 1, and *City of Richmond* v. *Poe, trustee*, 149

SCALING DEBTS.

1. R executes to M his bond for $3,000, bearing date the 11th of July 1862, payable on demand. In a deed of trust given at the same time by R to secure the debt, it is provided that if R will pay punctually the interest semi-annually the debt shall not be collected for five years. R pays the interest until July 1864. *Held*: The bond being payable on demand, the provision in the deed for time does not change its character in that respect; and it must be scaled as of its date.
Moon v. *Richardson*, 219

2. Though debtor allowed three years to pay a debt, yet if he had the right to pay it at any time, it is to be scaled as of its date.
Earp v. *Boothe*, 368

3. How debts to be scaled. See *Contracts*, No. 11, 12, 13, and *Stearns* v. *Mason*, 484

SCIRE FACIAS.

1. A *scire facias* upon a recognizance is made returnable to the term of the court. It is properly placed upon the docket at that term.
Bolanz & al. v. *Commonwealth*, 31

2. Prisoner is indicted for embezzlement, which is a felony, and he is admitted to bail. The recognizance is conditioned for his appearance to answer an indictment for embezzlement. The *scire facias* upon the recognizance recites it, that he was to appear "to answer of a certain felony whereof he stands accused." This is not a variance.
Idem, 31

SERGEANTS OF CORPORATIONS.

1. During the recess of a Corporation court, the sergeant appoints a deputy without the consent in writing of the judge of the court; but the deputy takes the oath of office before the judge, which is in writing and signed by the deputy, and is certified in writing by the judge. This is a sufficient consent in writing by the judge, and the deputy has authority to execute a *venire facias* directed to his principal. *Craft's case*, 602

SHERIFFS.

1. When an execution is placed in the hands of the sheriff, the presumption of law is, that he has levied it and made the money; and in the absence of evidence that he did not levy it, he and his sureties will be liable for the debt to the creditor.
O'Bannon & al. v. *Saunders*, 138

2. If the sheriff fails to levy the execution when he might do it, he and his sureties are liable for the debt. *Idem*, 138

3. Execution is issued in June 1860; and the sheriff does not return it until 1868, after suit is brought against him and his sureties: when he returns that he received the money in 1861 or 1862. A law to stay the levy of executions, and directing that where levied at the time the sheriff should restore the property to the debtor, was passed in July 1861. The court will presume, against the sheriff and his sureties, that the money was received on the 1st of January 1861.
Idem, 138

4. In an action by an execution creditor against a high sheriff, for the failure of his deputy to pay over money made on the execution, the deputy is present at the trial and examined as a witness, but there is a verdict and a judgment for the plaintiff. In a subsequent action by the high sheriff against
699 the deputy and his sureties, on *their bond with condition to indemnify the high sheriff from all loss and damages from the conduct of the deputy in said office, the judgment against the high sheriff, in the absence of fraud and collusion, is conclusive evidence of the default of the deputy against not only the deputy, but also his sureties.
Crawford & als. v. *Turk, Sheriff*, 176

5. Though the declaration in the action by the high sheriffdoes not allege that the deputy was requested to defend the suit against the high sheriff, or had an opportunity of doing so, or had notice thereof, his presence at the trial and being active in the defence may be proved by oral testimony.
Idem, 176

6. The County and Corporation courts have authority under the act, Code of 1860, ch. 49, § 2, to require the sheriff of the county or the sergeant of the corporation, who is collector of taxes assessed therein, to execute a second bond in a larger penalty and with other sureties.
Corprew & als. v. *Boyle & als.*, 284

7. Where an estate is committed to a sheriff or sergeant, and he receives assets before the second bond is executed, and his accounts are settled after the execution of the second, showing a balance in his hands, the securities in both bonds are liable for it.
Idem, 284

SLAVES.

1. The case of *Henderlite* v. *Thurman*, 22 Gratt. 446, approved and sustained.
Rives v. *Farish's adm'r*, 125

2. R owning slaves in A county, within the Confederate lines, in January 1864 sells them to P, and takes his bond for them, payable when R should demand it. In August 1865 R took the amnesty oath prescribed by President Lincoln, with the conditions expressed in the proclamation of December 8th, 1863, and in the same year, as one owning $20,000 of property, he obtained a special pardon from President Johnson under his proclamation of May 29th, 1865, with its conditions, and took the oath prescribed in it. In suit upon this bond by R against P. *Held:*
1. The slaves not being within the Fed-

eral lines, were not emancipated by President Lincoln's proclamation, even if that was a valid act. *Idem*, 125

2. The contract being valid when made, however conclusive the effect as an estoppel the pardon and oath of R, P is not bound by it, and therefore cannot obtain any benefit from it. *Idem*, 125

3. The conditions attached to the pardon were not intended to require an admission from R that his slaves had become free in any particular way, or under any special law or proclamation. *Idem*, 125

4. President Lincoln's proclamation only affected slaves under the Federal control; and as the slaves of R were not under that control, R's pardon and oath cannot create any obligation on him to maintain or agree that these slaves were under Federal control, and emancipated by that proclamation. *Idem*, 125

3. Slaves within the Confederate lines were not freed by the proclamation of President Lincoln, and were slaves in January 1865.

Puryear & als. v. *Cabell & als.*, 260

STATE BONDS.

1. The act of March 7, 1872, which repeals the act of March 30th, 1871, so far as it authorizes the issue of coupon bonds with coupons attached, receivable for taxes and other dues to the State, is constitutional, so far as it applies to bonds not presented to the 2d auditor before the passage of the repealing act.

Wise Bro., &c., agents, v. *Rogers*, 2d *aud.*, 169

Maury & Co. v. *Rogers*, 2d *aud.*, 169

2. The obligations created in the name of the State of Virginia by the general assembly which sat in Richmond, at its session in 1861-62, are embraced by article 10, s. 10, of the Constitution of Virginia; which forbids that any provision shall be made for their payment.

Meredith and others v. *Rogers*, 2d *aud.*, 172

3. In 1862 the general assembly 700 *passed an act which authorizes the issue of $200,000 of State bonds to the James River and Kanawha Company. These bonds were received by the company and sold during the war to third persons. They are not embraced in the act of March 30th 1871, which authorizes the investing of two-thirds of the amount of bonds of the State in coupon bonds with coupons attached receivable for taxes and other dues to the State. *Idem*, 172

4. The holders of bonds of the State issued before the war to the Kanawha board of the James River and Kanawha Company, under s. 9 of the act of March 3d, 1860, is entitled to have them transferred upon the books of the 2d auditor, and funded under the provisions of the act of March 30, 1871, as amended by the repealing clause of the act of March 7, 1872, entitled an act declaring what shall be received in payment of taxes, &c.

Robinson v. *Rogers*, 2d *auditor*, 319

5. The proceeding by *mandamus* is the proper proceeding to compel the 2d auditor to transfer and fund said bonds; his act in doing so being merely ministerial. *Idem*, 319

6. The act of March 18, 1862, passed by the Richmond government, in relation to said bonds, was temporary in its character, and has been repealed by implication. *Idem*, 319

STATUTES.

1. The act, Code of 1860, ch. 172, § 5, in relation to equitable defences construed in

Burtners v. *Keran*, 42

2. President Lincoln's emancipation proclamation, construed in

Rives v. *Farish's adm'r*, 125

3. The act of March 7, 1872, which repeals the act of March 30th, 1871, in relation to investments in coupon bonds, construed in

Wise Bro., &c., agents, v. *Rogers*, 2d *aud.*, 169

4. The act of 1861-62, authorizing the issue of bonds to the James River and Kanawha Co., held within article 10, § 10, of the Constitution of Virginia, and not within the act of March 30th, 1871, in relation to investments in coupon bonds.

Meredith & others v. *Rogers*, 2d *aud.*, 172

5. The act, Code of 1860, ch. 49, § 2, in relation to sheriffs and sergeants giving bonds, construed in

Corprew & als. v. *Boyles & als.*, 284

6. The act, Code of 1849, ch. 129, § 11, in relation to the appointment of guardians, construed in

Durrett v. *Davis' guardian & als.*, 302

7. The act, Code of 1860, ch. 119, s. 4, 5, and ch. 186, s. 1, 8, in relation to the registry of decrees, and Id. s. 5, in relation to *lis pendens*, construed in

Briscoe v. *Ashley & als.*, 454

8. The act, Sess. Acts, 1866-67, chap. 283, s. 14, in relation to larceny from the person, construed in *Johnson's case*, 555

9. The act, Sess. Acts 1869-70, ch. 179, s. 10, in relation to the county treasurer, construed in *Anable's case*, 563

10. The act of October 7, 1870, amending s. 1, ch. 12, Code of 1860, is unconstitutional.

Cullen's case, 624

SURETIES.

1. For the liability of sureties of a sheriff, for his failure to pay over money collected on execution or to levy, and the presumptions that will be made against them, see *Sheriffs*, No. 1, 2, 3, and

O'Bannon & al. v. *Saunders*, 138

2. A judgment against a high sheriff for the default of his deputy, held to be conclusive against the deputy and his sureties.

Crawford & als. v. *Turk, sheriff*, 176

3. The presence of the deputy and his being active in the defence of the action

against the high sheriff may be proved by oral testimony. *Idem*, 176

4. When sureties in a bond bound, though signed upon a condition which is not complied with. See *Bonds*, No. 4, and

Nash v. *Fugate & als.*, 202

5. A sergeant of a corporation having been required to give a second bond in a larger penalty, and an estate having been committed to him and assets received by him before the second bond is executed, and upon a settlement of his account afterwards there is found to be a balance in his
701 *hands; the sureties in both bonds are equally responsible for it.

Corprew & als. v. *Boyle & als.*, 284

6. What will not relieve sureties in recognizance of bail from their liability. See *Practice at Common Law*, No. 4, and

Bolanz v. *Commonwealth*, 31

TRUSTS AND TRUSTEES.

1. When the trustees in a deed recorded in the clerk's office in Richmond have died or removed out of the State or refuse to act, the Circuit court of the city of Richmond has jurisdiction to appoint a trustee in the place of such trustees. See ch. 155, § 4, and ch. 174, § 8, Code of 1873.

Hunter's ex'x v. *Vaughan & als.*, 400

2. The grantor and one of the trustees in a deed are dead, and the other trustee has removed out of the State. On the motion of the creditors secured by the deed, for the appointment of a trustee to execute the trust, it is sufficient to give notice to the personal representative of the grantor, and of the deceased trustee and to the surviving trustee; and it is not necessary to give notice to a subsequent purchaser from the grantor, or his personal representative if he is dead.

Idem, 400

3. Land held in trust for A and her children, in F county, is sold under the decree of the Circuit court of F, and the proceeds directed to be invested in land in C county. J, the trustee, buys land in C, sold under a decree of the Circuit court of C, and pays for it by the proceeds of the land in F, except a small amount, which is unpaid; and this purchase is approved by the F court. J purchased the C land in his own name, and, without its being conveyed to him, he sold and conveyed it to T, who paid him for it; and T sold and conveyed it to B. A and her children petitioned the C court to have the C land conveyed to them. T and B claimed as purchasers for value without notice. *Held:* The equity of Mrs. A and her children being prior in time to that of T and B, A, &c., are entitled to the C land as against them, though they purchased *bona fide* for value, and without any notice of A's equity.

Briscoe v. *Ashby & als.*, 454

UNLAWFUL DETAINER.

1. See *Church Property, passim.*

VARIANCE.

1. See *Practice at Common Law*, No. 3, and

Bolanz & al. v. *Commonwealth*, 31

2. The addition to a name of jr. is no part of the name; and when a judgment is against B, jr., and in a suit against a sheriff for failing to make the money, the judgment is described as against B; this is no variance, and will not sustain the plea of *nul tiel* record.

O'Bannon & al. v. *Saunders*, 138

3. A notice is addressed by B to R, late sheriff, and his surviving sureties by name, survivors of themselves and James Sims. On the trial B introduces the bond, which is signed by R and all the surviving sureties; but it is objected to as evidence because the name described in the address of the notice of James Sims is written Jos. Sin. This is not a material variance, and the bond should be admitted as evidence.

Beasley v. *Robinson & als.*, 325

4. If it could be considered in a case of variance between the pleadings and the proofs it would have been such a one as might and ought to have been cured by an amendment according to the Code of 1860, ch 177, s. 7.

Idem, 325

VENDOR AND PURCHASER.

1. M dies in November 1861, and by his will directs a certain land to be sold. It is valued in December by commissioners at eight dollars per acre; and the administrator c. t. a. sells it within sixty days at private sale, the greater part at ten dollars and the rest at eight, and the purchaser pays the purchase money, some of it before it is due, and takes the receipts of the administrator for the payments; but the land is not conveyed to him. The parties act in good faith in the transaction. The sale is valid, and the purchaser is entitled to a conveyance of the land, without any conditions to be imposed upon him.

Moss & wife & als. v. *Moorman's adm'r & als.*, 97

702 *2. In an action of debt upon a bond given for the purchase of land at auction, it is not competent for the plaintiff to prove his declarations, not in the hearing of the defendant, prescribing different terms of sale from those set out in the published advertisement and announced on the day of sale, unless shown to have been communicated to him.

Effinger v. *Kenney, trustee*, 116

3. Where a bond for the purchase of land was executed in March 1863, payable in two years, in the absence of anything on the face of the bond to indicate the kind of money in which it was to be paid, under the statute there is no presumption of law on the question. The only presumption is a presumption of fact from the circumstances proved; and is a question for the jury. *Idem*, 116

4. See *Confederate Contracts*, No. 1, and

Idem, 116

5. An executor being vested with discretion as to the time of selling real estate, and he

acting in good faith, the sale made by him is valid, whether his judgment that a sale could then be made without a sacrifice was reasonable or not.
Staples & als. v. *Staples & als.*, 225

6. Even if the executor acted in bad faith, yet if the purchaser, at the sale had no knowledge of the fact, but acted in good faith in making and completing their purchases, they acquired a good title to the land purchased by them respectively. *Idem*, 225

7. The sales of real estate are made by the executor in July 1862 for Confederate money on the terms of cash for one-third, and the balance in one and two years. That the sale was made for Confederate money at that time and under the circumstances cannot affect the *bona fides* of the executor or the validity of the sales. *Idem*, 225

8. The fair mode of considering the prices paid for the property is, to estimate the value of the price in Confederate money as at the time of the sale. *Idem*, 225

9. The purchasers at the sale having in good faith paid the amount of the purchase money due by them, and the executor having in good faith received it and executed conveyances to them, they became entitled, in law and equity, to the property purchased by them respectively, and their title thereto cannot, therefore, be impeached.
Idem, 225

10. When purchaser at a judicial sale made in 1860 upon a credit of one, two and three years, paying the money into bank under an order of the court made in October 1861, having made the payment in Condederate money, will not be liable to repay it. See *Judicial Sales*, No. 11, and
Mead v. *Jones & als.*, 347

11. Among purchasers of an equity the prior in time is entitled. See *Trusts and Trustees*, No. 3, and
Briscoe v. *Ashby & als.*, 454

12. For the principles applicable to the doctrine of purchaser for value without notice, see the opinion of *Christian, J.*
Idem, 454

13. See *Contracts*, No. 11, 12, 13, and
Stearns v. *Mason*, 484

WARRANTY.

1. In fines, feoffments and other common-law recoveries, the warranty not only concluded the grantor or feoffer, but actually transferred the after-acquired estate to the grantee or feoffee.
Burtners v. *Keran*, 42

2. Conveyances under the statute of uses only pass such estate as the grantor had at the time; the warranty merely serving as a remedy, or operating to estop the grantor from denying the ownership of the estate at the time of the conveyance executed.
Idem, 42

3. If a person conveys land with general warranty, and does not own it at the time, but afterwards acquires the same land, such acquisition enures to the benefit of the grantee, because the grantor is estopped to deny, against the terms of his own warranty, that he had the title in question; but it does not operate actually to transfer the estate subsequently acquired. *Idem*, 42

4. K conveys land to B, with general warranty. B conveys to C with general warranty; and he afterwards conveys to K with general warranty; and K then obtains a conveyance of the interest of L, a prior
703 owner. *Though the deed from B to K enured to the benefit of C, under the operation of K's warranty to B, and estops K from claiming the land against C, it does not pass the interest in K or operate as a conveyance. *Idem*, 42

5. In such case though the estoppel of K's warranty operates in favor of C, B can derive no benefit from it. He cannot say that his deed vested no beneficial interest in K.
Idem, 42

6. Though an assignee can only take advantage of a covenant of warranty when an estate passes by the deed, yet it is, in favor of the grantee, a covenant in gross, and binds the warrantor though no estate passes by the deed. *Idem*, 42

7. In the case above, though the deed from B to K was fraudulent in its intent as to C, it was valid between the parties, and K may maintain an action against B upon the covenant of warranty. *Idem*, 42

8. In an action by K against B, upon the warranty in B's deed to K, the motives influencing K to take the deed from B cannot be the subject of enquiry before the jury to defeat or vary its legal operation and effect.
Idem, 42

9. In this case upon the pleas of *non est factum*, covenants performed, and covenants not broken, K is entitled to recover, though the jury may believe that the covenant in B's deed to K was executed by B, induced by the fraudulent misrepresentations of K as to the effect of said covenant. *Idem*, 42

WILLS.

1. Testator directs, that all my estate be sold as soon as the times seem to justify a sale without a sacrifice, and the proceeds, without regard to any advancement heretofore made, be equally divided among my children. The discretion as to the time of sale is given to the executor, and if he acts in good faith his sale is valid, whether his judgment that a sale could then be made without a sacrifice was reasonable or not.
Staples & als. v. *Staples & als.*, 225

2. See *Husband and Wife*, No. 1, and
Buck & als. v. *Wroten & Wife*, 250

WITNESSES.

1. The plaintiff in a cause is not a competent witness under the statute to prove the acts and declarations of a deceased person, under whom the defendants claim.
Field v. *Brown & al.*, 74

2. But when the question is whether such deceased person, in building a dam across a stream, injured the land of the plaintiff, the plaintiff is competent to prove the condition of his land, the character of the stream doing the injury, the effect of the dam on the stream and on the adjacent lands of the plaintiff, and other independent facts, as to which his testimony, if untrue, could be rebutted by others, as readily as by the deceased.
Idem, 74

3. The plaintiff's deposition having been taken, and the defendants having cross-examined him, they cannot have the questions and answers on cross-examination struck out, though they may refer to the acts and declarations of a deceased person under whom the defendants claim. *Idem*, 74

4. By the 8th section of the bill of rights of Virginia a person is not only secured against giving evidence against himself on his own trial, but he cannot be required on the trial of another to testify, if his evidence will tend to criminate himself.
Cullen's case, 624

5. Even if a person might be required to give evidence on the trial of another which might tend to criminate himself, if the statute afforded him a complete indemnity, by discharging him from all prosecution for the offence (of which *quære*), the act of October 7, 1870, amending § 1, ch. 12, of the Code of 1860, does not afford that indemnity; and therefore in requiring any person engaged in a duel to testify against another prosecuted for having fought, &c., such duel, is unconstitutional. *Idem*, 624

6. The fact that the witness has testified before the coroner, and stated the facts, does not deprive him of his privilege; and that having been done without being advised of his privilege, it is not a waiver of it by him.
Idem, 624

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

OF VIRGINIA.

BY PEACHY R. GRATTAN.

VOLUME XXV.

FROM APRIL 8, 1874, TO MARCH 1, 1875.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

R. C. L. MONCURE, PRESIDENT.

JOSEPH CHRISTIAN, FRANCIS T. ANDERSON,

WALLER R. STAPLES, WOOD BOULDIN.

Attorney General: RALEIGH T. DANIEL.

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CASES

DECIDED IN THE

Supreme Court of Appeals of Virginia.

Town of Danville v. Pace—Two cases.*

March Term, 1874, Richmond.

[18 Am. Rep. 663.]

Absent, BOULDIN, J.

1. **Statute—Retroactive Operation—Usury.**†—The act of March 22, 1873, Code of 1873, ch. 57, § 36, p. 544, in reference to the defense of usury by corporations, is retroactive in its operation before the passage of the act; and this, though suit has been brought upon such contract, before its passage. And the act is not in violation of the constitution of the United States or that of Virginia.

These were two actions on the case, brought in June 1868 in the Circuit court of the town of Danville, and afterwards removed to Richmond, by James B. Pace against the town of Danville, to recover interest due upon two certificates of debt issued by said town and purchased by said Pace. It appears that by *the order of the council of the town of Danville there was sold at public auction, in September 1863, $20,000 of the bonds or certificates of debt of said town, payable in ten and twenty years, and bearing interest at the rate of six per cent. per annum, payable semi-annually, and of these Pace purchased two of $3,000 each, for which he gave $12,000 in Confederate States currency. Interest was paid up to and including January 1st, 1865. In June 1873, the defendant demurred to the declarations, and pleaded non assumpsit, and, in July, offered two pleas setting up usury in the debts, which pleas were, upon the motion of the plaintiff, excluded by the court; and the defendant thereupon excepted.

2

There were judgments in the cases in favor of the plaintiff for the amount of the interest due prior to the institution of the suit; and the town of Danville thereupon applied to a judge of this court for a supersedeas in each of the cases, which was allowed.

Ould & Carrington, for the appellant.

F. L. Smith, Marshall and F. L. Smith, Jr., for the appellee.

Staples, J. The plaintiff in the court below, who is the defendant in error here, is the holder of four notes or certificates of indebtedness, executed by the town of Danville in 1863, amounting in the aggregate to twelve thousand dollars, and maturing ten and twenty years after date, with interest thereon, payable semi-annually. In the year 1868 the plaintiff instituted actions of trespass on the case in the Circuit court of Danville, for the recovery of the interest which had accrued upon these notes from the 1st *day of January 1865, to the 1st day of January 1868. The cases were subsequently removed to the Circuit court of Richmond. At the June term 1873 of that court, the defendant, in addition to the general issue, tendered two pleas of usury in writing, which, on motion of the plaintiff, were rejected; and the defendant excepted.

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After the rejection of these pleas, it was agreed by the parties that a jury should be waived, and all matters of law and of fact submitted to the court upon the facts agreed: whereupon the court rendered judgment for the plaintiff. To that judgment a writ of error was awarded by a judge of this court.

The chief, if not the only question for our determination, is the right of the town of Danville to rely upon the defence of usury in these actions. The decision of that question depends upon an act passed March 22d, 1873, and found in the Revised Code of 1873, page 544. It is in these words: "No corporation shall hereafter interpose the

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***For monographic note on Municipal Corporations, see end of case.**

†See subsection K in the analysis of the monographic *note* on "Usury" appended to Coffman & Bruffy v. Miller, 26 Gratt. 698. See also, Ewell v. Daggs, 2 Sup. Ct. Rep. 413, 108 U. S. 143, where the principal case is cited and approved upon the point embraced in the headnote.

Effect of War upon the Identity of a City.—In Dinwiddie County v. Stuart, Buchanan & Co., 28 Gratt. 551, the court says, referring to the principal case, "The bonds, the subject of the controversy, were issued by the town of Danville during the war. Judgment was given upon these bonds after the war, which was affirmed by this court. It was never suggested by court or counsel that there was any 'want of identity' between Danville during the war and Danville after the war." Citing also, Miller & Franklin v. City of Lynchburg, 20 Gratt. 330.

Statutes—Retrospective Effect.—See Price's Ex'or v. Harrison's Ex'or, 31 Gratt. 115, and *note* for a collection of the Virginia authorities upon the subject. See also, Lynchburg v. Slaughter, 75 Va. 60; Lackland v. Davenport, 84 Va. 640, 5 S. E. Rep. 540; Crabtree v. Building Ass'n, 95 Va. 677, 29 S. E. Rep. 741; Smith v. Henning, 10 W. Va. 600, where the principal case cited upon this subject is affirmed.

defence of usury in any action; nor shall any bond, note, debt or contract of such corporation be set aside, impaired or adjudged invalid by reason of anything contained in the laws prohibiting usury." It is claimed by the counsel for the defendant, that this section applies only to causes of action arising, and contracts made, after its adoption; and consequently, the notes or certificates in controversy are not embraced by its provisions. The learned counsel relies strongly upon the well settled rule, that statutes are to be construed as prospective in their operation, unless the language plainly shows the intention of the legislature that they should have a retrospective effect. In support of this view he has cited numerous authorities, which undoubtedly sustain the proposition that
4 the courts will not so construe *a statute as to give it a retrospective operation, unless there is something on the face of the enactment putting it beyond a doubt that such was the purpose of the legislature. Upon this point there can be no solid ground for controversy. The question is, whether the present enactment furnishes unmistakable evidence of the legislative purpose to give it a retroactive operation and effect.

It will be observed that the words used are very comprehensive. "No corporation shall hereafter interpose the defense of usury in any action." The words, "any action," necessarily include suits instituted before as well as after the passage of the act. There is nothing in the context to give them a more limited operation. The defense is prohibited in all cases. In order to adopt the construction insisted on by the defendant, other words must be incorporated into the body of the act so as to make it read, "no corporation shall hereafter interpose the defense of usury in any action upon a contract hereafter made." But clearly the legislature did not intend so to confine the effect of the enactment. Had such been the purpose, nothing would have been easier than to have used words appropriate to that object. If any doubt upon this point existed, it will be removed by reference to the next clause in the same section: "Nor shall any bond, note or debt, or contract of such corporation, be set aside, impaired or adjudged invalid by reason of anything contained in the laws prohibiting usury." No distinction is made between contracts entered into before and after the statute: whenever made, they shall not be adjudged invalid by reason of anything contained in the usury laws. The legislature having thus declared, in the most unequivocal terms, that no contract of a
5 corporation *shall be deemed invalid because it may be usurious, it is impossible for the courts, without the grossest perversion of language, to hold that those contracts only are meant which are entered into after the law is passed.

It must not be forgotten that the first clause of the section, already quoted, is a literal copy of a New York statute upon the same subject. The identity of language, used in both statutes, shows that the framers of our act had before them the New York law, and intended to adopt it without change or qualification. In Curtis v. Leavitt, 15 New York R. 1, a very noted case, this statute received a very careful consideration. All the judges agreed in giving it a retrospective effect, so that securities, to an amount exceeding a million of dollars, were held to be valid, though utterly void when issued, by reason of the usurious taint with which they were infected.

It is not to be supposed that the legislature incorporated into our laws an important statute of another state in entire ignorance of the interpretation given to it by the courts of that state. It must be presumed rather, that the legislature in adopting the precise phraseology, intended to adopt along with it the interpretation also.

I shall have occasion hereafter to refer to a number of cases in other states involving the constitutionality of statutes giving validity to antecedent usurious contracts. The language of some of these statutes is certainly not more comprehensive than that of our act; and yet the courts there experienced no difficulty in giving them a retrospective operation and effect. The limits assigned to this opinion will not justify any citations of these statutes. I must therefore content myself with this simple
6 reference to them, *satisfied that upon examination they will sustain the view I have taken.

The learned counsel who argued the case here for the defendant referred to the 18th section of chapter 16, Code of 1860. The learned counsel obviously did not attach much importance to this section, although it seems to have been relied upon elsewhere as decisive of the case. I do not give the exact words of the section, but it substantially provides that no new law shall be construed to repeal a former law as to any act done, or right accrued, under the former law, or in any way whatever to affect any act done, or right accrued, under the former law.

In construing this section, it is necessary to consider also the preceding one, which provides that this rule of construction shall not be adopted, if it would be inconsistent with the manifest intention of the legislature. In other words, the two sections taken together mean no more than that a new law shall not be construed to affect any right accrued under a former law, unless such is the manifest purpose of the legislature. A rule of construction which would always prevail in regard to vested rights of a civil character independently of any statutory enactment on the subject.

Now if the view already presented in regard to the statute of March 23, 1873, be correct, if that statute is plainly retroactive in its operation, and was so intended by the legislature, then the 18th section does not apply to it, because it would be inconsistent with the manifest purpose of the legislature to give it such application. To adopt any other rule would be to declare

that one legislature having adopted a general statutory rule of construction, no succeeding legislature is authorized to depart from that rule.

7 *It is worthy of observation that the provisions of the 18th section were taken from the revised statutes of New York and Massachusetts. The 35th section of the New York statutes, although not identical with the language of the 18th, is substantially the same in its operation and effect. That section, the 35th, was in force long anterior to the case of Curtis v. Leavitt, and yet the Supreme court of New York did not regard it sufficient to prevent the retroactive operation of their statute in relation to the defence of usury by corporations. As already stated, the first clause of our act is a literal copy of the New York statute.

For these reasons I am satisfied that all contracts of corporations, whether entered into before or subsequent to the passage of the act in question, must be held to be comprehended by its provisions. Thus construed, is the act constitutional? This is the important question for our consideration. When this subject was first under discussion my own convictions were very decided that this legislation could not and ought not to be sustained, as applied to antecedent contracts. It seemed to me not only unjust, but contrary to the first principles of the constitution, for the legislature to attempt to divest a right accrued under existing laws; and it mattered but little whether it was a right to defeat an action or maintain it; to prevent a recovery or enforce it. And although no specific provision of the constitution could be shown expressly forbidding such legislation, it had the appearance of being repugnant to the entire spirit and scope of that instrument.

Subsequent investigation has, however, satisfied me that my own views on this

8 subject were in conflict *with the opinions of many able judges and commentators, and an imposing array of well considered cases.

The reasoning employed in these cases, though not always satisfactory, and the great weight of authority upon the subject, have at least created doubts and difficulties in my own mind which ought to be controlling in passing upon an act of the legislative department. A conscientious judge will not, in the face of a current of authorities, almost uniformly tending in the same direction, pronounce against the constitutionality of a law unless upon full examination his conviction is very clear that it is plainly repugnant to the constitution. When he finds himself opposed by a long array of distinguished names; when he sees that the wisdom of the legislature and the learning of the judiciary are against him, he ought to retrace his steps, re-examine his ground, and ascertain, if possible, whether there is not some radical defect in the process of reasoning by which he has reached his conclusion. He should be careful to inquire whether indeed he is not substituting his own preconceived opinions of what may be right and proper in the particular case, as a rule or standard for the determination of a mere question of constitutional power. It should never be forgotten that the courts cannot deny validity to an act of the legislature, because it may seem to the judges that injustice has been done or sound policy disregarded. As has been well said, the judiciary cannot run a race of opinion with the law-making power upon points of right, reason and expediency. Cooley on Con. L. 168. Such an assumption would lead to dangerous conflicts of authority, and practically result in the absorption by the judiciary of the other great departments of the government.

9 *The legislature represents the sovereign authority of the people, except so far as restrictions are enforced by the constitution in express terms or by strong implication. We look to the constitution of the state not for grants of power but for limitations. When the prohibition is not found in the language of that instrument, or in its frame work and general arrangement, there is no solid ground to pronounce the enactment void. The infraction must be clear and palpable. In the language of Judge Marshall, the question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom if ever to be decided in the affirmative in a doubtful case. The opposition between the constitution and the law should be such, that the judge feels a strong and clear conviction of their incompatibility with each other. Fletcher v. Peck, 6 Cranch R. 87, 128.

Bearing these principles in mind, we are to consider whether the statute already cited is repugnant to the constitution of the United States or of the state of Virginia. Two provisions of the constitution of the United States have been invoked as prohibitive of this sort of legislation. One of these is the clause declaring that no state shall pass any ex post facto law. In answer to this, it is sufficient to say, that the phrase ex post facto law, as used in the constitution, is not applicable to civil, but only to criminal and penal laws, which impose a punishment for previous acts which were not punishable at all when committed, or not punishable to the extent or in the manner prescribed. So that ex post facto laws relate to penal and criminal proceedings which inflict punishment or forfeitures, and not to civil proceedings which affect private rights retrospectively,

10 *This doctrine has been solemnly settled by the Supreme court in numerous cases, and is now the accepted rule of construction. Calder v. Bull, 3 Dall. R. 386; Watson v. Mercer, 8 Peters R. 88, 110.

The other provision of the constitution relied upon is that which prohibits a state from passing any law impairing the obligation of a contract. It seems very clear, however, that the statute, so far from invalidating the contract, upholds and sus-

tains it. In the case of Satterlee v. Matthewson, 2 Peters R. 380, Mr. Justice Washington, commenting upon an act of the Pennsylvania legislature to which the same objection was urged, said: "Now this law may be censured as an unwise and unjust exercise of legislative power, as retrospective in its operation, as the exercise by the legislature of judicial functions, and as creating a contract where none previously existed. All this may be admitted, but the great question which we are now considering is, does it impair the obligation of a contract? It is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that contract. It cannot be intended that to create a contract between the parties where none existed, and to impair one, mean the same thing."

This case, and indeed all the cases, establish the position that even though a statute may take away vested rights by reason of its retrospective operation, it cannot, for that reason merely, be treated as repugnant to any provision contained in the constitution of the United States. Charles River Bridge v. Warren Bridge, 11 Peters R. 420. In considering this question then, I think we may safely discard from our view the constitution of the United States.

The next inquiry is as to the con-
11 stitution of Virginia. *Is the statute in contravention of any of its provisions? I do not understand the learned counsel for the defendant as contending that the act in question violates any specific provision of that instrument. His proposition is substantially, that the contract here when made was usurious and void; and there was then vested in the defendant a right so to declare it; that by the statute now under consideration, he has been deprived of this right; that a law which thus takes away a valuable and a vested right is an exercise of arbitrary power, unjust in itself, and contrary to the fundamental principles of the social compact.

Now, let it be conceded there are restrictions upon the legislative power not found expressly enumerated in the constitution; that a law may not infringe upon any specific provision of that instrument and yet it may involve so flagrant an abuse of power that it is the imperative duty of the judiciary to interpose and arrest its execution; still it must be also conceded that when we depart from the express limitations of the constitution, and venture into the vast and unexplored region of implied restrictions, the legislative usurpation ought to be very clear, palpable and oppressive to justify the interposition of the judiciary. All admit that it is not competent for the legislature by retroactive laws to interfere with vested rights. But the inquiry still recurs, what are these vested rights that are secure against legislative invasion; that the legislature has the constitutional power to pass retrospective laws, laws affecting vested rights, no one will deny who is familiar with the jurisprudence of the country. According to Chancellor Kent, statutes which go to confirm existing rights and in furtherance of the remedy, by
12 curing defects *and adding to the means of enforcing existing obligations, have been held clearly valid, when just and reasonable, and conducive to the general welfare, even though they might in some degree infringe upon vested rights. 1 Kent's Com., page 456; Underwood v. Lilly, 10 Serg. & Rawle 101; Tate v. Stooltzfoos, 16 id. 35; Bleakney v. F. and M. Bank, 17 id. 64; Hepburn v. Curts, 7 Watts R. 300; Foster v. Essex Bank, 16 Mass. R. 245; Oriental Bank v. Freeze, 18 Maine R. 109; Townsend, v. Townsend, Peck (Tenn.) R. 1; Bell v. Perkins, Peck's R. 266; State v. Bermudez, 12 Louis. R. 352; Syracuse City Bank v. Davis, 16 Barb. R. 188; Rich v. Flanders, 39 N. Hamp. R. 304; Schenley v. Commonwealth, 36 Penn. State R. 29; Goshen v. Stonington, 4 Conn. R. 209; Wilkinson v. Leland, 2 Peters R. 627; Langdon v. Strong, 2 Verm. R. 234; Watson v. Mercer, 8 Peters R. 88.

In his work on constitutional limitation, Judge Cooley enumerates a number of retrospective statutes, the constitutionality of which is almost universally conceded. Among these are statutes validating antecedent illegal marriages, confirming city ordinances which had failed to take effect for want of registration, and by reason of such confirmation establishing liens for tax assessment upon private property, statutes abolishing penalties and forfeitures, and taking away rights of appeal in pending cases; all of which, in a greater or less degree, interfere with vested rights. After citing these and other illustrations of retrospective laws, the author proceeds as follows: "On the same principle legislative acts validating invalid contracts have been sustained, when these acts go no farther than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal
13 inability on his part to make *it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy and not of constitutional power." Cooley, 373-'4.

In support of this view the learned author mentions a number of cases, some of which I shall have occasion to consider in the course of this opinion. One of the most important of these is the case of Curtis v. Leavitt, 15 New York R. 1, heretofore mentioned in another connection, justly celebrated, not only for the variety and importance of the questions involved and the magnitude of the subject of controversy, but for the vast ability and learning employed in the discussion by both bench and bar. Mr. Justice Page said p. 229: "The defence of usury is in the nature of a penalty or forfeiture, and may at any time be taken away by the legislature in respect to previous as well as subsequent contracts, without trenching upon any vested rights.

A proposition that a party can have a vested right in enforcing a penalty or forfeiture, against which it is the office of a court of equity to relieve, is a legal solecism. Statutes of usury are highly penal in their character, and the defence of usury has always been regarded as an unconscientious defence, and has never received the favor of either courts of law or equity." All the judges sitting, seven in number, concurred substantially in this view. Among these were Judges Selden and Comstock, universally respected for their soundness of judgment and the extent and variety of their legal attainments. The former said: "Usury being a mere statutory defence, not founded upon any common law right, either legal or equitable, it was clearly within the power of the legislature to take it
14 away." See also Washburne *v. Franklin, 13 Abbott Prac. R. 140, and 35 Barb. R. 599.

The decisions of the Ohio courts are in entire harmony with those of New York. I do not deem it necessary, however, to do more than make a brief reference to the case of Lewis, trustee v. McElvin, 16 Ohio R. 347, 599. It seems that the Mechanics and Traders Bank of Cincinnati was an unauthorized banking company, and all bills and notes made for the purpose of being discounted there were declared to be unlawful and utterly void. The bank transferred all its assets to a trustee, including notes discounted there in violation of law. The legislature of Ohio passed an act authorizing the trustee to institute suit upon these notes in his own name against the debtors; and it was farther provided it should not be lawful for the debtors to set up in their defence that these notes were void on account of being in violation of any statute law of the state, or on account of their being contrary to public policy. It was objected that this legislation was unconstitutional, inasmuch as the effect would be to give validity to contracts illegal and void under laws in force when they were made. Hitchcock, J. speaking for the court said: "I can never consent to declare an act of the legislature void on account of violating the constitution, unless it is palpably both against the letter and spirit of that instrument. So long as there is the least doubt upon the subject the law must be enforced. Now what provision of the constitution of Ohio is violated by this law? Certainly it violates no contract. Its very object is, that the contract may be enforced. But it is said to be a law retrospective in its character. I find nothing in the constitution prohibiting retrospective laws.
15 The enactment *of ex post facto laws is prohibited, not retrospective. Such laws may be impolitic, but with this as a judge I have nothing to do. This law interferes with no vested rights. It merely compels men to do justice."

The case of Parmelee v. Lawrence, decided by the Supreme court of Illinois, and reported in 48 Illinois R. 331, the case of Andrews v. Russell, 7 Blackf. R. 474, decided by the Supreme court of Indiana, and the case of Woodruff v. Scruggs, 27 Arkansas R. 26, all involved the constitutionality of statutes giving validity to antecedent usurious contracts. In each case the enactment was strongly assailed as trenching upon vested rights, and in each case its validity was fully sustained by the court.

The decisions of the Maryland courts accord with those already cited. Baugher v. Nelson, 9 Gill's R. 299, is an example. In that case the point was made that the contract was void for usury, and there was vested in the defendant a right so to declare it. Mr. Justice Martin, in answering this objection, said: "When vested rights are spoken of by the courts as being guarded against legislative interference, they mean those rights to which a party may adhere, and upon which he may insist without violating any principles of sound morality. In the language of Judge Duncan, in Satterlee v. Matthewson, 16 Serg. & Rawle 191, there can be no vested right to do wrong. In the nature of things there can be no vested right to violate a moral duty, or to resist the performance of a moral obligation." See also Nelson v. Hardesty, 1 Mary. Ch. R. 56.

The Connecticut decisions proceed upon the same ground. In Goshen v. Stonington, 4 Conn. R. 209, Hosmer, C. J. in commenting upon a statute prohibiting
16 *the defense of usury as against antecedent contracts, said: "It was no violation of the constitution; it was not a novelty, such exercises of power having been frequent, and the subject of universal acquiescence; and no injustice can arise from having given legal efficacy to voluntary engagements, and from accompanying them with the consequences they always import.

These questions, and others of a like character, have been perhaps more carefully considered and oftener decided by the courts of Pennsylvania than in any other state. In a long train of decisions pronounced by the ablest jurists of that state, legislation of this kind has been fully sustained as in entire conformity with both federal and state constitutions. I refer particularly to the cases of Hess v. Werts, 4 Serg. & Rawle 356; Satterlee v. Matthewson, 16 Serg. & Rawle 169; Bleakney et als. v. Farmers & Mec. Bank of Greencastle, 17 Serg. & Rawle 64.

To these cases may be added decisions of the Supreme courts of New Jersey, Michigan and Iowa. These decisions do not involve the precise points arising in the present case; but the principles they announce apply to the statute in question, and fully sustain its contstiutionality. State v. City of Newark, 3 Dutcher's R. 186; Gibson v. Hibbard, 13 Michigan R. 215; Harris v. Rutledge, 19 Iowa R. 389; State v. Squires, 26 Id. 340.

It thus appears that the constitutionality of this legislation, or legislation of a like character, has been affirmed by learned judges and commentators, by the Supreme

courts of ten states, and the declared will of ten legislatures, besides that of Virginia. Against this formidable array of authorities what have we? The learned counsel
17 for the defendant has *cited a number of cases supposed to give countenance to his position; but it will be found upon a careful examination that very few of them have any direct bearing upon the point in controversy here. The New York decisions referred to, relate principally to statutes affecting the vested rights of husbands in the estates of their wives. They do not in the least conflict with the doctrines laid down in Curtis v. Leavitt.

The cases in the Supreme court of the United States do not touch the point under consideration. The only province of that court is to enquire whether the statute is in conformity with the constitution of the United States. If it is, that court will not pronounce against its validity, because it is repugnant to the constitution of the state.

The cases from Massachusetts and Mississippi upon which so much reliance is placed, were decided upon statutes which attempted to revive certain causes of action already barred by limitation. Legislation of this kind has been generally considered an unconstitutional interference with vested rights. The reason is apparent and is well understood. The statutes of limitation are essentially statutes of repose; they are founded upon the idea that the party affected has had full opportunity to try his right; that he has lost it by his own conduct, and he has thus vested in his adversary a right of property as complete and perfect as if bestowed by grant. It has been very justly observed, that after the bar is complete, parties are justified in forbearing to take and preserve evidence, and to retain proofs and vouchers, as they otherwise would; and they feel and act upon the conviction that the cause of action is at an end. "The act of limitations is therefore a law of presumptions: it presumes evidence from length of time which cannot now be
18 produced; payments *which cannot now be proved; releases which cannot now be shown." Barton lessee v. Shall, Peck R. 215; Wright v. Oakley, 5 Metc. R. 410.

These considerations are sufficient to show that the principles which apply to rights vested by reason of the operation of the statutory limitation have no just application to laws giving effect to the contract of parties affected by the taint of usury. We are told, however, that the laws in force when and where the contract is made enter into and constitute a part of it, and consequently the legislature is not authorized so to change or modify those laws as to affect rights vested under them. This is a very just principle in some cases. But it does not admit of universal application. No one seriously maintains that the statutes of limitation in force when a contract is made, or the laws authorizing imprisonment for debt or distress for rent, constitute a part of the contract. And yet they confer important rights, and it is fairly to be presumed, in many cases, parties contract with reference to them. They are, however, often changed and even abolished at the pleasure of the legislature, without a question of the constitutional power to affect existing causes of action.

The cases decided by the Supreme court of the United States to which reference has been made, only affirm the doctrine that the laws in existence when a contract is made so far enter into and become a part of it that they cannot be changed or abolished to the extent of depriving a party of all remedy to enforce the contract. This is a well established principle, universally recognized by the courts. It proceeds upon the obvious ground that to take away the remedy entirely is, in effect, to impair the obligation of the contract. To impair
19 the obligation of a contract is *one thing; to afford a remedy for enforcing it, where none previously existed, is another and very different thing. In Sedgwick's Treatise on Constitutional Law, page 406, it is laid down that the legislature is competent to give a statute a retrospective operation unless it violates that provision of the federal constitution relating to ex post facto laws and the obligation of contracts, or unless it is repugnant to some express provision of the state constitution, or unless it interferes with vested rights of property, so as not to come within the proper limits of the law-making power. Independently of these exceptions, retrospective laws are within the scope of the legislative authority, and the judiciary will not interfere with them. Now, it is very clear that statutes taking away the defense of usury as against antecedent contracts are not included in either of the exceptions mentioned. As has already been seen, they do not infringe upon the federal constitution, they certainly do not violate any express provision of the state constitution, and it is equally clear they do not interfere with any vested right of property.

The usury laws are founded upon considerations of public policy. They are modified from time to time, and even abolished, as the popular sentiment may dictate, or the public interest require. In Virginia, these laws have undergone frequent changes in the last few years. In other states, parties are left free to regulate the subject at their discretion, with a statute fixing the rate of interest in the absence of any express agreement. If no laws upon the subject existed, no one questions that any rate agreed upon by the parties would be lawful and enforced by the courts. The statutes upon this subject are regarded as
20 purely remedial, and subject *to the modification and control of the legislative department, even as applied to past transactions. This is the view of the courts and legislatures, not only in modern times, but seems also to have prevailed in the earlier history of the state. By the act of 1734, usurious contracts made previous to the 1st

of November, 1734, were legalized to the point of principal and lawful extent. We have no means of ascertaining whether the constitutionality of this statute was ever called in question. The presumption is that it was not, as the legislature fourteen years after, in 1748, re-enacted identically the same provision.

Now it is very clear that the contract being an entire thing, the promise of the debtor to pay the principal and lawful interest cannot be separated from the promise to pay the usurious premium. In either case the promise is utterly void. If, therefore, the legislature may legalize the contract as to the principal and lawful interest, it may legalize it as to the excess. If it may take away the defense of usury as to part, it may do so as to the entire contract. Courts of equity effect substantially the same results contemplated by these early statutes, in requiring the payment of the principal and lawful interest as a condition of relief; and this too in direct opposition to the statute forfeiting the entire debt. Indeed the charge is sometimes made that the equity courts repeal the statutes prohibiting usury. May not the law-making power apply the same rule to the common law courts; may it not clothe these courts with like jurisdiction and authority to administer relief in the mode exercised by the equity courts? If indeed it may prescribe that the defense of usury shall be
21 taken away as to *the principal and lawful interest, it may declare that the defense shall not be made at all.

Under one section of the statute prohibiting usury, if the borrower exhibits his bill and calls for discovery, he is relieved upon the payment of the principal without interest. If he does not seek a discovery, but asks for an injunction to prevent a sale of property, and is full-handed with proof, he is released from the payment of both principal and interest. There can be no question, I imagine, but that this relief may be varied at the pleasure of the legislature, and that it may be applied alike to antecedent and to subsequent transactions. The statutes against usury are regarded in Virginia as highly penal in their character. In Brockenbrough's ex'ors v. Spindle's adm'ors, 17 Gratt. 21, 32, the president of this court said: "However small the amount of usurious interest contracted for, and however large the amount of money loaned, the contract is declared void, and the lender forfeits the whole amount of the debt and interest."

In Crenshaw's adm'or v. Clark, 5 Leigh 65, 72, Judge Carr speaks of the loss of the debt as a severe penalty, not to be inflicted without clear and strong proof. And in the same case Judge Tucker said: "The defense goes not merely to absolve the debtor from usurious gain, but to vacate the contract and to annihilate the debt, to take from the usurer his just principal and interest, and put it in the coffers of the debtor to whom it does not fairly belong."

These citations sufficiently show the light in which the defense of usury has been regarded in Virginia, and that the loss of the debt under that defense is treated as a forfeiture imposed by the stern mandates of the statute.

22 *There may be cases, but I have not seen them—certainly no well considered case—in which it has been held that a party can have a vested right to a forfeiture, contrary to the express terms of the contract, even where the forfeiture results from a violation of an agreement. Courts of equity often relieve against it upon the application of the debtor. This is a favorite branch of equitable jurisdiction. It is founded upon the idea that although the legal right to the forfeiture is complete, the creditor shall not be permitted to avail himself of it for the purposes of injustice and oppression. This is certainly an interference with vested rights; but they are not of such a character as are deemed secure against legislative or judicial action. In the language of the Supreme Court of New Jersey, "Courts do not regard rights as vested contrary to the justice and equity of the case."

In the case of Foster and others v. Essex Bank, 16 Mass. R. 245, it was urged that a statute giving a right of action against certain debtors, which had been lost by the expiration of the bank charter, was retrospective and void. Parker, J., said: "The statute does not interfere with any of the privileges secured by the charter, unless it be considered a privilege to be secured from the payment of debts or the performance of contracts; and this is a kind of privilege which we imagine the constitution was not intended to secure. The truth is, there is no such thing as a vested right to do wrong."

Unless we suppose it is the deliberate purpose of the debtor when he borrows the money never to return it, the only effect of the statute is to compel him to do what he intended and agreed to do at the time of entering into the contract. It is a legislative declaration that the forfeiture shall not be enforced. It leaves the
23 *contract to be executed according to its terms and the original intention of the parties. It violates no vested right, unless it can be considered a vested right of the loaner to vacate his contract and annihilate his debt. Clearly this is not the kind of right the constitution was designed to protect.

This conclusion would not be varied in the slightest degree by the passage of the legislative act after the institution of the suit. It might be argued, with some degree of plausibility, that the plaintiff, having brought his suit, thereby acquires rights which cannot be affected by subsequent legislation; but it is difficult to perceive in what way an action against a party can confer upon him rights he did not possess independently of such action. If the right to rely upon the defense of usury is not in the nature of a vested constitutional right, secure against legislative invasion, the law-

making power may certainly take away the privilege at any time before its actual exercise by the defendant.

Upon this point the authorities are abundant and generally uniform. I do not deem it necessary to do more than refer to a few of the most important. Butler v. Palmer, 1 Hill's R. 324, 330; Stoever v. Immell, 1 Watts' R. 258; Curtis v. Leavitt, 15 New York R. 1; Satterlee v. Matthewson, 16 Serg. & Rawle R. 169; Sedgwick on Con. Law 412.

It has been very strongly argued that this law involves the exercise of judicial functions by the legislature. This objection was suggested in some of the cases heretofore mentioned. In others it was not even alluded to. In none of them does it seem to have received much attention, or to have been considered as entitled to much weight.

The case of Griffin's ex'or v. Cun-
24 ningham, 20 Gratt. *31, is, however, principally relied on in support of the objection. In that case a majority of this court held that an act of the legislature authorizing a review, after the term was ended, of the decrees and judgments rendered by the Court of Appeals, which sat here before the organization of the present government, was in the nature of a judicial act, and was therefore void. This decision was based upon the obvious ground, that a statute which vacates decrees and judgments, grants new trials, or authorizes rehearings, is essentially judicial in its character. Such an act is the very essence of judicial power, and an invasion of the judicial department.

This simple statement demonstrates that the reasoning advanced, and the doctrines asserted in Griffin v. Cunningham, have no application to the subject under consideration. It is proper to add, that two of the judges, Moncure and Anderson, did not concur with the majority in that case. They were of opinion that the statute was in every view constitutional and valid.

All will concede that the line which separates judicial from legislative functions, is, in many cases, shadowy and indistinct, so that it is often a matter of real difficulty to determine within which of the two classes a particular subject falls.

Statutes affecting limitation of actions, statutes relating to frauds and perjuries, to the admission of parol and written evidence, statutes relating to the registration of deeds, legalizing judicial proceedings, validating defective marriages, and a multitude of others, apply to the transactions and agreements of parties rules of decision wholly different from that which prevailed when the transactions occurred or the agreement

was made. And yet these statutes
25 have *been fully sustained as clearly within the constitutional competency of the law-making department.

. The courts of Pennsylvania decided that the relation of landlord and tenant could not exist in that state under a Connecticut title. The legislature of that state then passed an act which provided that such relation shall exist and be effectual on the trial of cases then pending or thereafter instituted. This act was fully sustained by both state and federal courts, and was actually applied to suits or a suit brought before its enactment. Judge Cooley expresses the opinion, that as the purpose and intent of the act was to remove from contracts which parties had made, a legal impediment to their enforcement, there would seem to be no doubt, in the light of the authorities, that the conclusion reached was the only just and proper one. Satterlee v. Matthewson, 16 Serg. & Rawle 169.

That case goes much farther than is necessary for the purposes of this. There the statute was intended to apply only to a few cases; here it is general in its character—applicable to all the contracts of corporations made before or after the date of the act. A law which prescribes a general rule for the adjudication of all contracts of a certain character, may, in its retrospective feature, affect vested rights; but clearly it does not involve the exercise of judicial functions.

It only remains to consider, very briefly, one other objection urged by the learned counsel for the defendant. It is said that the law does gross injustice to the defendant. I must confess it does not so appear to me. None of those considerations which prompt the legislature to interpose for the security of the needy debtor against the exactions of the usurer apply to corporations.

As a general rule, they sell their bonds
26 *in the public market, for the best price such securities will command. In such case there is no demand for an usurious premium, and no intention to commit usury; but a fair contract of purchase and sale upon terms believed by both parties to be just and legal. Such securities are often sought for as safe, judicious and permanent investments, under the sanction of the courts. In this way the resources and means of the corporate authorities are increased, the burdens of excessive taxation avoided, and the health, the comfort and prosperity of the inhabitants of towns and cities promoted and extended by the establishment of useful institutions, valuable works of public improvement and the blessings of good government. These considerations are sufficient to show that the defense of usury by corporate bodies is not in accordance with the dictates of justice or an enlightened public policy. The legislature might, therefore, well provide that no such defense should be interposed in any action against them. The constitutional power being conceded, there is no valid reason why the prohibition should not extend alike to antecedent and subsequent contracts. But if I am mistaken in this view, it is very clear that the injustice or impolicy of a law is not a matter for judicial consideration. In no case can the sanctity, the honesty and the wisdom of the legislature become questions of judicial cognizance. We must take the law as we find it. We must treat it as having been deliberately

considered by the legislature; all its provisions, as it respects their constitutionality and expediency, thoroughly examined and understood, and finally receiving the enlightened approval of the executive.
27 Thus regarding it, we can *arrest the execution of the law only upon a clear conviction that the legislature has transcended its constitutional limits in the enactment. Entertaining no such conviction in this case, we are constrained to affirm the judgment of the Circuit court.

The other judges concurred in the opinion of Staples, J.

Judgment affirmed.

MUNICIPAL CORPORATIONS.

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I. DEFINITION AND CREATION.

A municipal corporation, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. 1 Dillon's Municipal Corp. (4th Ed.) § 19.

In Virginia and West Virginia, municipal corporations are created and organized only under special legislative enactments, which constitute their charters. 15 Am. & Eng. Enc. Law 959.

In Brown v. Gates, Treasurer, etc., 15 W. Va. 131, it was held that the city government, is not the corporation.

"City"—Construction of Statutes.—In Roche v. Jones, 87 Va. 484, 12 S. E. Rep. 965, section 1016, Va. Code 1887, is held not to apply to a town having less than 5,000 inhabitants, and no corporation court, notwithstanding Code, § 5, ch. 16, provides that the word "city" shall be construed to mean a town of 5,000 population and a corporation court.

II. RIGHTS AND POWERS.

A. In General.—A municipal corporation has only such powers as are conferred upon it, by the legislature, in its charter; or more specifically, as said by the court in Duncan v. City of Lynchburg, 98 Va. —, 34 S. E. Rep. 964: "It is the settled law of this state that a municipal corporation possesses and can exercise the following powers, and none others: first, those granted in express words; second, those necessarily or fairly implied, or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable." See also, Lynchburg, etc., Co. v. Dameron, 95 Va. 545, 28 S. E. Rep. 951; Wallace v. Richmond, 94 Va. 204, 26 S. E. Rep. 586; Winchester v. Redmond, 93 Va. 711, 25 S. E. Rep. 1001; Whiting v. West Point, 88 Va. 905, 14 S. E. Rep. 698; Roper v. McWhorter, 77 Va. 214; Danville v. Shelton, 76 Va. 325; Charleston v. Reed, 27 W. Va. 681; Peters v. City of Lynchburg, 76 Va. 927; Kirkham v. Russell, 76 Va. 956.

As said by the court in Ould v. City of Richmond, 23 Gratt. 467: "The powers of public corporations are either express, implied, or incidental. And except as to such powers as are incidental, the charter itself, or the general law under which they exist, is the measure of the authority to be exercised. They have no inherent jurisdiction, like the state, to make laws, or adopt regulations of government. They are governments of enumerated powers, acting by a delegated authority; so that while the state legislature may exercise such powers of government, within the description of legislative power, as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and such as are incidental, subject to such regulations and restrictions as are annexed to the grant."

The exercise of chartered functions in a mode different from that prescribed is a want of power on the subject. Page v. Belvin, 88 Va. 985, 14 S. E. Rep. 843.

Contracts—Limited Powers—Acts Ultra Vires.—All persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract. A contract beyond the scope of the corporate powers is void. City of Winchester v. Redmond, 93 Va. 711, 25 S. E. Rep. 1001.

Grant of Franchise to Street-Car Company—Validity—Constitutional Law.—Under the general statute law of West Virginia governing cities and towns, a grant by a municipal corporation of the privilege, not exclusive, of occupying its streets for the conveyance of electricity for public use therein, confers a valid franchise, and is a contract protected by the provisions in state and federal constitutions prohibiting the passage of any law impairing the obligations of contracts. (The question of the reasonableness of the term of such grant not considered.) Clarksburg Electric Light Co. v. City of Clarksburg *et al.* (W. Va.), 35 S. E. Rep. 994.

Grant of Exclusive Franchise—Validity.—The council of the town of Clarksburg in 1887 had no power, either under its charter or under the general statute law governing towns and cities, to grant an exclusive franchise for 20 years to a private corpo-

ration to use its streets for the conveyance of electricity for public use in the city. Such exclusive grant does not prevent the town from granting to another corporation, within said term, the privilege to occupy its streets for the same purpose. Such exclusive grant, being void, is not a valid contract protected by the provisions in the federal or state constitutions forbidding the passage of any law impairing the obligations of contracts. Clarksburg Electric Light Co. v. City of Clarksburg *et al.* (W. Va.), 35 S. E. Rep. 994.

The grant by a city to a gas company of the exclusive privilege of lighting the city with gas does not deprive the city of the power to contract with an electric-light company for lighting the city with electric lights. Parkersburg Gas Co. v. City of Parkersburg *et al.*, 30 W. Va. 485, 4 S. E. Rep. 650.

Grant of Franchise to Unorganized Corporation—Validity.—The grant by a city or town to an intended corporation of a franchise to use its streets for the conveyance of electricity for public use in the town or city is valid, though at its date the corporation is not chartered, but is later chartered, and accepts the grant. Clarksburg Electric Light Co. v. City of Clarksburg *et al.* (W. Va.), 35 S. E. Rep. 994.

Power to Become Surety, Guarantor or Endorser.—The power conferred on a city to acquire suitable works and machinery for the generation of electricity for the use of the city and its inhabitants, and to do all things necessary or proper to carry into effect the powers conferred does not authorize the city to guarantee the bonds of another corporation, in which it has no interest, to enable it to furnish electric lights to the city and its inhabitants. Lynchburg & Rivermont Street Railway Co. v. Dameron, 95 Va. 545, 28 S. E. Rep. 951.

Power to Abate Nuisances.—The general powers of a municipal corporation to abate nuisances cannot authorize the extra-judicial condemnation and destruction of that as a nuisance which is not such. A municipal corporation has no authority to destroy a building which is private property, and a nuisance only because of the uses to which it is devoted. Bristol Door & Lumber Co. v. City of Bristol (Va.), 2 Mun. Corp. Cas. 548, and *note*.

Any unauthorized obstruction of such highway, is an indictable nuisance. And when a municipality has control of its streets, it may proceed in its corporate name to prevent or remove obstructions therein by judicial proceedings. Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. Rep. 818.

A merry-go-round, run by a steam engine, the whistle of which blew every few minutes, accompanied by a band, and attended by a large, noisy, and boisterous crowd till after 10 at night, disturbing some of the people living near by it, is such a nuisance as a town council has power to abate, after proper investigation, under Code, c. 47, § 28. Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. Rep. 906.

Change of Boundary—Statute.—The duty of a town council under section 48, c. 47, Code 1891, to submit the question of a change of boundary to a vote, is mandatory, not ministerial or discretionary, if such petitions as it prescribes are presented. Shank v. Town of Ravenswood, 43 W. Va. 242, 27 S. E. Rep. 223.

In Wade v. Richmond, 18 Gratt. 583, it was held that a statute changing the boundaries of a municipality is not unconstitutional, and the legislature having the authority to extend the boundaries of a city, the justice of expediency of it is not a question of which the courts can take jurisdiction. See also, Board of Education v. Board of Education, 30 W. Va. 424, 4 S. E. Rep. 640.

Rewards for Apprehending Criminals.—The city of Winchester has no power, either under its charter or the general laws of the state, to offer a reward for the detection, apprehension, or conviction of offenders against the criminal laws of the state. The provision of section 9 of the charter authorizing the council "to do all such things as it may deem proper for the prosperity, quiet, and good order of the city" is to be confined, in its exercise, to the ordinary objects and purposes of municipal corporations, and not extended to matters which are common to the state, and affect its people at large. Municipal corporations are not created to execute the criminal laws of the state, but to regulate and administer the local and internal concerns of the people of the particular locality. City of Winchester v. Redmond, 93 Va. 711, 25 S. E. Rep. 1001.

Rights as Proprietor of Water Lots.—The city of Norfolk is the owner of the ground which she has not disposed of, covered by water, lying between Parker street and the portwarden's line, both as riparian proprietor and as having had long possession thereof; and the city may maintain an action of unlawful entry and detainer, against any intruder upon said water lots. Norfolk City v. Cooke, 27 Gratt. 430.

Grant of Land to Municipality—Conditions in Deed.—In Bolling v. Mayor, etc., of Petersburg, 8 Leigh 224, a person granted land to a town corporation, having power to purchase and hold land "for the use of the town, for the purposes after mentioned in the deed." The deed recited that the grant was in consideration of the courthouse and jail having been built thereupon, and also in consideration that such buildings, and the judiciary proceedings of the town should be continued and held on the premises, with covenant of quiet enjoyment, so long as the judiciary proceedings should be held thereon, with a proviso, that if they should ever be discontinued, the land shall revest in the grantor. The courthouse and jail and the judiciary proceedings were continued, maintained, and had on the land, but the town erected other buildings on the land also, which were rented to individuals. *Held*, that such use of the land was competent to the town, and that the grantor had no right to interfere.

Establishment of Hospital—Retrospective Legislation.—In Richmond v. Henrico Co., 83 Va. 204, 2 S. E. Rep. 26, the city of Richmond purchased land outside of its corporate limits, and in an adjoining county, to use as the site of a small-pox hospital, in lawful pursuance of a general statute authorizing the establishment of hospitals. Before the city could use the property for which it was purchased, and a few days afterwards, the legislature enacted an amendment to the law providing that cities locating hospitals outside of their corporate limits must first obtain the consent of the county court and board of supervisors. *Held*, that the purchase of the land by the city was such an establishment of the hospital on the site in question; that the city can use the property for such purpose without hinderance, notwithstanding the enactment of the amendment.

Delegation of Powers.—Under the provision of the charter authorizing the council to prescribe the width of the sidewalks, such power cannot be delegated to the street committee and city engineer. McCrowell v. City of Bristol *et al.*, 89 Va. 652, 16 S. E. Rep. 867.

In Green v. Ward, 82 Va. 324, it was held that by its charter the city council of Alexandria is empowered to have work, for which an assessment is made, done under the direction of a body known as the board of public works, created by the city council.

B. Acquisition of Property.

1. Dedication.

Definition—How Made—Conclusiveness of.—Dedication is an appropriation of land by its owner for the use of the public. It is not within the statute of fraud and need not be by deed or other writing, but may be effectually done by verbal declaration. It may also be either express or implied, and will be implied from long use by the public of the land claimed to be dedicated. The intent is the vital principle, and dedication may be made in every conceivable way that such intention may be manifested. When such intention has been unequivocally manifested, and there has been an acceptance by competent authority, or such long use by the public as to render its reclamation unjust and improper, the dedication is complete; and when complete it is irrevocable. Buntin v. City of Danville, 93 Va. 200, 24 S. E. Rep. 830.

Acceptance—Revocation of Dedication.—Although there may have been a sufficient dedication of land to a public road or street, acceptance in some form by the public is necessary to establish the right in the public. The dedication, however, whether express or implied, may be revoked before it has been accepted by competent authority, or others have, upon the faith of it, been induced so to act as to render its revocation unjust. City of Norfolk v. Nottingham, 96 Va. 34, 30 S. E. Rep. 444.

Acceptance by Public.—In Taylor v. Com., 29 Gratt. 780, it is held that to constitute a valid dedication of a street the intention of the owner to dedicate the property must be perfected by acceptance, express or implied, on the part of the public through its authorized officials. Where such acceptance is established no length of user is essential to a valid dedication. See also, Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. Rep. 818, 10 Am. St. Rep. 860; Skeen v. Lynch, 1 Rob. 186.

Manner of Acceptance.—Until there has been an express or implied acceptance, the original owner may of course revoke his offer and reclaim the property. But a binding acceptance may be shown in many ways, and, unlike an acceptance of country highways does not have to be evidenced by record. If the offer to dedicate has been so acted upon as to virtually amount to an acceptance, it will operate as an estoppel to denying the dedication. Norfolk v. Nottingham, 96 Va. 34, 30 S. E. Rep. 444; Buntin v. City of Danville, 93 Va. 200, 24 S. E. Rep. 830; Richmond v. Stokes, 31 Gratt. 713.

Partial Dedication.—In Talbott v. R. & D. R. Co., 31 Gratt. 685, it was held that the grantor of a private right of way may limit its use to particular persons, but that there cannot be such a partial dedication to the general public.

What Title Passes by Dedication.—The dedication of a street only vests in the commonwealth a right of passage; the freehold and the profits (such as trees upon it and mines under it), belong to the owner of the soil, who has a right to all remedies for the freehold, subject, however, to the easement. Bolling v. The Mayor, etc., of Petersburg, 3 Rand. 563.

As said by the court in Warwick v. Mayo, 15 Gratt. 545: "The dedication or laying out of a street within a corporation does not affect the ownership of the soil, and however enlarged the easement may be, when within the limits of a corporation, in order to the beneficial use of it, and to effect the purposes intended when the easement was created; subject to such use, whether enlarged or limited, the title remains in the owner. Notwithstanding the easement, the owner retains many and valuable interests."

General Requisites of Valid Dedication.—No particular form of ceremony is necessary to dedicate land to public uses; the assent of the owner, and the fact of the land being used for public purposes, are all that is requisite. In 1789, with the consent and approval of the owner, the body of Mary Washington was interred in a burial lot, and forty-two years later a monument was erected over her grave by an association organized for that purpose. The corner-stone was laid with civic and military ceremonies by the president of the United States. Since then no one has claimed any private ownership over this spot of ground. *Held*, this constituted a complete dedication of the tomb to public uses. Colbert v. Shepherd, 89 Va. 401, 16 S. E. Rep. 246.

For an exhaustive treatment of the law of dedication see *note* appended to City of Seattle v. Hill *et al.*, 5 Mun. Corp. Cas. 191.

Dedication — Burden of Proof. — Where a town proceeds to open an alley through a man's land without his consent, and without having first condemned the same for public use, according to law, upon the ground that the land proposed to be taken for that purpose has been dedicated to the public by the owner thereof, the burden of proof that such dedication has been made is upon the town. Where such town claims that such alley has been, by the acts and declarations of the land owner, dedicated to the public for that purpose, such acts and declarations must be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property for that specific public use. Miller v. Town of Aracoma, 30 W. Va. 606, 5 S. E. Rep. 148.

2. Condemnation.—Where a statute has defined what interest or estate may be taken under condemnation proceedings, no less interest or estate than that specified can be taken. Accordingly, under a power to condemn the fee in lands, the right of a municipal corporation to condemn merely the use of water flowing through the land cannot be exercised. The right of eminent domain must be exercised in the manner and upon the terms and conditions prescribed by the act conferring the power: and though that power be conferred by the charter of a municipal corporation it is still to be exercised in accordance with the general law on the subject, unless a contrary intent clearly appears, or is necessarily implied in the special legislation. Statutes which encroach on the personal or property rights of the individual are strictly construed. City of Charlottesville v. Maury, 96 Va. 383, 4 Va. Law Reg. 499, 31 S. E. Rep. 520.

Condemnation of Fee Simple.—A statute requiring the condemnation of the fee simple is not repugnant to the constitution. And if it was, the municipality cannot be heard to deny the validity of the statute under which it has chosen to proceed. Roanoke City v. Berkowitz, 80 Va. 616.

C. Rights of Municipality in Streets.

1. In General.—In Charlottesville v. Southern Ry. Co., 97 Va. 431, 34 S. E. Rep. 98, it was held that a street in a city, though under the control of the city, is the

property of the state, held in trust for the benefit of the public.

Police Power—Prohibition of Steam Railway on Streets.—The charter of the Richmond, Fredericksburg and Potomac Railway Company does not in express terms, or by necessary implication, vest in the company the right to propel her engines by steam through the streets of a city without the consent of the corporate authorities of the city; and the charter of the city of Richmond giving to the council of the city the authority to prevent the propelling of the cars of a railroad company by steam through the streets of the city, provided no contract is thereby violated, the counsel may prohibit said railroad company from the use of steam in propelling their cars in the streets of the city. A corporation, except where it is otherwise provided in its charter, expressly or by clear implication, in the use of its property, the exercise of its powers and the transaction of its business, stands upon the same footing as individuals, and is subject to the same control under the police powers of the state or a municipal corporation. Richmond, etc., R. Co. v. Richmond, 26 Gratt. 83.

Power to Allow Railroad on Street.—Where a county road has been included within the limits of an incorporated town, and the municipal authorities of said town have assumed control of such road, they may, under the general powers conferred by statute with reference to streets, alleys, etc., authorize a railroad company to use a portion of said road for the purpose of constructing its railway along the same, in accordance with the statute which provides for such construction. Yates v. Town of West Grafton, 34 W. Va. 783, 12 S. E. Rep. 1075.

Cattle Running at Large—Power of Preventing—Impounding.—Code, c. 47, § 28, provides that the council of a city shall have power to prevent cattle from going at large in the city, and section 29 declares that to carry into effect the powers conferred on a city the council shall have the power to pass all needful ordinances not contrary to the constitution and laws of the state, and to prescribe reasonable fines and penalties. *Held*, that the council could provide for the taking up and impounding of cattle found running at large in the public streets, and for selling them to pay charges. Burdett v. Allen, 35 W. Va. 347, 13 S. E. 1012.

Sale of Lots by a Map—Rights of Purchasers in Streets—Rights of Third Persons.—The sale of lots according to a map vests in the purchasers the right to use the streets appearing on such map, and the right so vested cannot be defeated by the act of the vendor, because by the sale under such circumstances, he is estopped to deny or impeach rights thus acquired. Such an estoppel, however, operates only in favor of him who has been misled to his injury, and he alone can set it up. It does not operate in favor of a city or county which has acquired no rights thereunder. City of Norfolk v. Nottingham, 96 Va. 34, 30 S. E. Rep. 444.

Firing Pistol in Street.—The wilful firing of a pistol in the streets of a city, whether done maliciously or not, is of itself an unlawful act, and the consequences must be visited on those who commit it, or instigate it. Daingerfield v. Thompson, 33 Gratt. 137.

2. Opening, Grading and Improving.

Appropriation of Private Property.

Virginia Rule—"Taking."—A municipal corporation, acting within the scope of its powers with reasonable care and skill, in opening, grading and improving its streets, is not liable to the adjacent owner whose land is not actually taken, for consequential damages to his premises, unless there is a provision in its charter, or in some statute, creating the liability. It is *damnum absque injuria*. Kehrer v. Richmond City, 81 Va. 745; Smith v. Alexandria, 33 Gratt. 208; Powell v. Wytheville, 95 Va. 73, 27 S. E. Rep. 805, *notes*; 2 Mun. Corp. Cas. 556 *et seq.*, *notes*; 1 Mun. Corp. Cas. 73 *et seq.*

What Constitutes a "Taking."—In the case of Stearns v. City of Richmond, 88 Va. 992, 14 S. E. Rep. 847, the decision is anomalous, and directly in conflict with all the other Virginia cases on the subject both before and since. The facts were that, in changing the grade of a street, a city excavated to the depth of sixty feet, causing plaintiff's abutting land to cave in to such an extent as to destroy the walls of brick buildings thereon twenty feet from the street line. The fallen earth was used in a neighboring pit. This was held to be a taking of plaintiff's property and resulting damages were direct and not consequential.

West Virginia Rule—Taking and Damaging.—The doctrine in West Virginia, in respect to the right of a city to appropriate private property for public use, differs from that in Virginia for the following reason: In the former state the constitutional prohibition is against not only the "taking," but also the "damaging," of private property, while in Virginia the constitution only prohibits the taking. Accordingly it is held in West Virginia that a city is liable for merely damaging private property. In Blair v. City of Charleston, 43 W. Va. 63, 26 S. E. Rep. 341, the syllabus by the court was as follows: (1) If a street be opened and used upon the natural surface as a grade line, and it is recognized and treated by a city or town as a public street, and owners of lots upon it build with reference to such natural grade line, and it is changed, the city or town is liable to lot owners for damages consequential upon the change of grade, though no grade for the street was ever adopted by the municipality, under section 9, art. 3, of the constitution. Such natural grade thus became the established grade. (2) Though such owner purchase after the municipality has established a paper grade line, but before actual physical grading conforming a street to that line, that will not preclude his recovery for damage to his lot; but he cannot recover for damages to buildings erected after the adoption of such paper grade. He must conform to such grade line. (3) The measure of damages for injury to property from change of a street grade line is that sum which will make the owner whole; that is, the diminution of the market value from the change. If the market value is as much immediately after as immediately before the change, no damages can be recovered. (4) In estimating damages to property from change of grade in a street, all damage and injury arising from the change causing a diminution in the value of the property are to be regarded, abating all special benefits to the property enhancing its value arising from the change of grade, but not general benefits shared by the property owner in common with others in the community at large. The question is one of damage, less special, but not less general, benefit. (5) What are special benefits? If property is enhanced in value by reason of a public improvement, as distinguished from the general benefits to the whole community at large, it is specially benefited, and is to be assessed for the special benefits, notwithstanding every other piece of property upon or near the improvement may, to greater

or less extent, be likewise specially benefited. In other words, it is not only such benefits as are special, or limited to the particular property, thereby excluding the consideration of such benefits as are common to other property similarly situated, but it is such benefits as that the particular property is by the improvement enhanced in value—that is, specially benefited—that are to be considered. If a piece of property is enhanced in value, its enhancement, or, in other words, benefits to the property, cannot be said to be common to any other piece of property specially enhanced in value, and it is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. (6) Opinions of witnesses as to the value of property before and after a change in a street's grade are admissible as evidence in actions against municipal corporations for damage flowing from such change. See also, Johnson v. City of Parkersburg, 16 W. Va. 402.

Laying Out Streets—Keeping Streets in Order.—The right to lay out streets and to regulate their use when laid out, and to suspend such regulations at pleasure, are governmental and discretionary powers, but when laid out, the duty to keep them in a reasonably safe condition for travel is a ministerial and positive duty. For their safe condition the municipality is liable, but for their unlawful or improper use it is not. Jones v. City of Williamsburg, 97 Va. 722, 34 S. E. Rep. 883, 3 Mun. Corp. Cas. 444, and *note*.

Laying of Pipes—Right to Dig up Street.—The right to dig up streets for the purpose of laying water or gas-pipes is a franchise which can only be granted by the legislature or by the city under legislative authority. The legislature, in 1850, chartered a company to open streets, etc., in a city, to lay water-pipes, provided they be, as soon as practicable, repaired by the company at its own expense, subject to the approval of the superintendent of police or the council. That council, in 1889, ordained that no person should open the streets, etc., without previous permission from the mayor, and depositing with the city treasurer such a sum as the committee on streets should deem sufficient to repair the street, under a penalty. Wheat v. City Council of Alexandria, 88 Va. 742, 14 S. E. Rep. 672.

Privilege to Lay Pipes—Removal.—Where for value received, a city allowed a company to lay gas or water-pipes in its streets, the company is held to have accepted the privilege subject to the city's right to change the grade of its streets, and with the probability that the right would be exercised. The city may afterwards lower the grade, and if in so doing the pipes become exposed and obstructive, it may require the company to remove them or have it done by its own agents. If the company have any remedy for such removal of the pipes, it is at law for compensation. The municipal council, and not the court, is the judge of the expediency and necessity of exercising the power; and an injunction will not lie to prevent its exercise. Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 14 S. E. Rep. 665.

Improvement of Streets—Delegation of Power.—The power to grade and improve its streets granted to a city by its charter cannot be delegated or alienated. Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 14 S. E. Rep. 665.

D. Power of Borrowing Money.

1. In General.

Power to Purchase Real Estate and Give Bonds Therefor.—A municipal corporation cannot borrow money and issue its bonds therefor unless the power to do so be conferred by legislative enactment expressly given, or clearly implied. But every municipal corporation has the power to purchase and hold all the real estate reasonably necessary to the proper exercise and enjoyment of the powers conferred upon it, or essential to the purposes for which it was created, and, as incident to this power, may purchase on credit and bind itself by the execution of a bond, note, or other non-negotiable security for deferred payments. Richmond, etc., Co. v. West Point, 94 Va. 668, 27 S. E. Rep. 460.

Limit of Indebtedness.—A city, indebted up to the limit fixed by the constitution, cannot carry on its operations upon credit, within the meaning of credit in the constitution, in any manner, or for any purpose, but must pay during the current year with funds in hand, or with funds already legally levied. A city thus indebted cannot increase its indebtedness beyond the constitutional limit by contracting for an electric apparatus and plant; and, such indebtedness being forbidden, the contract out of which it arises, although executory, is also forbidden. The end aimed at is prohibited, which carries with it the prohibition of the means directly and appropriately designed and adapted for its accomplishment. Any tax-paying resident and voter of such city, suing on behalf of himself and of all other taxpayers of such city, has a right to enjoin the creation of any such unconstitutional indebtedness. Spilman v. City of Parkersburg, 35 W. Va. 605, 14 S. E. Rep. 279.

Limit of Indebtedness—Pleading.—When an incorporated town has contracted for work to be done upon its streets, which work is done as provided in the contract, accepted by the town, and orders issued upon its treasury for the amount agreed to be paid therefor, such orders being presented and payment refused, and the holder of the orders sues out an alternative writ of *mandamus*, and defendant files his return and answer, offering no defense, except that, for the same year in which the contract was made and the work done, it had already, prior to the making of the contract, created a greater amount of indebtedness than the amount of the levy it was authorized to make upon the taxable property and persons and all other sources of revenue of the town to pay it, for such answer to be sufficient to defeat recovery it must show clearly that it had created such indebtedness to the full extent of its authority to levy before it made the contract with plaintiff, or, if its said prior indebtedness had not reached the full limit allowed by law, it should have shown that it had actually paid, on account of such contract for which said orders were issued, the amount the plaintiff could be entitled to receive out of such levy. Roe v. Town of Philippi, 45 W. Va. 785, 32 S. E. Rep. 224.

In exercising the power to borrow money, a municipal corporation is not exercising sovereign powers, but is responsible for the acts of its agents as a private corporation. DeVoss v. City of Richmond, 18 Gratt. 338, 98 Am. Dec. 647; Supervisors v. Randolph, 89 Va. 614, 16 S. E. Rep. 722; Bell v. Farmville, etc., R. Co., 91 Va. 99, 20 S. E. Rep. 942.

Authority of Municipality to Subscribe to Stock.—The legislature has power to authorize a county or other municipality to subscribe to the stock of a railroad company and to issue bonds for such subscription. Although, by reason of mistake, carelessness, or other cause, a county has failed to comply with the conditions precedent to the exercise of a

power conferred upon it by the legislature to issue bonds, still the legislature can cure all irregularities by subsequent legislation, and makes such bonds as valid and binding as if all the conditions precedent had been strictly complied with. Bell v. Farmville, etc., R. Co., 91 Va. 99, 20 S. E. Rep. 942.

The commonwealth of Virginia having long desired to effect a complete line of transportation from the navigable waters of the Ohio to the city of Richmond, and having with this view constructed certain works on portions of the route, subsequently incorporates a joint stock company to accomplish the object, to which company the works of the commonwealth are, by the terms of the act of incorporation, to be transferred at a specified valuation, and in which company the commonwealth herself becomes a large stockholder. The city of Richmond having been incorporated for municipal purposes, a majority of her citizens qualified to vote for members of the common council desire that the corporate authorities should subscribe for a large number of shares in this joint stock company, and the legislature, in accordance with their desire, pass laws authorizing the common council to make such subscription. By these laws, the common council is authorized to borrow money to effect the object, and to levy, assess and collect such taxes as in their opinion will be necessary for the purpose of paying the interest and redeeming the principal of any loan which may be effected. This authority to borrow money and levy taxes is carried into effect, by an ordinance: and under the ordinance the collector takes the property of a citizen, against whose will the laws authorizing the subscription was passed, who refuses to pay the taxes levied under authority of these laws, upon the ground that they are unconstitutional. *Held*, they are constitutional and valid. Goddin v. Crump, 8 Leigh 120.

2. Municipal Bonds.

Issuance of Bonds.—Power of municipal corporations to borrow money implies power to issue its bonds therefor. Bunch's Ex'or v. Fluvanna County, 86 Va. 452, 10 S. E. Rep. 582.

Authority to Issue.—In an ordinance the authorization of bonds not to exceed $6,000 is equivalent, in legal effect, to fixing the amount of such bonds at such sum. In either case, the authorities would only have the right to issue bonds sufficient to cover the purpose for which the ordinance is adopted. Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. Rep. 163, 1 Mun. Corp. Cas. 219, and *note*.

In a municipality having less than 600 voters, an election confined solely to the question of the issue of municipal bonds is not invalid because conducted in the mode prescribed for the election of municipal officers in the absence of political or party nominations. Mere informalities of the election officers in holding, and ascertaining and declaring the result of, an election, unless otherwise provided by statute, will not vitiate an election otherwise fair and impartial. Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. Rep. 163, 1 Mun. Corp. Cas. 218, and *note*.

Municipal Bonds—Purchasers for Value.—The *bona fide* purchaser for value of negotiable coupon bonds of a municipal corporation is in no sense bound to see to the application of the purchase money, nor to determine whether the proceeds were or were not to be used in the discharge of an *ultra vires* contract of the municipality. If the municipality had power to issue the bonds, and that power has been properly exercised, and the bonds are regular on their face, it is immaterial to what use the proceeds of the bonds are applied, so long as the purchaser had acted in good faith. Town of Clifton Forge v. The Alleghany Bank, 92 Va. 283, 23 S. E. Rep. 284.

Municipal Bonds—Conditions—Rights of Bona Fide Holder.—A municipal corporation having authority to provide for the poor and needy of the city in 1864, pass an ordinance for the issue of $50,000 of the coupon bonds of the city, and the ordinance provides that the proceeds shall be paid into the treasury of the city, subject to the order of the council, for the use and benefit of indigent families and citizens. *Held*: A *bona fide* holder of these bonds is not required to look further than the ordinance to see whether the bonds were issued for a legitimate purpose; and his right to recovery upon the bonds will not be affected by the fact that the council may have applied the proceeds of the bonds to other purposes. City of Lynchburg v. Slaughter, 75 Va. 57.

Municipal Bonds—Validity—Rights of Bona Fide Holder.—Though coupon bonds may have been issued by a municipal corporation for the purpose of aiding the rebellion, this not appearing on the face of the bonds, or the ordinance authorizing their issue, the bonds in the hands of a *bona fide* holder for value without notice or knowledge of the purpose, are valid, and binding upon the corporation. And though the holder of the bonds had such notice, yet if the party from whom he purchased was a *bona fide* holder for value, without such notice, the bonds are valid and binding in the hands of the present holder. City of Lynchburg v. Slaughter, 75 Va. 57.

The district court of the Confederate States confiscated certain bonds of the city of Richmond, and by its decree directed the city council to issue bonds in lieu of those so confiscated to its receiver. The council, by resolution, directed its officers to issue the bonds as directed by the decree; but to insert on the face of the bond so issued, and on the books of the office, that it was so issued in lieu of a confiscated bond, and to do this upon every re-issue of the bond. The officer obeyed the directions on the first issue of the bond, but failed to do it upon the re-issue of the bond, and it was purchased by a party having no knowledge that it was such a bond. The city is bound to pay the bond. DeVoss v. City of Richmond, 18 Gratt. 338, 98 Am. Dec. 647.

Municipal Coupon Bonds—Holder for Value without Notice—Defence of Ultra Vires.—Although the negotiable coupon bonds of a municipal corporation, or the proceeds of such bonds, may have been used to discharge an *ultra vires* contract of the corporation, this defence cannot be set up by the corporation against a *bona fide* holder for value of such bonds, acquired before maturity, without notice of such defence. If the corporation had power to execute the bonds, and the power has been executed in a lawful manner, and the bonds are free from condition, and exhibit all the requisite features of negotiability, the *bona fide* purchaser of such bonds, for value, acquires good title. Town of Clifton Forge v. The Brush Electric Co., 92 Va. 289, 23 S. E. Rep. 288.

Municipal Bonds—Sale at Less Than Par—Payment in Confederate Money.—A municipal corporation having a general authority under its charter to contract loans or cause to be issued certificates of debt or bonds, may issue coupon bonds and sell them at public auction for less than their par value, and for bonds sold during the war might receive payment for them in Confederate money. City of Lynchburg v. Slaughter, 75 Va. 57.

Municipal Bonds—Conditions—Liability of Purchaser.—An individual purchasing the bonds of a municipal corporation, and having no actual notice of any special directions given to the officers of the company in relation to the particular bonds purchased, will only be bound by such directions if he has been wilfully ignorant of them, and not merely where there has been a want of caution. DeVoss v. City of Richmond, 18 Gratt. 338, 98 Am. Dec. 647

Recovery of Bonds by City.—F was the owner of $8,700 of the certificates of stock of the city of A, which by a decree of the United States court in May, 1864, were confiscated and sold by the marshal, and $2,000 of it purchased by W; and at his request the marshal made a transfer of the same on the books of the city. When the stock became due W received from the city of A four coupon bonds of $500 each in exchange for his stock. In 1874 F sued the city for his stock and recovered it, the court holding that the decree of the United States court confiscating it was invalid. The city of A then sued W to recover the four bonds issued to him for the stock. *Held*, the city of A is entitled to recover the bonds. Webb v. City Council of Alexandria, 33 Gratt. 168.

E. Power of Taxation.

1. In General.—A grant by the legislature to a municipality of a general power of taxation confers upon the municipality all the power possessed by the legislature itself in respect to the imposition of taxes. The municipality may then tax all subjects within its jurisdiction, not withheld from taxation by the legislature, whether the state taxes them or not. Norfolk v. Norfolk Landmark Publishing Company, 95 Va. 564, 28 S. E. Rep. 959.

The legislature has absolute sovereign power of taxation, save so far as restricted by the federal or the state constitution. But all taxation—state, county or town—must be equal, uniform and *ad valorem*, except as to income, licenses and capitation. A succession tax is not a tax on property, in the sense of the constitution, art. 10, § 1. It is a premium demanded for the privilege of transmitting one's estate. To impose a tax on such privilege is a power inherent in the legislature, in the absence of constitutional inhibition. Municipal corporations have no power of taxation, except the power be plainly and unmistakably conferred. The power to impose a succession tax may be delegated by the legislature to counties and municipal corporations. Peters v. City of Lynchburg, 76 Va. 927.

Every grant of the power of taxation to a municipal, or other subordinate body, must be strictly construed. And municipal officers must show, in the words of the charter, a warrant for whatsoever authority they assumed to exercise. City of Lynchburg v. N. & W. R. R. Co., 80 Va. 237.

Legislative Control.—A city charter is not a contract between the state and the city, securing to the city the absolute power of taxation beyond the control or modification of the legislature. The powers of exemption, as well as the power of taxation, is an essential element of sovereignty; and can only be surrended or diminished, in plain and explicit terms. Municipal corporations are mere auxiliaries of the government, established for the more effective administration of justice; and the power of taxation confined to them is a delegated trust. Richmond v. R. & D. R. Co., 21 Gratt. 604.

Construction of Statutes.—Section 31, c. 47, Code authorizes towns and villages chartered under such chapter to levy taxes, not exceeding one dollar on every hundred dollars of property within such municipality. Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. Rep. 163, 1 Mun. Corp. Cas. 219, and *note*.

Taxation—Notice of Imposition—Constitutional Law.—The imposition of taxes and levies is a "taking" within the meaning of the constitution of the United States, and if the law under which property is assessed for taxes does not provide an opportunity for the owner to be heard and contest the justice of the assessment he is deprived of his property without due process of law, and the law is unconstitutional and void, and the assessment or levy is illegal. Section 45 of the charter of the city of Radford, being liable to objections of this kind, is unconstitutional and void. Heth v. City of Radford, 96 Va. 272, 31 S. E. Rep. 8; City of Norfolk v. Young, 97 Va. 728, 34 S. E. Rep. 886.

Erroneous Assessments—Construction of Statutes.—The method prescribed by sec. 444 of the Code for correcting erroneous assessements of real estate applies solely to the general assessment of land throughout the commonwealth every fifth year, and has no application to assessments made under special provisions contained in charters of municipal corporations. Heth v. City of Radford, 96 Va. 272, 31 S. E. Rep. 8.

Ad Valorem System.—Taxes imposed by municipal corporations must be equal and uniform and *ad valorem*. If so authorized, they may levy a tax on all business which cannot be reached by the *ad valorem* system. But under color of a license tax they cannot impose an unequal and uniform tax on property. Danville v. Shelton, 76 Va. 325.

Back Taxes.—The powers of a municipal corporation are to be construed strictly, and the power to tax must be plainly and unmistakably conferred; and, in the absence of legislative authority, the corporation has no power to levy back taxes; and where the charter empowers the council to "order the collection of taxes for any year," this refers to taxes previously assessed, there being nothing in the charter authorizing a retrospective assessment. Whiting v. Town of West Point, 89 Va. 741, 17 S. E. Rep. 1.

Tax on Newspapers—Freedom of the Press.—A city ordinance which imposes a tax on the business of publishing a newspaper does not infringe upon the constitutional guaranty of the freedom of the press. Such guaranty was never intended to restrict the right of taxation for the support of the government. Nor is such ordinance in conflict with sec. 1, Art. X, of the constitution, which requires all taxation to be equal and uniform, nor with sec. 4, Art. X, which provides for a tax on licenses upon business which cannot be reached upon the *ad valorem* system. City of Norfolk v. Norfolk Landmark Publishing Company, 95 Va. 564, 28 S. E. Rep. 959.

Taxation of Railroad Companies.—The 25th section of the act of March 18th, 1856, imposing taxes for the support of the state government, does not extend to exempt railroad companies, complying with said section, from taxation by a city government. The charter of the city of Alexandria gives the power to raise taxes for the use and benefit of the city; provided the laws passed for the purpose shall not be repugnant to the laws and constitution of the state or of the United States. The proviso does not limit the power of the city to tax only such subjects as are taxed by the state. The city council of Alexandria may tax the real estate in the city, and the rolling stock, of the Orange and Alexandria railroad company; the residence or domicil of that company being in that city. The real purpose

and intention of the legislature is the thing to be ascertained in the construction of a statute: and to effect this the general meaning of the words may be restricted. Though it is true that laws conferring the power of taxation upon municipal corporations are to be construed strictly, it is also true that exemptions from taxation are to be construed strictly; and where the power has once been conferred, it is not to be crippled or destroyed by strained interpretations of subsequent laws. Orange & Alexandria R. Co. v. City Council of Alexandria, 17 Gratt. 176.

Power to Tax Non-Residents.—F, who lives outside of the city limits, rents a stall in the market-house of the city of Richmond, where he carries on his business as a butcher. He prepares his meat for market at his house, and owns two carts and horses, which he used to bring his meats from his house to his stall, and take out such of it as is not sold; and he pays a tax on these carts and horses as property in the county. *Held*, under the charter of the city, the city council may require F to take out a license for so using his carts and horses, and to pay a tax on said license. Frommer v. City of Richmond, 31 Gratt. 646.

Power to Tax Non-Residents—License to Tax on Non-Resident Attorneys at Law.—The legislature has power to authorize municipal corporations to impose taxes on persons whose ordinary avocations are pursued within the corporate limits, although residing beyond those limits, the same as upon residents, and, in the case at bar, the city of Petersburg has power, under its charter, to impose a license tax on an attorney-at-law having his office and place of business in the city and practicing his profession therein, although he resides outside of the city's limits, in like manner as upon an attorney residing and doing business within the city. City of Petersburg v. Cocke, 94 Va. 244, 26 S. E. Rep. 576.

Taxation of Foreign Corporations.—The council of the city of Richmond has authority, under the charter of the city, to impose a license tax upon a foreign telegraph company having an agency in the city and doing business therein. And there is nothing in the constitutions and laws of the state or of the United States which forbids such a tax, if it is equal and just in its provisions. Though the ordinance of the city imposing taxes speaks only of persons or firms doing business in the city, yet it imposes a tax in terms on telegraph companies, and obviously intends to include incorporated companies as well as individuals. Corporations are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute. West. U. Tel. Co. v. City of Richmond, 26 Gratt. 1; Humphreys v. City of Norfolk, 25 Gratt. 97.

Unequal Taxation.—An ordinance imposed on "every one engaged in purchasing leaf tobacco in D a tax of ten dollars, and one per cent. on capital employed, and in addition fifteen cents per thousand pounds purchased monthly." *Held*, this feature is illegal. As a tax, fifteen cents on the thousand pounds, without regard to value, is unequal. As a license, it is not warrantable, because the business could have been reached on the *ad valorem* principle. Danville v. Shelton, 76 Va. 326.

Taxation—Capital Stock—Shares.—The capital stock and the shares of the capital stock are distinct things. Both may be taxed, and it is not double taxation, where ordinance directs assessments of tax "on all personal property, money and credits, including all capital stock," etc., the valuation of the personal property of a bank is rightly ascertained by adding to the paid up capital the demand notes of stockholders given for unpaid up capital stock, drawing interest and held by the bank. Domicile of holder of evidence of debt is the *situs* of the debt for taxation purposes. Notes held by a bank located in a city are taxable by said city, wherever the makers may reside, whether in or out of the city or in or out of the state. Where tax has been lawfully assessed, and is not paid when due, of course the penalty imposed by the ordinance for nonpayment of the tax may rightly be enforced. State Bank of Virginia v. City of Richmond, 79 Va. 118.

Taxation of Shares of Railroad Stock.—In City of Richmond v. Daniel, 14 Gratt. 385, it was held that, the shares of a railroad company are not liable to be taxed by the council of the city of Richmond, either under the charter of the city or under the Code.

Taxation of Property of Testator—Domicile.—Where, at the time of his death, the domicile of testator was beyond the corporate limits of a city, bonds belonging to his estate are not assessable and taxable by said city, though at the time the assessment and levy was made his executors resided within said city. City of Staunton v. Stout's Ex'ors, 86 Va. 321, 10 S. E. Rep. 5.

Taxation of Lawyers.—The council of the city of Richmond may lay a tax upon lawyers as such. The ordinance of the council provides that lawyers and others shall be divided into six classes, and that those in each class shall pay a certain sum as his tax; and it directs that the committee of finance shall place each lawyer in the class to which they shall think he properly belongs, looking to all the circumstances of the case. And it is provided that when the committee has completed its classification, public notice shall be given, and any lawyer dissatisfied with his classification, may appear before the committee and have it corrected if erroneous. *Held*, the tax is not an income tax, nor are the duties imposed on the committee legislative, but ministerial; and the ordinance is not unconstitutional. Ould v. City of Richmond, 23 Gratt. 464, 14 Am. Rep. 139.

License Tax on "Every Attorney at Law."—A city ordinance imposing a specific license tax "on every attorney-at-law" includes non-resident attorneys who have offices and practice their profession in the city, as well as resident attorneys. City of Petersburg v. Cocke, 94 Va. 244, 26 S. E. Rep. 576.

License Tax.—Section 5, of charter of city of Lynchburg, granting authority to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or employment, which it may deem proper, whether such person or employment be herein specially enumerated or not," does not empower the city to impose such tax upon a railroad corporation; which is neither a person nor an employment, within the ordinary acceptation of those words. City of Lynchburg v. N. & W. R. R. Co., 80 Va. 237.

Licenses—Construction of Statute.—In Roche v. Jones, 87 Va. 484, 12 S. E. Rep. 965, it is held that § 550, Va. Code 1887, applies only to state and not to municipal licenses, which may be prescribed to expire June 3rd instead of April 30th, of each year.

Licenses—Brokers—Interstate Commerce.—A license tax imposed by a city on a broker whose business is

confined to selling by sample and personal application, for non-resident principals exclusively, goods belonging to them in another state, for the purpose of introducing them into the state, is a regulation of interstate commerce and beyond the city's power. Adkins v. City of Richmond (Va.), 3 Mun. Corp. Cas. 514.

Power to Exempt Property from Taxation.—Delegated power to tax, does not imply power to exempt from taxation, and where a municipality is authorized to tax all property, it can exempt none. Whiting *et als.* v. Town of West Point, 88 Va. 905, 14 S. E. Rep. 698.

This case *criticised, overruled,* or *distinguished* the decisions in Williamson v. Massey, Auditor, 33 Gratt. 237; City of Petersburg v. Petersburg Ben. Association, 78 Va. 431; O. & A. R. Co. v. Alexandria, 17 Gratt. 176; Danville v. Shelton, 76 Va. 325.

Property Specially Exempted from Taxation.—The charter of the R. & D. Railroad Co. provides that "all machines, wagons, vehicles or carriages belonging to the company, with all their works, and all profits which may accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, shall be deemed personal estate, and exempt from any charge or tax whatever." *Held*: (1) The real estate owned and used by the company for the purposes of their business, is embraced in the provision, and is personal estate. (2) All the said property, real and personal, is exempt from taxation, both state and municipal. (3) The exemption from taxation of the real estate of the company in the city of Richmond, is not unconstitutional as being in conflict with the charter of the city, previously granted, giving the city the power to tax real estate for the purposes stated in the city charter: the city having ample means of taxation left for the payment of her expenses and debts. Richmond v. R. & D. R. Co., 21 Gratt. 604.

Ferry Landing Owned by City Exempt from Taxation.—A lot in a city of N., owned and used by county of E. and city of P. as landing for ferry maintained by them, is exempt from taxation under Acts 1881-82, p. 382. Black v. Sherwood, 84 Va. 906, 6 S. E. Rep. 484.

2. Local Assessments.

In General.—Local assessments for street improvements are an exercise of the taxing power of the state, and article XIV of the amendments to the constitution of the United States applies to such assessments; and a law which authorizes such assessments without reasonable notice to the person of whom the assessment is exacted, and without affording him an opportunity to appear and contest the legality, justice, and correctness of the assessment before it is finally determined upon, deprives such person of his property without due process of law, and is void. "Due process of law" requires that a person shall have reasonable notice, and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be made affecting his rights to liberty or property. It is not enough that the owner may by chance have notice, or that he may, as a favour, have a hearing. The law itself must require notice to him, and give him a right to a hearing and an opportunity to be heard. While the legislature may prescribe the kind of notice and the mode of service, it cannot dispense with all notice. Violett v. City of Alexandria, 92 Va. 562, 23 S. E. Rep. 900.

Statutes authorizing local assessments on abutting lands or lots, to meet the expense of improvements to the street in front of such land or lots, levied according to the benefits to such land or lots, are not in violation of section 1 of article X of the constitution of this state, and are valid. Section 33 of the charter of the city of Alexandria, as amended by an act of the legislature approved March 1, 1888, is not in conflict with said section of the constitution. Violett v. City of Alexandria, 92 Va. 562, 23 S. E. Rep. 900.

While the legislature may grant to municipal corporations the power to levy local assessments for street improvements, yet the statute making the grant must be strictly construed, and the municipality must keep closely within its provisions. If the statute conferring the power to make such assessments limits its exercise to the benefits, by the improvements, to the property assessed, or is not broad enough to confer on the municipality the power to select the mode of assessments, then an assessment by frontage is an unwarranted assumption of benefits, and does not meet the requirements of the statute, but is in conflict therewith. Tested by this rule, the ordinance of the city council of Alexandria, under which the assessment in the case at bar was made, is not authorized by the charter of said city under which the ordinance was passed. Violett v. Alexandria, 92 Va. 562, 23 S. E. Rep. 900. See also, 4 Va. Law Reg. 540, 547; and especially *note* to Hornung v. McCarthy, 3 Mun. Corp. Cas. 257; Sands, Receiver, v. City of Richmond, 31 Gratt. 571; City of Norfolk v. Ellis, 26 Gratt. 224; Richmond & A. R. Co. v. City of Lynchburg, 81 Va. 473; Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. Rep. 230; Wilson v. Philippi, 39 W. Va. 80, 19 S. E. Rep. 553; Parkersburg v. Tavenner, 42 W. Va. 491, 26 S. E. Rep. 179. But compare, City of Norfolk v. Chamberlain, 89 Va. 196, 16 S. E. Rep. 730; McCrowell v. City of Bristol, 89 Va. 652, 16 S. E. Rep. 867.

The city council of Richmond has authority under its charter and the constitution of Virginia to require the owner of a lot upon a street which has been graded, paved and guttered by the city to pave the sidewalk in front of his lot, and when it is at the corner of a street, to pave the sidewalk on the side of the lot. And if the owner does not have the work done within the time prescribed by the ordinance, the city may have it done and collect the money from him. Sands, Receiver, v. City of Richmond, 31 Gratt. 571.

Local Assessments—Personal Liability for—Constitutional Law.—An act of General Assembly which empowers the council of a city to determine what portion, if any, of certain street improvements shall be paid by the owners of the real estate benefited thereby, or bounding and abutting on said streets, and to assess the same by the front foot and which declares that the assessment thus made shall constitute a lien on the property, "and shall also be a personal debt of the owner of the property," authorizes a system of taxation which, in so far as it makes such assessment the personal debt of the owner of the property, is not equal and uniform, and is in conflict with section 1, Article X of the constitution of the state, and is therefore, in this respect, void. Asberry v. Roanoke, 91 Va. 562, 22 S. E. Rep. 360.

Local Assessments—Charge in Rem—Construction of Charter.—By a section of its charter, power is conferred on a city "to specifically tax a lot adjoining a street on which paving is done or a curbstone put down (whether on the sidewalk or carriageway), not exceeding two-thirds of the expense of the curbstone or paving on that half of the street opposite

the lot." *Held*: (1) This section does not authorize a special assessment for street improvements, to be made a personal charge against the owner, but only a charge on the lot so taxed. (2) Nor does this section authorize a tax for the grading of the street, but only for the paving and laying down curbstone on the same. Green v. Ward, 82 Va. 324.

Local Assessments—Charge in Personam.—The provision of the charter authorizing such local assessments, if valid, can be charged only upon the abutting property, and cannot be levied on the personal property of the abutting owners. McCrowell v. City of Bristol, 89 Va. 652, 16 S. E. Rep. 867.

Local Assessments—Not a Lien on Lots—Anomalous Decision.—The act authorizing an assessment for paving the streets of Norfolk, does not impose a lien upon the lots in the borough, for the payment of the assessment, but gives a personal remedy only, against the freeholders in possession, and not against reversioners and remaindermen. Moseley v. Boush, 4 Rand. 392. This decision is anomalous and seems never to have been followed.

Local Assessments in the Ratio of the Front Foot.—The city council of Norfolk has authority under the charter of the city and the constitution of Virginia, to assess the expense, or a part of the expense, of paving a street upon the owners of the property on the street in the ratio of the front foot of their lots facing on the street. Norfolk City v. Ellis, 26 Gratt. 224; Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. Rep. 230; R. & A. R. Co. v. City of Lynchburg, 81 Va. 473.

Assessment by Front Foot.—The provisions of the charter of Lynchburg empowering the council, when water mains are laid in the street, to levy an annual special assessment on the real estate on both sides of such street to meet the expenses of the waterworks, and further authorizing it to exempt from such assessment any property to which water is supplied and water rates charged, are not repugnant to the state constitution. R. & A. R. Co. v. City of Lynchburg, 81 Va. 473; Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. Rep. 230.

Enforcement of Local Assessments—Construction of Charter—Constitutional Law.—A section of a municipal charter which authorizes local assessments by the council for street improvements, upon the written petition of a majority of the owners of the property to be assessed, or, without such petition, by a vote of a majority of all the members elected to the council, after publication for twenty days, in two or more newspapers published in the municipality, of a resolution declaring such assessment to be expedient, is in contravention of amendment XIV of the constitution of the United States, and therefore void, as it provides no tribunal before which, place where, or time within which, parties to be affected may contest the legality, justice, or correctness of the assessment. If the publication is intended as notice to appear before the council and contest the assessment, and that be the law, it is not full and clear enough to disclose that fact to a person of ordinary intelligence. Norfolk v. Young, 97 Va. 728, 34 S. E. Rep. 886.

By a section of its charter the collecting officers of a city are empowered to distrain for taxes and levies due the city. *Held*, this section does not empower those officers to distrain for special assessments for street improvements, which are chargeable on real estate only. Green v. Ward, 82 Va. 324.

III. DUTIES AND LIABILITIES.

A. In General.

Governmental Duties—Private or Ministerial Duties—Liability.—The powers conferred upon a municipal corporation for the government of that portion of the public residing within its limits are called governmental, legislative, or discretionary powers. For injuries resulting from the failure to exercise these powers, or for their negligent or improper exercise, the municipality is not liable. But powers and privileges conferred for its private advantage impose corresponding duties which are ministerial and absolute. For injuries resulting from a failure to exercise these powers and duties, or for negligence in their exercise the municipality is liable in an action for damages in the same manner as a private individual. Jones v. City of Williamsburg, 97 Va. 722, 34 S. E. Rep. 883, 3 Mun. Corp. Cas. 444, and *note*.

Non-Liability for Neglect in Governmental Capacity.—"In its governmental capacity, a municipality is strictly a branch of the state government, within the extent of its limitations, both as to territory and powers granted. And in the discharge of their duties, governmental and discretionary, its officers are public officers, for whose acts the municipality is in no wise liable. Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. 447; Brown's Adm'r v. Town of Guyandotte, 34 W. Va. 299, 12 S. E. 707; Thomas v. Town of Grafton, 34 W. Va. 282, 12 S. E. 478; Mendel v. Wheeling, 28 W. Va. 233; Orme v. City of Richmond, 79 Va. 86; City of Richmond v. Long's Adm'rs, 17 Gratt. 375; Barnes v. District of Columbia, 91 U. S. 540." City of Charleston v. Beller, 45 W. Va. 44, 30 S. E. Rep. 152.

As to the powers and functions of an incorporated town of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein. Bartlett v. Town of Clarksburg, 45 W. Va. 393, 31 S. E. Rep. 918, 1 Mun. Corp. Cas. 43, and *note*; Brown's Adm'r v. Town of Guyandotte, 34 W. Va. 299, 12 S. E. Rep. 707.

Special Instances of Non-Liability.—A city owning waterworks, not required by its charter, and charging consumers water rents, is not liable for loss, by a fire, caused by its negligence in the care of the works. Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 664.

A city is not responsible for property destroyed by its police force, without any authority from the city, or its governing power. Harman v. City of Lynchburg, 33 Gratt. 37; Brown's Adm'r v. Guyandotte, 34 W. Va. 299, 12 S. E. Rep. 707.

Municipal corporations, in the exercise of their political, discretionary, and legislative authority, are not liable for the misconduct, negligence or omissions of the agents employed by them. City of Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461.

In Duncan v. City of Lynchburg (Va.), 34 S. E. Rep. 964, the city was held not liable for a nuisance, occasioned by a work it had no authority to operate.

The power of the common council of a city, town, or village to prevent or abate nuisances is governmental and discretionary, and for the proper exercise thereof the city cannot be held liable for the loss or destruction of property or damages occasioned thereby. Such loss, if any, must fall upon the actual or proposed nuisancer. Wood v. City of Hinton (W. Va.), 3 Mun. Corp. Cas. 547.

A town is not liable for damages for the death of a person caused by the burning of its jail while such person was confined therein by town authority for

a violation of its ordinances, though such fire was attributable to the wrongful act or negligence of the officers or agents of the town. Brown's Adm'r v. Town of Guyandotte, 34 W. Va. 299, 12 S. E. Rep. 707.

The mayor of the town of Grafton having imposed fines upon a citizen of the town, execution therefor came into the hands of the town sergeant, who levied upon the separate property of the offender's wife, and sold the same at a sacrifice. *Held*, (1) that the town could not be held liable for the tortious act of the sergeant, unless it was proven that the town directed, counseled, or otherwise participated in the perpetration of the wrong; (2) in levying the writ, the sergeant acted not as a municipal, but as a public, civil officer, and the doctrine of *respondeat superior* has no application; (3) as the net proceeds of the sale of the property improperly seized were paid over to the town, the latter would be liable for such net proceeds in an action for money had and received. Thomas v. Town of Grafton, 34 W. Va. 282, 12 S. E. Rep. 478.

Where Negligence of City Amounts to a Taking of Private Property.—Where a person is permitted and aided by a city to alter the course of a sewer over which it has assumed control (it matters not by whom it was originally constructed), and such alteration is so negligently effected as to cause the water and filth to flow into the plaintiff's cellar, the city is liable for the damages resulting therefrom. Chalkley v. City of Richmond, 88 Va. 402, 14 S. E. Rep. 339.

Negligence in Proprietary Character.—The city of Petersburg owns a wharf in the Appomattox river, for the use of which the city is authorized to charge and does charge wharfage. In October 1872 the vessel of A not being able to get to the wharf at which she was to deliver her loan on account of an obstruction in the stream by another vessel, drew up to the city wharf and moored to it, and whilst waiting there she sunk on the next low water, from a pile going through her bottom. This pile was oak, being about two feet from the wharf, in the stream where a vessel at the wharf would probably lie, and was visible at low water, though it was some two feet or more above the bed of the river, and was firmly fixed there. *Held*, the allowing such an obstruction in the place where it was, was negligence; and the city of Petersburg being the owner of the wharf, is liable for the damages occasioned by it. City of Petersburg v. Applegarth's Adm'r, 28 Gratt. 321.

Negligence in Exercise of Ministerial Duties.—Municipal corporations, in discharge of ministerial or specified duties assumed in consideration of the privileges conferred by their charter, are liable for the misconduct, negligence or omission of their agents; and this, though there be the absence of special rewards or advantages. City of Richmond v. Long's Adm'rs, 17 Gratt. 375, 94 Am. Dec. 461.

Liability of City for the Torts of its Officers.—A public officer is not responsible to third persons for the negligence or default of his official subordinates. This principle of exemption from liability, for the defaults of its officers is not extended to municipal corporations, where the authority, though for the accomplishment of objects of a public nature, and for the benefit of the public, is one, from the exercise of which, the corporation derives a profit, or where the duty may be presumed to be enjoined upon the corporation in consideration of privileges granted. Sawyer v. Corse, 17 Gratt. 230.

Ministerial Duties—Negligent Discharge—Liability.—A municipal corporation is liable for injuries caused by its negligence in the discharge of, or failure to discharge, such duties as are purely ministerial, and not governmental or discretionary. Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. Rep. 447.

Municipal corporations, in discharge of ministerial or specified duty, are liable for the misconduct, negligence or omissions of their agents. City of Richmond v. Long's Adm'rs, 17 Gratt. 375; Orme v. City of Richmond, 79 Va. 86.

Negligent Management of Corporate Property—Liability.—A municipal corporation is liable for injuries sustained by the negligent management of its corporate property, to the same extent that private individuals are liable for the same character of negligence. Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. Rep. 447.

Liability for Ultra Vires Acts.—The ordinance of the city of Richmond, adopted April 2, 1865, on the eve of the evacuation of the city by the Confederate forces, directing the destruction of all liquor in the city, and pledging the city for its payment, is *ultra vires* and void, and the owner of the liquor cannot recover the value thereof from the city. The destruction of the liquor was not an exercise of the city's power of eminent domain, but was a police regulation for the preservation of peace and good order in the city. The charter of the city limited its exercise of the right of eminent domain to the acquisition of "ground for the purpose of opening or extending its streets," or other public purposes. The power exercised by the city council was not conferred, either in express terms or by fair implication, by the city's charter or by the general laws, nor is it indispensable to the performance of its corporate duties, or the accomplishment of the purposes of its incorporation. Wallace v. City of Richmond, 94 Va. 204, 26 S. E. Rep. 586; Jones v. City of Richmond, 18 Gratt. 517, disapproved.

Liability of City for Damage by Railroad on Streets.—Where work is done by a railroad company in a street of a city, under authority from the city to occupy the street for its track, the city is not liable to adjoining lot owners for injury to their lots from such work, but they must look to the company. Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. Rep. 266.

Use of Streets by Railroad—Liability of City for Damage from Defective Tunnel.—A city is not liable for damages resulting from the defective construction of a tunnel under one of its streets by a railroad company, when the railroad company is authorized to construct its road from said city, and the city permits the company to enter and use its streets for its roadway, in pursuance of authority vested in the city by its charter. The right of the city to allow the use of its streets by the railroad company includes the right to permit the company to run under the streets as well as upon them. But permission to enter and use the streets confers no right on the railroad company to take or invade the property of any citizen without just compensation, nor does it sanction any tort the company may commit. Nor does the taking of a bond from the company to indemnify the city against loss by reason of the failure of the company to carry out its contract with the city to render the city liable for the torts of the company. The company alone is liable for its torts. It is in no sense the agent of the city. Terry v. City of Richmond, 94 Va. 537, 27 S. E. Rep. 429.

Liability of Municipal Property to Execution.—In Brown v. Gates, Treasurer, etc., 15 W. Va. 131, a writ of *fieri facias* may issue under provisions of the Code

of 1868 of this state against a political public municipal corporation upon a judgment for a debt or damages rendered by a court of competent jurisdiction in this state. It seems that such a corporation may sometimes own some descriptions of property strictly private or interests in such property, or have debts of a strictly private nature due to it, which are subject to levy and to the lien of such writ of *fieri facias*. But perhaps property charged with public trusts, or owned or used by such corporation for public purposes, such as fire-engines, etc., are not subject to levy, or to the lien of a *fieri facias*, upon the same principle that the taxes and revenues of such corporation are not subject to the levy or lien of a *fieri facias*; but as that question is not involved in this case it is not now decided. See also, monographic *note* on "Executions" appended to Paine v. Tutwiler, 27 Gratt. 440.

Attachment or Garnishment of Municipal Corporations.—A municipal corporation may be garnished or attached for a debt due to one of its creditors just as a natural person may be. Such a proceeding is not contrary to the public policy of this state. Portsmouth Gas Co. v. Sanford, 97 Va. 124, 33 S. E. Rep. 516, 5 Va. Law Reg. 172.

Mechanics' Liens on Property of Municipality.—A mechanic's lien cannot be claimed against public buildings erected by the state, or cities or counties, for public persons. Hicks v. Roanoke Brick Co., 94 Va. 741, 27 S. E. Rep. 596; Manly Mfg. Co. v. Broaddus, 94 Va. 547, 27 S. E. Rep. 438; Phillips v. University of Virginia, 97 Va. 472, 34 S. E. Rep. 66, 5 Va. Law Reg 466.

Subcontractor's Lien.—Furnishing materials to be used by a contractor in the erection of a public improvement for a city, which materials are so used, does not give any lien on the fund due by the city to the contractor. Hicks v. Roanoke Brick Co., 94 Va. 741, 27 S. E. Rep. 596.

Taking of Private Property—Liability.—On the 2d of April, 1865, in anticipation of the evacuation of the city of Richmond by the Confederate army, the council of the city ordered the destruction of all the liquor in the city, and undertook to pay for it. The council, under the charter of the city, had authority to make the order and the pledge; and the city of Richmond is responsible for the value of the liquor destroyed under the order of the council. Jones v. The City of Richmond, 18 Gratt. 517.

Liability for Notes Issued during the War.—The city of L., on the 8th of May, 1862, passed an ordinance for the issue of $120,000 of small notes, and directed its treasurer to exchange them for coin or currency, which should be held or invested for the redemption of the notes. From May 8, to October, $72,418 was received in currency in exchange of the notes, of which $68,000 was invested in Confederate bonds and the balance was held in hand. The notes were directed to express, and did express, on their face—received in payment for city taxes and all other city dues. The city did not levy a tax for the redemption of the notes. *Held*: (1) The notes were issued and received with reference to Confederate currency as a standard of value. (2) By the act the notes were required to be redeemed within the period prescribed by the act. (3) The city of L. having provided for the issue of her notes, under the act of March 29, the act of May 15, extending the time of redemption, does not apply to the notes issued by that city. (4) The city of L. having provided ample funds for the redemption of her notes, she was not required to levy a tax for their redemption. (5) Some of these notes not having been presented for redemption within the time prescribed by the act of March 29, the holders of them are not entitled, after the war, to set them off against taxes due from them to the city; and the fund which had been provided and held ready for their payment, having perished, without fault of the city, the city of L. is not under any obligation in law or equity, to redeem them. Miller v. City of Lynchburg, 20 Gratt. 330.

Bicycles—Failure to Pass Ordinance.—Bicycles are vehicles, and should not be ridden on sidewalks, but, if so ridden, the municipality is not liable for damages resulting from a collision with a pedestrian, merely because it failed to pass an ordinance forbidding such use of its sidewalks. Jones v. City of Williamsburg, 97 Va. 722, 3 Mun. Corp. Cas. 444 and *note*, 34 S. E. Rep. 883.

Jailer's Fees—Construction of Statute.—Code, § 3532, fixing the fees a jailer is entitled to for receiving and supporting prisoners, applies only to payments out of the state treasury for receiving and supporting prisoners charged with crime, and not to payments out of a city's treasury to the keeper of the city jail for receiving and supporting prisoners charged with violation of its ordinances. City of Richmond v. Epps (Va.), 35 S. E. Rep. 723.

Personal Injuries—Fireworks—Consent of Officers—Liability.—An incorporated town is not liable for personal injuries occasioned by the firing of squibs, rockets, fireworks, and firearms on the streets by a crowd of citizens, although such acts be done with the knowledge and consent of the mayor, council, police, and other officers of such corporation. Bartlett v. Town of Clarksburg, 45 W. Va. 393, 31 S. E. Rep. 918, 1 Mun. Corp. Cas. 42, and *note*.

Child Drowned in City Reservoir—Negligence—Liability of City.—A landowner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is a child does not raise a duty where none otherwise exists. Such a trespasser, injured on such premises, cannot recover of the landowner by reason of the unsafe condition of the premises, unless this negligence be so gross as to amount to a wanton injury. Frost v. Eastern R. R., 64 N. H. 220, 9 Atl. Rep. 790; Ritz v. Wheeling, 45 W. Va. 262, 31 S. E. Rep. 993, 1 Mun. Corp. Cas. 360, and *note*.

Duty of Draining Lots.—A city is not bound to furnish drains or sewers to relieve a lot of its surface water, whether its own or that flowing from other premises. Jordon v. City of Benwood, 42 W. Va. 312, 26 S. E. Rep. 266.

Payment to City by Mistake.—A citizen of Richmond pays money to the corporation, under a belief of both parties, that it was due for city taxes imposed by an ordinance of the corporation; admitting that the money was paid under a mistake of the meaning of the ordinance, and that the ordinance did not impose such a tax, yet *held*, it cannot be recovered back, in an action for money had and received against the corporation. Mayor, etc., of Richmond v. Judah, 5 Leigh 305.

Exclusion of Territory from Corporate Limits.—Act Feb. 28, 1872, "for the relief of Samuel W. Johnston," providing "that the farm of Samuel W. Johnston, on which he now resides, be, and the same is hereby, excluded from the corporate limits of the city of Huntington," did not exclude any portion of the farm sold and conveyed by Johnston before the act was passed. Phillips v. City of Huntington, 35 W. Va. 406, 14 S. E. 17.

B. Relating to the Condition of Streets and Sidewalks.

Conditions of Streets and Sidewalks—Degree of Care Requisite.—A municipal corporation is not an insurer against accidents upon its streets and roads. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets and roads are in a reasonably safe condition for travel in ordinary modes, with ordinary care; and whether so or not is a practical question to be determined in each case by its particular circumstances. While the liability of municipal corporations in such cases is in its nature absolute, that does not refer to the cause of action. The cause of action must exist before liability arises,—such cause as raises the liability. Van Pelt v. Town of Clarksburg, 42 W. Va. 218, 24 S. E. Rep. 878; Yeager v. City of Bluefield, 40 W. Va. 484, 21 S. E. Rep. 752.

Municipalities are simply required to keep streets and sidewalks in a reasonably safe condition for persons traveling in the usual modes, by day and night, and exercising ordinary care. Waggener v. Town of Point Pleasant, 42 W. Va. 798, 26 S. E. Rep. 352.

General Duty of City—Construction of Term "The Public."—A city is bound to keep its streets and sidewalks in a reasonably safe condition for the use of the public, and for a failure so to do it is liable for resulting damages to one injured in consequence thereof while exercising such degree of care and caution as, under the circumstances, including age and intelligence, might reasonably be expected. "The public" embraces "all persons." City of Roanoke v. Shull, 97 Va. 419, 34 S. E. Rep. 34; *dictum* in Fry v. Albemarle Co., 86 Va. 195, 9 S. E. Rep. 1004, 19 Am. St. Rep. 882.

Defects—Notice—Reasonable Time to Repair.—A city is entitled to a reasonable time after the discovery of a defect in its sidewalks, within which to remove or remedy the same, and is not liable for injuries resulting from such defects before that time. City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. Rep. 675.

Absolute Liability.—A municipal corporation is absolutely liable for injuries caused by its failure to keep in repair the streets, alleys, sidewalks, roads, and bridges. Chapman v. Milton, 31 W. Va. 385, 7 S. E. Rep. 22; Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. Rep. 447.

Notice of Defects.—A city charged with keeping the sidewalks of its streets in repair is liable for personal injuries caused by a defective sidewalk, whether it had notice of the defect or not. Evans v. City of Huntington, 37 W. Va. 601, 16 S. E. Rep. 801.

Notice of Defective Condition.—A municipal corporation is only liable for negligence in keeping its streets in repair, when it can be imputed with notice of such defects. Hence when the injury is caused by mere passive neglect or *nonfeasance* on the part of the city it is essential that the city should have express or constructive notice of the defect in the street, in order to render it liable for injuries occasioned thereby. In such case notice to the city officials is notice to the city. McCoull v. City of Manchester, 85 Va. 579, 8 S. E. Rep. 379.

Territorial Extent of Duty—Evidence.—The duty of a city to keep its sidewalks in a reasonably safe condition for the use of the public, extends to its territorial limits, and it cannot escape liability by showing that it has laid out more streets and sidewalks than it can keep in a reasonably safe condition. In an action to recover damages for an injury resulting from a failure to keep its sidewalks in a reasonably safe condition, evidence as to the number of miles of streets and sidewalks within the city limits is irrelevant. City of Roanoke v. Shull, 97 Va. 419, 34 S. E. Rep. 34.

"Reasonable Care"—Question for Jury.—What is reasonable care on the part of a city in keeping its footways in a reasonably safe condition, is a question for the jury, under all the circumstances of the case, including the age of the party injured in consequence of alleged defects; and cannot be shown by expert testimony. City of Roanoke v. Shull, 97 Va. 419, 34 S. E. Rep. 34.

City Streets—Obstructions—Snow and Ice—Negligence—Duty of Passenger.—If a city negligently permits its sidewalks to become obstructed by the accumulation thereon of snow and ice, and, after notice thereof, fails to use due care to remove such obstruction, and in consequence thereof, a traveller is injured, the city is liable in damages for such injury, provided the traveller exercised ordinary care, under all the circumstances, to avoid the negligence of the city. City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. Rep. 675.

Duty of Traveller.—Where a traveller or pedestrian, in passing along a street, sees an obstruction therein, it is his duty to exercise greater care, whether the circumstances are sufficient to arouse his fear or not. City of Richmond v. Leaker (Va.), 37 S. E. Rep. 348.

It is negligence in a city to allow its streets to remain obstructed at night, without taking reasonable and proper precautions to light them so as to enable persons travelling thereon to observe the obstruction by the use of ordinary care. City of Norfolk v. Johnakin, 94 Va. 285, 26 S. E. Rep. 830.

Contributory Negligence of Plaintiff.—Though it is the duty of a city to use reasonable care to keep its streets and sidewalks in a safe condition for travel, it is equally the duty of a traveller thereon, to exercise ordinary care, and contributory negligence on the part of the latter whereby he is injured will preclude a recovery against the city. Clarke v. City of Richmond, 83 Va. 355, 5 S. E. Rep. 369; City of Roanoke v. Harrison (Va.), 19 S. E. Rep. 179; City of Richmond v. Courtney, 32 Gratt. 792; Moore v. City of Richmond, 85 Va. 543, 8 S. E. Rep. 387; Piedmont, etc., Co. v. Patteson's Adm'x, 84 Va. 771, 6 S. E. Rep. 4; Richmond, etc., R. Co. v. Morris, 31 Gratt. 200.

Cities are not insurers of the safety of their streets and sidewalks; but they must use reasonable care to keep them in safe condition for travel in the ordinary modes by day and by night, and for the negligent failure so to do they are liable to one who, while so travelling and exercising reasonable care, is injured by reason of their negligence. See *note*, 1 Mun. Corp. Cas. 58; *dictum* in Gordon v. City of Richmond, 83 Va. 436, 2 S. E. Rep. 727.

Defective Sidewalks—Latent Defects—Contributory Negligence.—A person who uses a sidewalk or other highway, which his observation, prudently exercised, would inform him was dangerous, takes the risk of such injuries as may result to him by open and apparent defects, such as his observation ought to have detected and avoided; but if the injury does not result from these, but from another and latent defect, which no reasonable degree of prudence or care could detect, he will not be considered as taking the risk of injury from this latent defect. Moore v. City of Huntington, 31 W. Va. 842, 8 S. E. Rep. 512.

In an action against a municipal corporation for personal injuries, plaintiff testified that she fell

over a rock while she was walking in the dark, on a street that she knew to be obstructed and dangerous, though there were no danger signals to mark the obstructions. *Held*, that plaintiff was guilty of contributory negligence, and her evidence should have been excluded from the jury as insufficient to sustain the issue on her part. Hesser v. Grafton, 33 W. Va. 548, 11 S. E. 211.

Liability for Injury near but Not upon Street.—Where a traveler unnecessarily, for his own convenience, leaves the highway, and in so doing meets with an accident outside of the highway, the city cannot be responsible, no matter how near the highway the obstruction may be. Biggs v. City of Huntington, 32 W. Va. 55, 9 S. E. 51.

For What Kind of Injuries City Liable.—Under section 53, of chapter 43, of the Code, any person who sustains a direct injury to his person or property,—for instance, having a limb broken or a horse disabled, —by reason of a street in a town being out of repair, may recover damages for such injury by an appropriate action, in a court of competent jurisdiction, against said town. But one who suffers an injury only in his business from a street being out of repair cannot recover damages therefor from a city or town under section 53, of chapter 43, of the Code. Hale v. Town of Weston, 40 W. Va. 313, 21 S. E. Rep. 742.

Liability of City for Injury to Business.—The proprietor of a brickyard who is engaged in the manufacture of brick in the vicinity of a city or town, and in the erection of houses in said town or city, who, in common with others, is injured in his business by reason of the municipal authorities thereof failing to keep a street in repair which constitutes the highway from said town passing said brickyard, cannot maintain an action for damages against said city or town for losses sustained by him in his business. Hale v. Town of Weston, 40 W. Va. 313, 21 S. E. Rep. 742.

Personal Injuries—Rope across Sidewalk—Negligence —Question for Jury.—In an action of trespass on the case against a city to recover damages for an injury claimed to have been sustained by tripping and falling over a rope stretched across one of its sidewalks, in which the testimony of the plaintiff shows that he was ignorant of the existence of such obstruction, and that, although there were electric lights in the immediate neighborhood of the rope, yet the shadow of the telegraph pole to which it was tied obscured the rope, the question of negligence on the part of the defendant was one for the jury. Where a party is injured by an obstruction on a sidewalk in a town, the question as to whether said town has been negligent in allowing such obstruction to be and remain on the sidewalk depends upon the circumstances of the particular case. Arthur v. City of Charleston (W. Va.), 2 Mun. Corp. Cas. 326.

Defective Streets—Unmanageable Horse.—Where a boy 17 years of age is driving an open buggy along a street, with two companions, younger than himself, behind a horse which has contracted the vicious habit of backing, and which, becoming frightened at escaping steam from a locomotive engine, stops and trembles for a moment, and, on being struck with a whip, commences backing, and in spite of whips and words continues to back the buggy some 25 or 26 feet on the surface of the street, and then down a steep bank, by reason of which one of the occupants was injured, if sufficient time elapses between the fright of the horse and the accident to permit the driver, a man of ordinary prudence, to make a proper effort to regain control of the frightened animal, even though he should fail, the city would not be liable for its negligence in failing to maintain a rail or barrier along said embankment, as the injury must be attributed to the viciousness of the horse, rather than the defect of the street. It is not the duty of towns to provide streets which shall be safe for runaway or unmanageable horses, or such as have escaped from the control of their drivers without the fault of the town. Hungerman v. City of Wheeling, 46 W. Va. 761, 34 S. E. Rep. 778, 3 Mun. Corp. Cas. 92.

Permitting Dangerous Use of Streets.—An incorporated town is not liable for personal injuries occasioned by the firing of squibs, rockets, fireworks, and firearms on the streets by a crowd of citizens, although such acts be done with the knowledge and consent of the mayor, council, police, and other officers of such corporation. As to the powers and functions of an incorporated town, of a public governmental character, it is not liable for damages caused by the wrongful acts or negligence of its officers or agents therein. Bartlett, Plff. in Err., v. Town of Clarksburg (W. Va.), 43 L. R. A. 295.

Negligence in Keeping in Repair—Liability.—When a municipal corporation is empowered by its charter to lay off, pave, and keep in repair its streets, and to levy taxes for such purposes, it is liable for injuries caused by neglect to keep its streets in repair. City of Roanoke v. Harrison (Va.), 19 S. E. Rep. 179; Noble & Wife v. The City of Richmond, 31 Gratt. 271.

Defective Crossing—Liability of City.—In an action against a city for injuries occasioned by a defective street crossing, it appeared that plaintiff, after passing over a board crosswalk, had to step down about 12 inches to a platform of rock and earth 15 inches wide, and then step over a gutter 18 inches wide to another crossing made of flagstones. This crossing was at least 17 inches wide, was about on a level with said platform, and, through constant snow and rain, it had become nearly covered with mud. The plaintiff saw it was a bad crossing, but, being in a hurry, tried to jump over it, and in so doing stepped upon an uneven part of the flagging, where it was raised, and fell. *Held*, that the city was not liable. City of Roanoke v. Harrison (Va.), 19 S. E. Rep. 179.

Negligence of Contractor—Liability of City.—Where a dangerous excavation is made in a city street and left open without proper guards, covering or lights, by contractor with the city for building a sewer, the city is liable to a person injured directly thereby, although it had no immediate control over the workmen, and had stipulated in the contract that proper precautions should be taken by the contractor for the protection of the public, and that he should be liable for accidents occasioned by his neglect. Wilson v. City of Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

Injury Resulting from Excavation—Liability of City. —Such a corporation having by its charter power to lay out, improve, light and keep its streets in order, is liable in damages to any person who may sustain injuries by reason of its neglect to keep its streets in proper and safe condition, if it has notice, express or implied, of the defect. And where it permits an excavation to remain without proper guards so near the highway that one rightfully using it may, without fault, by unintentional deviation, or accidental misstep, sustain injury by falling into such excavation, it is also liable. Clark v. City of Richmond, 83

Va. 355, 5 S. E. Rep. 369; Noble v. City of Richmond, 31 Gratt. 271.

Approaches to Streets.—In Orme v. City of Richmond, 79 Va. 86, it is held that a city is bound to use all necessary measures to guard against injury to persons coming upon its streets from private way over adjoining lots, upon that portion of its streets which may be enclosed by barriers.

Delegation of Duty.—The grant of power, in the charter of a city, to the council, to lay out, improve, light, etc., its streets, is a grant to the corporation, and is of such a character as to prevent its exercise by any other person or body. Noble & Wife v. The City of Richmond, 31 Gratt. 271.

Proof That Certain Place is a Public Street.—In an action for injuries received on a street or sidewalk of a city the plaintiff makes out a *prima facie* case when he proves that the authorities of such town or city have treated the place where the injury was received as a public street, by taking charge of it and regulating it as they do other streets, and that the accident resulted from a defective sidewalk, which was out of repair. Phillips v. City of Huntington, 35 W. Va. 406, 14 S. E. Rep. 17.

Abandonment of Street by Municipality—Burden of Proof.—When a public road is taken into a city, town, or village by its charter of incorporation, it becomes the duty of such city, town, or village to keep such road in repair, unless it is abandoned as a public road in the manner provided by law. Proof of abandonment devolves on the city, town, or village. Hanley v. City of Huntington, 37 W. Va. 578, 16 S. E. Rep. 807.

In an action against a city for personal injuries caused by a defective street, the burden of proving that the street had been abandoned rests on defendant. Hanley v. City of Huntington, 37 W. Va. 578, 16 S. E. Rep. 807.

C. In Connection with the Improvement of Streets and Sidewalks.

Improvement of Streets—Degree of Care Requisite.—A city, acting within its charter powers in improving its streets, is the agent of the state, and is not answerable for consequential damages, where the work is done with care and skill, and does not actually encroach upon private property. Home Building, etc., Co. v. Roanoke, 91 Va. 52, 20 S. E. Rep. 895.

A municipal corporation is not liable for consequential damages from improving its streets, where it exercises reasonable care and skill in the performance of the work which it is authorized to do, and no part of the lands of others is actually taken. But, in the absence of such care and skill, it is liable for all damages not necessarily incident to the work, and which are chargeable to the unskillful or improper manner of executing it. Powell v. Town of Wytheville, 95 Va. 73, 27 S. E. Rep. 805.

Want of Due Care—Liability.—If a municipal corporation in improving its streets, fills up a street and does it in such way that the water which before had been carried off by gutters, is thrown back upon an adjoining lot, the corporation will be liable for the damage to the lot, if by proper care and means it might have been prevented. Smith v. The City Council of Alexandria, 33 Gratt. 208; Powell v. Wytheville, 95 Va. 73, 27 S. E. Rep. 805.

Damage—Remedy.—If damage results to an adjacent lot owner, from the improper manner in which a municipal corporation executes a lawful work, such damage is not necessarily incident to the accomplishment of the work, and the remedy is by an action at law. Courts of equity cannot interfere by injunction with the exercise in good faith by municipal corporations of discretionary powers conferred upon them by law. The apprehension of the lot owner that the corporation may not perform a lawful work in a proper manner is no ground for an injunction. Courts of equity are without jurisdiction to fix the grade of streets, or the manner in which the work shall be done by municipal corporations invested with discretionary powers in the premises. Town of Harrisonburg v. Roller, 97 Va. 582, 34 S. E. Rep. 523.

Consequential Damage—Damnum Absque Injuria.—A municipal corporation, when authorized by its charter, may make, improve, open, and grade its streets and sidewalks, and if, in so doing, it exercises reasonable care and skill, it is not answerable to the owner of an adjacent lot, whose land is not actually taken, for consequential damages to his premises, unless such liability is created by its charter, or some statute. If there be such damage it is *damnum absque injuria*. Town of Harrisonburg v. Roller, 97 Va. 582, 34 S. E. Rep. 523.

Additional Servitude—Damnum Absque Injuria.—The building of an approach to an elevated bridge in the streets of a city, leaving a space of about seven and one-half feet on each side, for the convenience of the public or adjacent owners, when there is no actual encroachment on the property of the abutting land owner, does not create any additional servitude on the land, and is not a "taking" of private property, within the meaning of article V, section 14, of the Constitution of Virginia, though the use of the property may be thus impaired. The resulting damage, if any, is *damnum absque injuria*. And it is immaterial whether the fee in the street is in the city, the state, or the abutting land owner. Home Building, etc., Co. v. Roanoke, 91 Va. 52, 20 S. E. Rep. 895.

Additional Servitude—Steam Railway—Measure of Damages.—In Stewart v. Ohio River R. Co., 38 W. Va. 438, 18 S. E. Rep. 604, it was held that, where a railroad is laid down in a public street, the abutting property is damaged, within the meaning of section 9, art. 3, of the constitution, to the extent of the depreciation caused by the construction and operation of the road. The measure of the damages is such a sum as will make the owner whole,—that is, the depreciation of the market value of the abutting property, caused by the railroad company laying their track and running their trains in the street. In such case, if the fair market value of the abutting property is as much immediately after the construction of the railroads as it was immediately before such improvement was made, no damages are sustained for which a recovery can be had.

Additional Servitude—Steam Railway.—Owners of lots abutting on streets own the fee in the land to the middle of the street, subject to the rights of the public to travel over it. Locating a railroad track on the street is an additional burden, which cannot be imposed without compensation to the owner. Hodges v. S. & R. R. Co., 88 Va. 653, 14 S. E. Rep. 380.

Additional Servitude—Erection of Telegraph Poles and Wires.—Condemnation of land for public highways gives only right of passage over it. The absolute property in the land remains in owner. Erection of telegraph poles and wires constitutes an additional servitude on the land. Act February 10, 1880 (Code, sec. 1287-1290), authorizing construction of telegraph lines along any public road, if the use of the highway be not obstructed, without providing any compensation to the land owners, vio-

lates the constitutional intention when taking private property for public use without compensation. Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E. Rep. 106.

Additional Servitude—Street Railways.—The substitution of a double track electric street-car line for a single track horse-car line is not an additional servitude or burden on the street for which the abutting lot owners are entitled to compensation. Reid Bros. & Co. v. Norfolk City R. Co., 94 Va. 117, 26 S. E. Rep. 428. See also, on this subject, 5 Va. Law Reg. 477.

Additional Servitude—Compensation.—Owners of lots abutting on streets own the fee in the land to the middle of the street, subject to the rights of the public to travel over it. Locating a railroad track on the street is an additional burden, which cannot be imposed without compensation to the owner. Hodges v. S. & R. R. Co., 88 Va. 653, 14 S. E. Rep. 380.

Damage Resulting from Change of Grade—Measure of Damages.—In an action against a municipal corporation for damage to a lot from change of grade of a street, the measure of damages is the difference between the market value of the lot immediately before and immediately after the change. McCray v. Town of Fairmont (W. Va.), 2 Mun. Corp. Cas. 323.

Change of Grade Causing Damage by Surface Water—Liability of Municipality.—A municipal corporation is not liable for damages to a lot by reason of change of a street's grade operating upon surface water, though it may increase it; but if the work operates, as its direct effect, to collect and cast water in a mass on the lot, the corporation is liable. McCray v. Town of Fairmont (W. Va.), 2 Mun. Corp. Cas. 323.

Drainage—Liability for Failure to Drain.—If a city or town negligently fails to keep its existing drains and gutters open and clear of obstructions, and in condition to carry off the water in them, and by reason thereof land is injured from their overflow, the city or town is liable in damages, provided the overflow is not due to an unusual or extraordinary storm or rainfall. Clay v. City of St. Albans, 43 W. Va. 539, 27 S. E. Rep. 368.

If a city or town, by gutters, drains, or otherwise, collect surface water and cast it in a body on land, it is liable in damages. Clay v. City of St. Albans, 43 W. Va. 539, 27 S. E. Rep. 368.

Drainage—Change of Street Grade—Injuries to Adjoining Lot.—Where a town, in grading its streets raises its grade so as to cast the surface water on an adjoining lot occupied by a store room, if the grade of such street is not raised in violation of the constitution, or some statute law, or the charter of the town, no action can be maintained by the adjoining lot owner for damages sustained by reason of casting said surface water on said adjoining lot, unless the surface water is collected in a body and cast upon said lot. Yeager v. Town of Fairmont, 43 W. Va. 759, 27 S. E. Rep. 234.

Liability to Lot Owners for Discharge of Surface Water.—A city is not liable for damages to a lot owner because change of grade of a street prevents surface water of the lot from flowing off. It is not different even if the surface water is, by reason of such change of grade, increased in quantity upon the lot, if not cast in a mass or body upon the premises. Nor is a city liable for mere surface water flowing from a street upon an adjoining lot. Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. Rep. 266.

A city cannot by ditches, drains, or other artificial channels collect surface water, and cast it in a body or mass upon a lot. If it does so, it is liable to the lot owner in damages. Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. Rep. 266.

The provision, in section 9, art. 3, of the constitution, that private property shall not be taken or damaged for public use without just compensation, does not render a city liable for damages to property from surface water where a private individual would not be liable. Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. Rep. 266.

Improvement of Streets—Legitimate Delegation of Power.—It is not an undue delegation of power for a municipal corporation to confide to the street committee the execution of work, where the work has been ordered, and the manner of its execution prescribed, by the council. Town of Harrisonburg v. Roller, 97 Va. 582, 34 S. E. Rep. 523.

IV. CHARTERS AND ORDINANCES.

A. Charters.

Construction of Charters.—It is a well settled rule of construction of legislative grants to public or private corporations, that they can exercise only such powers as are conferred expressly or impliedly by the act, and that in all cases of ambiguity, the doubts shall be resolved in favor of the public. Roper v. McWhorter, 77 Va. 214.

Conflict between General Law and Charter.—A general power of taxation "in accordance with the constitution and laws of the state," means a general power not repugnant to, or inconsistent with, the constitution and laws, and is not restricted by the provisions of sec. 1042 of the Code. But if there is a conflict between sec. 1042 of the Code and the charter of a municipality, the charter prevails, as provided by sec. 1048. City of Norfolk v. Norfolk Landmark Publishing Company, 95 Va. 564, 28 S. E. Rep. 959.

Construction of Charter—Erection of Public Buildings.—The provision of a city charter which requires all contracts for the erection of public improvements or buildings to be let to the lowest responsible bidder, does not inhibit the city from constructing public buildings or improvements under the direction of its own engineers or officers, but applies only to such buildings or improvements as are let to contract. Home Building, etc., Co. v. Roanoke, 91 Va. 52, 20 S. E. Rep. 895.

Construction of Charter—Improvement of Streets.—The grant to a city by its charter of power "to close or extend, widen or narrow, lay out, graduate, curb and pave, and otherwise improve the streets, sidewalks, and public alleys in said city," and also to "build bridges in and culverts over said streets" is a sufficient grant of authority to build an approach to an elevated bridge in its streets. The approach is but the grading of the street to adapt it to the use and need of the public. Home Building, etc., Co. v. Roanoke, 91 Va. 52, 20 S. E. Rep. 895.

Construction of Charter—Ordinance Imposing upon Abutting Owners Burden of Paving Street—Validity.—The provision of the charter of the city of Bristol, authorizing sidewalks and gutters along any street to be paved or improved at cost of abutting owners, does not authorize the city to impose by ordinance, upon such owners, the burden of paving the entire width of the street in front of their respective properties. McCrowell v. City of Bristol, 89 Va. 652, 16 S. E. Rep. 867.

Amendment of Charter—Construction of Statute.—A statute amending the charter of a town containing

upwards of 2,000 population, which takes from another town of less population than 2,000 some of its territory, is not a special act amending the charter of a town of less population than 2,000, prohibited by section 39, art. 6, of the constitution. Roby, Mayor, v. Sheppard, Mayor, 42 W. Va. 286, 26 S. E. Rep. 278.

Forfeiture of Charter.—A forfeiture of the charter of a municipal corporation cannot be enforced or taken advantage of in any legal proceeding collaterally or incidentally. That forfeiture must be declared in a proper, direct way. The state only can enforce such forfeiture, as it alone has the right to waive or enforce it. Hornbrook v. Town of Elm Grove, 40 W. Va. 543, 21 S. E. Rep. 851.

B. **Ordinances.**—City ordinances, to be valid, must be reasonable. An unreasonable by-law is void. Where the charter expressly grants a power, but prescribes neither the time nor the mode of its exercise, it must be exercised in a mode and at a time deemed reasonable by the court. Kirkham v. Russell, 76 Va. 956.

In Mayo v. James, 12 Gratt. 17, it was held not illegal to affix the punishment of stripes to the violation of a city ordinance by a free negro.

Ordinance to which land owner refused assent, allowing him to build across the drain to be cut through land proposed to be condemned for the purpose, cannot be considered in assessing the damages. Roanoke City v. Berkowitz, 80 Va. 616.

Ordinances—Selling Liquor on Sunday.—An ordinance of the city of Richmond provides that every hotel keeper, and keeper of a restaurant, lager beer saloon, or other place where ardent spirits, beer, cider or other drinks are sold or given away, shall close the bar where such drinks are sold or given away every Sunday during the whole day, * * * and any person violating any provision of this section shall be fined not less than ten nor more than $500. The act of March 6, 1874, ch. 83, p. 76, enacts "that no intoxicating drinks shall be sold in any bar-room, restaurant, saloon, store or other place within the limits of this commonwealth from 12 o'clock on each and every Saturday night of the week, until sunrise of the succeeding Monday morning." And the penalty for a violation of this act is a fine of not less than ten nor more than $500, and at the discretion of the court of a forfeiture of his license; "provided that this law shall not apply to any city having police regulations on this subject, and an ordinance inflicting a penalty equal to the penalty inflicted by this statute"—*held*, that the ordinance is not the same as to the statute, either in the specification of the offence or in the penalty, so as to bring it within the proviso of the statute; and therefore a prosecution for a violation of the act may be sustained. Thon v. Com., 31 Gratt. 887. See also, monographic *note* on "Intoxicating Liquors," 31 Gratt. 887.

Ordinances—Buildings.—A city ordinance forbids any person to erect any building outside the fire limits and within thirty feet of any building not his own, except of such materials as are allowed for buildings inside said limits. C. added a story to a house out of prohibited material. *Held*, he violated the ordinance. Carroll v. City of Lynchburg, 84 Va. 803, 6 S. E. Rep. 133.

Ordinance—Renting Market Stalls at Auction—Fees of Auctioneer.—A city ordinance which authorizes an officer to rent stalls in the market house at public auction does not authorize him to employ an auctioneer at the expense of the city. He is limited to his salary as compensation for all duties to be performed by him, unless otherwise provided, either expressly or by necessary implication. A renting at public auction simply required it to be made in public to the highest bidder. A regular auctioneer was wholly unnecessary to the validity of the renting. City of Norfolk v. Pollard, 94 Va. 279, 26 S. E. Rep. 832.

Violation of Ordinance.—Violation of the public ordinance of cities, towns, and villages are strictly criminal in nature, being offenses against the public, and not merely private wrongs. In prosecutions for such offences, costs are not recoverable against such city, town, or village. City of Charleston v. Beller, 45 W. Va. 44, 30 S. E. Rep. 152.

Ordinances—Repeal by Implication.—A subsequent municipal ordinance, fully covering the subject-matter of a previous ordinance, being a substitute therefor, repeals the former by implication, without words to that effect. Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. Rep. 163, 1 Mun. Corp. Cas. 218, and *note*.

V. OFFICERS AND GOVERNING BODIES.

Appointment of Town Officers.—The legislature incorporating a town may appoint the officers to exercise their functions until a regular election, notwithstanding constitution, art. 6, § 20, provides that town officers shall be electors of such towns, councilmen so appointed and exercising their functions, are *de facto* officers, and their acts in levying a license tax, authorized by the charter, are binding, even though one of them, after moving beyond the corporate limits, continued to perform his official duties and participated in said acts. Roche v. Jones, 87 Va. 484, 12 S. E. Rep. 965.

Qualifications of Officers.—Acts of Assembly (Acts 1883-4, p. 57), amending charter of city of Portsmouth, provides that qualifications of any person or persons elected as councilman, shall be adjudged of by the council, and determined by a majority vote thereof. *Held*, this provision applies only to the case of a contested seat. Jobson v. Bridges, 84 Va. 298, 5 S. E. Rep. 529.

Official Bonds—Liability of Sureties.—Sureties on an official bond are liable for money in the hands of their principal at the date of the bond, provided such money forms a part of the fund which the bond was intended to secure, and came to the hands of the principal obligor in the course of a precedent term of office or employment. If they make the defense that the money was collected or otherwise came into the hands of the principal before the execution of the bond, it is incumbent upon them to show also that it was misapplied before that time. Town of Parsons v. Miller, 46 W. Va. 334, 32 S. E. Rep. 1017, 2 Mun. Corp. Cas. 590, and *note*.

City Council—Powers—Removal of Corporate Officer.—In Richards v. Town of Clarksburg, 30 W. Va. 491, 4 S. E. Rep. 774, it was held, that every town and village in this state, incorporated under the provisions of chapter 47 of the Code, or to which they apply, is a municipal corporation possessing all the powers incident to such corporations at common law, not changed, abolished, or prohibited by statute. The corporate powers of every such municipal corporation can only be exercised by the common council thereof, or under its authority, except where others wise provided by law. The "corporate body at large" of every such incorporated town or village, in the exercise of its corporate powers, is represented by the "common council" thereof. The power to remove

a corporate officer from his office is one of the common-law incidents of all corporations.

City Council—Passage of Ordinances.—If the charter of the city requires that an ordinance providing for the opening, grading, etc., of streets shall be passed by a vote of three-fourths of each branch of the council, if the present ordinance was not so passed, yet if it is an amendment of a prior ordinance giving substantially the same powers to the council, the act of the council will be sustained. Sands, Receiver, v. City of Richmond, 31 Gratt. 571.

Authority of City Council—Grade of Streets.—Changes in grade of streets can be made only by authority of city council previously given, and changes made therein without such authority cannot be validated by subsequent ratification. Page v. Belvin, 88 Va. 985, 14 S. E. Rep. 843.

Sale of City's Real Estate.—A city council cannot delegate to a committee its authority to sell the city's real estate. Beal v. City of Roanoke, 90 Va. 77, 17 S. E. Rep. 738.

Authority of De Facto Officers.—The acts of *de facto* municipal officers, within the scope of their authority and under color of law, are valid and binding, in the absence of clear proof that they are not *de jure* officers of such municipality. Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. Rep. 163, 1 Mun. Corp. Cas. 219, and *note*.

City Council—Jurisdiction.—Where facts essential to give a town council jurisdiction appear in its proceedings, its jurisdiction is not open to collateral attack. Shank v. Town of Ravenswood, 43 W. Va. 242, 27 S. E. Rep. 223.

Powers of Mayor.—The chief of police of a city is the officer of the state, and not of the municipality in which he exercises his office. Though under the constitution of the state, article 6, § 20, the mayor has authority to remove the officers of the municipality, the constitution does not invest him with the power to remove state officers, though they are elected by the people of the municipality or appointed by the municipal authorities, and are paid by them. The charter of a city having provided for a board of police commissioners, and vested in them the power of removing the chief of police, only giving to the mayor the power of suspending the said officer for a short time, if the mayor removes the officer from his office he exceeds his power and is responsible to the officer in a civil action for damages. Burch v. Hardwicke, 30 Gratt. 24, 32 Am. Rep. 640.

Jurisdiction of Mayor.—Petitioner was arrested and brought before the mayor of C. for violation of city ordinance in selling beer without license within one mile from the corporation limits. He was tried and convicted by the mayor, and fined $50 and costs; and was committed to the street commissioner, to work out his fine. The warrant for his arrest was issued by the recorder, but it did not appear whether he was arrested within or without the city limits. He obtained from the circuit court a writ of *habeas corpus*. The return made by the mayor disclosed the facts, and alleged that petitioner had violated said ordinance. Petitioner demurred to said return, and on the hearing the circuit court dismissed the writ with costs. *Held*, under the charter of the city, and the West Virginia statutes relating to licenses by cities, etc., that the mayor of the city of C. had jurisdiction to hear and determine said cause, and the circuit court properly overruled said demurrer, and dismissed the writ. Flack v. Fry, 32 W. Va. 364, 9 S. E. Rep. 240.

VI. PLEADING AND PRACTICE.

A. Statute of Limitations as against Municipalities.—Owing to the dual character of municipal corporations—the one private and the other public.—a distinction is drawn by the courts in regard to the running of the statute of limitations against them. Wherever, a municipality sues in its proprietary character, it is held that the statute is as much applicable as against individuals. It is only where the municipality sues in a strictly public character, as an agency of the people, that the maxim *nullum tempus occurrit regi* is applicable. Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. Rep. 818; Taylor v. Com., 29 Gratt. 780; Norfolk v. Chamberlaine, 29 Gratt. 584; Manchester, etc., Co. v. Manchester, 25 Gratt. 825, 5 Va. Law Reg. 470.

Application of Maxim "Nullum Tempus Occurrit Regi.—When dedication has become complete and irrevocable, no obstruction of the subject of the dedication, and no encroachment upon it by the original owner or any one else, for any length of time, will affect the dedication, or impair the rights of the public to it, unless the land so dedicated has been abandoned by the public, or by the proper authority. Time does not run against the state, nor bar the right of the public. In the case at bar the dedication was complete, and there has been no abandonment. Buntin v. City of Danville, 98 Va. 200, 24 S. E. Rep. 830.

Strict Interpretation of Maxim "Nullum Tempus Occurrit Regi."—In Ralston v. Town of Weston, 46 W. Va. 544, 33 S. E. Rep. 326, the syllabus by the court was as follows: "(1) If an original owner of a tract of land lays the same off into town lots, with streets and alleys between, and has the same so platted, and sells the lots with reference to such streets and alleys as boundary lines of the same, and such plat is adopted by the corporate authorities of the town in which such lots are situated, a purchaser of one of such lots is estopped from denying the dedication of such streets to public use. (2) The statute of limitations runs against the state and municipal corporations, as against individuals in all similar cases. (3) The maxim, '*nullum tempus occurrit regi*,' applies to all the sovereign rights and property of the people of the state dedicated to public uses, and of which they cannot be deprived otherwise than according to their express will and appointment. (4) The public easement in the public highways, including roads, streets, alleys, and other public thoroughfares, dedicated to the use of the general public by individuals, or under the right of eminent domain, is such property, and cannot be lost to the people by the negligence of public officials or the unlawful acts of individuals. (5) An individual cannot destroy such easement by setting up a claim by the prescription, adverse possession under the statute of limitations, or equitable estoppel, as the people cannot be deprived of their sovereign rights in any of these ways. (6) The opinions of judges of this court in the cases of City of Wheeling v. Campbell, 12 W. Va. 36; Forsyth v. City of Wheeling, 19 W. Va. 318, and Teass v. City of St. Albans, 38 W. Va. 1, 17 S. E. Rep. 400, in so far as they hold that the public easement in the public highways of this state is subject to the bar of the statute of limitations, are disapproved. (7) It is the expressed will of the people of this state that private property shall not be taken or damaged for public use by governmental officers or agencies, without just compensation."

B. Miscellaneous Matters of Procedure.

Action for Injury Resulting from Defect in Streets or Sidewalks — Declaration. — A declaration, in a case against a city for personal injury by reason of a defect in a street crossing, alleging that the plaintiff fell, and thereby was "greatly injured, bruised, wounded, and crippled," is not bad because it does not state the particular injury, as a broken leg, for instance. Where special damages consequent on the particular injury are claimed, it seems otherwise. Yeager v. City of Bluefield, 40 W. Va. 484, 21 S. E. Rep. 752.

In an action against a city for injuries alleged to have resulted from its negligence in unlawfully permitting a sidewalk to be obstructed, the declaration set forth in detail the character of the action, and the circumstances leading to it, and alleged that plaintiff thereby had his right arm broken between the elbow and shoulder, and became sick, sore, lame, diseased, and disordered, and so remained from thence hitherto, during all of which time he thereby suffered and endured great pain, and was prevented from attending to and transacting his necessary and lawful game business, and was forced to give it up, and was also disabled from pursuing any business requiring the use of his right arm, and that he had been obliged to expend $500 to get cured of his wounds, sickness, etc. *Held*, that the declaration gave defendant complete notice of the nature and character of plaintiff's claim, and that no further bill of particulars was required. City of Richmond v. Leaker (Va.), 37 S. E. Rep. 348.

The averment that a person, while passing over a public brick sidewalk in bad repair, rough, uneven, sideling, and slippery, caught his foot against a projecting brick, and fell down, injuring himself, does not state a sufficient cause of action, as such accidents are liable to occur with the old and feeble, careless and indifferent, at almost any place or time. Waggener v. Town of Point Pleasant, 42 W. Va. 798, 26 S. E. Rep. 352.

Necessary Allegations.—In Chapman v. Town of Milton, 31 W. Va. 384, 7 S. E. Rep. 22, it was held that the statute (section 53, c. 43, W. Va. Code) imposes an absolute liability upon cities, villages, and towns for injuries sustained by reason of the failure of the municipal authorities to keep in repair those streets, sidewalks, etc., within the corporate limits, which its authorities have opened or controlled and treated as public streets, sidewalks, etc., and therefore, in an action against a town by a person injured by a defective sidewalk, he is not required to allege in his declarations, or prove at the trial, that the defendant had notice of the defect or want of repair in such sidewalk. But in order to entitle the plaintiff to recover in such action, he must allege and prove that the street or sidewalk upon which the injury occurred was, at the time and place where the injury was sustained, controlled and treated by the town authorities as the public street or sidewalk, and opened as such.

A declaration against a municipal corporation for damages from flowage of water upon a lot from a change of grade of a street must allege that by the work, water was collected and cast in a mass upon a lot. McCray v. Town of Fairmont (W. Va.), 2 Mun. Corp. Cas. 328.

Action on Bonds—Allegation as to Limit of Indebtedness.—In assumpsit against a municipal corporation to recover on interest coupons attached to bonds issued under legislative authority in aid of a railroad, the declaration need not allege specially that in issuing the bonds there was a compliance with the constitutional provision limiting the power of municipal corporations to incur indebtedness, and requiring a vote before the issue of bonds, etc.; a failure to comply with the provision being a matter of defense. Brown v. Town of Point Pleasant, 36 W. Va. 290, 15 S. E. Rep. 209.

Declaration—Specification of Damage Resulting from Grading Street.—Where the specification of damages is rested in the declaration only upon the elevation of the grade of the street from which, as alleged, it results that plaintiff is obliged to maintain a wall to prevent earth falling from the street on his premises; that ingress and egress is made inconvenient and unsafe; that the value of his premises is diminished; that his business has been injured, and that the flow of rain-water upon his premises causes further damages, a demurrer will lie. Kehrer v. Richmond City, 81 Va. 745.

Suit against Municipality for Allowing Nuisance—Sufficiency of Declaration.—A declaration filed against a municipal corporation in an action on the case, which avers that the common council authorized the plaintiff to erect a carpenter shop on a certain lot within such municipality, with the knowledge that a steam engine would be necessary in running the machinery connected with such shop, and that after the erection of such shop the council modified such permit so as to forbid the use of such steam engine therein, to the great damage and loss of the plaintiff, states no sufficient cause of action against such municipality. Wood v. City of Hinton (W. Va.), 3 Mun. Corp. Cas. 547.

Suit against Town in Corporate Name.—A suit to enjoin the collection of municipal taxes, on the ground that they were illegally imposed by reason of want of authority to impose them from forfeiture of the municipal charter, is not wrongly brought, from the mere fact that the town is sued in its corporate name. So bringing the suit does not admit its continued existence. Hornbrook v. Town of Elm Grove, 40 W. Va. 543, 21 S. E. Rep. 851.

Suit against Municipality — Process—Delivery—Bill Taken for Confessed.—If, in a suit against an incorporated town, the process be executed by delivering a copy thereof to its mayor, he is not thereby made a party to the suit; and if such town fail to answer the bill it will be taken for confessed against it, although the mayor has filed an answer in the cause. Miller v. Town of Aracoma, 30 W. Va. 606, 5 S. E. Rep. 148.

Right of Taxpayer to Restrain Ultra Vires Acts.—The right of taxpayers to resort to equity to restrain municipal corporations and their officers, and *quasi* corporate bodies and their officers from transcending their lawful powers or violating their lawful duties in any way injuriously affecting the taxpayers, such as making unauthorized appropriations of the corporate funds or an illegal disposition of the corporate property, is well established. Without legislative authority they cannot lease or alien any franchise necessary to perform its obligations and duties to the state. Roper v. McWhorter, 77 Va. 214.

Where a suit is brought by a landholder against an incorporated town, to enjoin it from opening a public alley through his land without having first condemned the same for public use, according to law, the owner of a lot adjoining such proposed alley, who has been instrumental in moving the public authorities of such town to open such alley, may properly be joined with such town as a defend-

ant in such suit. Miller v. Town of Aracoma, 30 W. Va. 606, 5 S. E. Rep. 148.

Any tax-paying resident and voter of a city may sue on behalf of himself and all other taxpayers to enjoin the creation of any indebtedness by the city in excess of the constitutional limit. Spilman v. City of Parkersburg, 35 W. Va. 605, 14 S. E. Rep. 279.

Suit by One or More Taxpayers to Enjoin Municipal Corporation from Levying Illegal Tax, or Incurring an Unauthorized Debt.—Courts of equity have jurisdiction, on the application of one or more taxpayers of a municipal corporation, suing for the benefit of themselves and all others similarly situated, to enjoin the corporation and its officers from levying and collecting an unauthorized tax, or creating an unauthorized debt. It is immaterial whether the debt was wholly unauthorized, or authorized only upon conditions which have not been complied with, or that the securities for it would be void in the hands of an innocent holder. Lynchburg & Rivermont Street-Railway Co. v. Dameron, 95 Va. 545, 28 S. E. Rep. 951.

Remedy against Illegal Tax.—By a long course of decisions it has been settled that the remedy against an attempt to coerce the payment of an illegal tax is by injunction. City of Richmond v. Crenshaw, 76 Va. 936.

If a municipal corporation taxes property beyond the limit fixed by the organic law conferring the power to tax, a court of equity will enjoin the collection of the amount illegally assessed. Tygart's Val. Bank v. Town of Philippi, 38 W. Va. 219, 18 S. E. Rep. 489.

Trespass by Corporation—Injunction.—The remedy for illegal entry by a corporation on lands is by injunction; and plaintiff is not required to show a case of destructive trespass or irreparable damage. The slightest excess of power is sufficient. Hodges v. S. & R. R. Co., 88 Va. 653, 14 S. E. Rep. 380.

Compensation Due Officer of City—Mandamus.—*Mandamus* will not lie to compel the issue of an order for the payment of compensation due to an officer of a city, where such compensation has not been provided for by statute or ordinance, or is in any wise discretionary. City of Richmond v. Epps (Va.), 35 S. E. Rep. 723.

Enjoining Abatement of Nuisance by Municipality.—Equity may restrain the proceedings of a municipal corporation to abate a nuisance, where those proceedings encroach upon private rights, and are productive of irreparable injury. Bristol Door & Lumber Co. v. City of Bristol (Va.), 2 Mun. Corp. Cas. 548, and *note*.

Mandamus to Compel Levy of City Taxes.—The duty of levying taxes to pay the debts of a city is a corporate duty of the city council, which it may be compelled to perform by *mandamus*. The members of the council in their capacity of councilmen may be proceeded against for contempt, for failure to obey an order of a court of competent jurisdiction directing a levy to be made, but an order directing the councilmen to make the levy is none the less an order to the city council in its corporate capacity. To such an order the councilmen in their corporate capacity alone can apply for a writ of error. Osborne v. Kammer, 96 Va. 228, 31 S. E. Rep. 19.

Commissioners' Report—Quashing.—Report of commissioners to condemn land for municipal purposes will not be quashed on the ground that a commissioner appointed, at the instance of the municipality, was interested, where the record does not show that the municipality was ignorant that he was interested when so appointed. Ignorance of the attorney making motion for the appointment, is not evidence of the municipality's ignorance that the commissioner was interested. But if commissioner was interested and disqualified, and municipality was ignorant, report will not be quashed, if record shows that the damages assessed are not excessive. Roanoke City v. Berkowitz, 80 Va. 616.

Constitutionality of Municipal Ordinance—Appellate Jurisdiction.—To call forth the jurisdiction of the court of appeals upon the question of the constitutionality of a law or municipal ordinance, it is not necessary that it specially appear in the record by some appropriate plea or other proceeding that such question was raised and decided in the lower court, but such jurisdiction may arise from any proceeding which necessarily puts the constitutionality of such laws or ordinance in issue, whether it be a demurrer, plea, instruction, or otherwise. Adkins v. City of Richmond (Va.), 3 Mun. Corp. Cas. 514.

Conviction by City Council—Appeal.—Const. art. 8, § 3, giving the supreme court of appeals appellate jurisdiction in cases of *certiorari*, and not the clause fixing the court's jurisdiction by the value of the matter in controversy, determines the court's jurisdiction when error is brought on the ground that the circuit court refused defendant a writ of *certiorari* on a conviction by a town council for maintaining a nuisance. Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. Rep. 906.

Conviction of City Council—Certiorari.—Where a person accused of maintaining a nuisance feels aggrieved by the decision of a town council, his remedy, if the statute gives no appeal, and no question is made that the statute is unconstitutional, or that the town authorities did not have jurisdiction of the subject-matter, is by *certiorari*, and not by prohibition. Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. Rep. 906.

A proceeding by a town council against a person for maintaining a nuisance is judicial in its character, and the decision is subject to review. Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. Rep. 906.

Abatement of Nuisances by City Council—Equity Jurisdiction.—Where the law gives the council of a town ample power to abate nuisances, and the council gives the person charged with maintaining the nuisance opportunity to be heard, it is unnecessary to resort to a court of equity for relief. Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. Rep. 906.

Abatement of Nuisances by City Council—Procedure.—Under Code, c. 47, § 28, giving the council of a town power to abate a nuisance, but not prescribing the methods of procedure, upon a petition signed by 50 residents, supported by two affidavits fully describing the alleged nuisance, a merry-go-round, and praying that the owner might be summoned before the town council, a summons signed by the mayor only in the nature of an order to show cause, and reciting the facts set out in the petition, was issued. *Held*, that the procedure and summons were sufficient. A summons in the nature of an order to show cause, issued by a town council to a person charged with keeping a nuisance, not being a writ or process, within the meaning of Const. art. 2, § 8, need not run in the name of the state. Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. Rep. 906.

Abatement of Nuisances by City Council—Quorum.—Code, c. 47, § 28, giving the council power to abate anything which, in the opinion of a majority of the whole council, shall be a nuisance, does not require

the recorder, or more than a majority of the council, to be present at the hearing of a petition to abate a nuisance. Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. Rep. 906.

Nuisances—Abatement by City Ordinance—Police Power.—Storage of gunpowder in a city being dangerous, its regulation is a matter within the power of the corporate authorities, and their judgment, as expressed in an ordinance requiring the removal of powder magazines, is conclusive upon the courts. An ordinance requiring the removal of powder magazines in a city, the sites whereof were sold by the city council to vendees for the purpose of erecting thereon such magazines, does not impair the obligation of a previous valid contract with that council and does not take private property without compensation; but is constitutional, being a valid exercise of the police power. Davenport v. Richmond City, 81 Va. 636.

Local Assessments under Statutory Authority—Necessary Allegations in Bill to Enforce.—An act of the legislature which authorizes a municipality to assess two-thirds of the expense of paving a street and the whole expense of constructing a sewer against the abutting property owners is constitutional and valid. It is only necessary, in a bill in equity to enforce such an assessment, to set out and allege a substantial compliance with the statute. City of Parkersburg v. Tavenner, 42 W. Va. 486, 26 S. E. Rep. 179.

Action for Injury from Defective Street—Proof That Street Was Recognized as Such by Municipal Authorities.—Code W. Va. 1887, c. 43, § 53, imposes an absolute liability upon cities, villages, and towns for injuries sustained by reason of the failure of municipal authorities to keep in repair the streets, sidewalks, etc., within the corporate limits, provided its authorities have opened or controlled such street or sidewalk where the injury was sustained, as a public street or sidewalk. *Held*, that plaintiff must allege and prove that the street or sidewalk upon which the injury occurred at the time and place when the injury was sustained was controlled and treated by the municipal authorities as a public street or sidewalk, and opened as such. Biggs v. City of Huntington, 32 W. Va. 55, 9 S. E. Rep. 51.

Injury from Defective Sidewalk—Contributory Negligence—Question for Jury.—In an action against a city for personal injuries alleged to have been caused by a defective sidewalk, plaintiff testified that she stepped over an offset about one foot in height, which conducted from a newly-laid pavement to the original plank walk upon an adjoining lot, which had not yet been removed or relaid; that she did not know of the defect, and had no opportunity for discovering it; that the night was dark, and that there was no light. Plaintiff was corroborated by two witnesses, and one witness for the defense testified that there was an offset of eight inches. *Held*, that plaintiff made out a *prima facie* case, under Code, c. 43, § 53, and that, the evidence being conflicting, the question of contributory negligence was for the jury, and a verdict for plaintiff would not be disturbed. Moore v. City of Huntington, 31 W. Va. 842, 8 S. E. Rep. 512; Phillips v. City of Huntington, 35 W. Va. 406, 14 S. E. Rep. 17; Bowen v. City of Huntington, 35 W. Va. 682; 14 S. E. Rep. 217, *followed*; Snoddy v. City of Huntington, 37 W. Va 111, 16 S. E. Rep. 442.

Injury from Defective Street—Evidence—Question for Jury.—In an action against a city for injuries caused by a defective sidewalk, it appeared that the plaintiff knew that the sidewalk was out of repair and dangerous; and it also appeared that the injury to the plaintiff was not necessarily caused by the open and apparent defects in the sidewalk, or any want of due care on her part, but may have been caused by a latent defect, for which the city was responsible, and which the plaintiff could not have detected by any reasonable prudence or care. *Held*, it was proper to submit the plaintiff's evidence showing these facts to the jury, and to refuse the motion of the defendant to strike out said evidence. Moore v. City of Huntington, 31 W. Va. 842, 8 S. E. Rep. 512.

Action for Injury from Defective Sidewalk—Instructions.—In an action against a city for injuries alleged to have resulted from its negligence in unlawfully permitting a sidewalk to be obstructed, it was error to refuse instructions intended to inform the jury that defendant had a right to permit persons erecting buildings to use a portion of the streets and sidewalks for the deposit of building materials and appliances therein, and that, where they are deposited in a street, and are open and obvious, travelers or pedestrians passing thereby must observe greater care to avoid accident than would otherwise be necessary. City of Richmond v. Leaker (Va.), 37 S. E. Rep. 348.

Action for Injury from Defective Sidewalk—Instructions—Contributory Negligence.—In an action against a city for injuries alleged to have resulted from its negligence in unlawfully permitting a sidewalk to be obstructed, the jury were instructed that the burden of proving defendant guilty of negligence rested on plaintiff, and that, if defendant sought to relieve itself from liability by reason of plaintiff's contributory negligence, the burden of proving such negligence rested on it. *Held*, that the instruction should have concluded as follows: "Unless such contributory negligence was disclosed by the plaintiff's evidence, or could be fairly inferred from the circumstances." City of Richmond v. Leaker (Va.), 37 S. E. Rep. 348.

Action for Personal Injuries from Defective Sidewalks—Province of Jury.—In an action by a traveller against a city for a personal injury resulting from a defective sidewalk, it is for the jury to determine, upon the circumstances of the particular case, whether the traveller, who previously had knowledge of the defect, had the right to assume that the defect had been remedied, or the city was negligent in having failed to do so. It is error in the trial court to give instructions which invade the province of the jury in these particulars. City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. Rep. 675.

Suit for Injury from Defective Sidewalk—Contributory Negligence—Burden of Proof.—Where the city, in a suit for injury from defective sidewalks, relies on the defence of contributory negligence, the burden of proof lies on it, but such negligence may be proved by circumstances. Gordon v. The City of Richmond, 83 Va. 436, 2 S. E. Rep. 727.

Evidence—Records of City Council.—Where work or other action of city authorities is claimed to have been done by its authority, the records of the city council are the proper and best evidence, if existent and accessible. Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. Rep. 266.

Evidence—Certificate of Recorder.—The certificate of a recorder of an incorporated town, stating facts which appear upon the records of the common council of said town, and not certifying copies from such records, is not admissible as evidence. Roe v. Town of Philippi, 45 W. Va. 785, 32 S. E. Rep. 224.

Evidence—Corporate Books.—The corporation books concerning the government of a city, town, or village, when they have been publicly kept, and the entries have been made by a proper officer, as well as duly authenticated copies therefrom, are admissible evidence of the facts witnessed in them. Town of Parsons v. Miller, 46 W. Va. 334, 32 S. E. Rep. 1017, 2 Mun. Corp. Cas. 590, and *note*.

Burden of Proof in Action on Municipal Bond Given for Purchase of Real Estate.—In an action against a municipal corporation on a bond, or other common-law security given for deferred payments on real estate purchased by the corporation, the defendant's plea of *nil debet* puts the burden of proof on the plaintiff to show that the real estate purchased by the defendant was reasonably necessary to the proper exercise and enjoyment by it of the powers and duties conferred upon it by its charter. Richmond, etc., Co. v. West Point, 94 Va. 668, 27 S. E. Rep. 460.

Action of Trespass on the Case against City for Damages Resulting from Change of Grade—What May Be Shown under General Issue.—In an action of trespass on the case against a city for damage to a lot situated in a town by reason of a change of the grade in front of it, the defendant may show, under the general issue, that the plaintiff agreed, at the time the grade was being changed, that, if defendant laid a sewer through his lot to a point indicated by him, he would claim no damage by reason of such change, and may also show that said sewer was constructed in accordance with the agreement, and accepted by the plaintiff. In an action of trespass on the case to recover damage of the character asserted in this case, the defendant may give in evidence, under the general issue, a release, or accord and satisfaction, or whatever would, in equity and good conscience, according to the existing circumstances, preclude the plaintiff from recovering, as any matters which operate a discharge of the cause of action or any justification or excuse. By this plea, all the material averments of the declaration are put in issue. Ridgeley v. Town of West Fairmont, 46 W. Va. 445, 33 S. E. Rep. 235.

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28 *Statham & als. v. Ferguson's Adm'r & als.

March Term, 1874. Richmond.

I. **Witnesses—Competency—Husband and Wife.**—In a controversy between an unmarried woman on the one part, and husbands and wives on the other, in relation to a transaction between them, in which all are interested, as the husbands and wives are incompetent, from their relation to each other, to testify in their own behalf in the case, the unmarried woman is not a competent witness in her own behalf.

Witnesses—Competency—Husband and Wife.—In M'Devitt v. Frantz, 85 Va. 758, 8 S. E. Rep. 642, the rule laid down by the principal case, that where married women and their husbands are directly interested in the result of the suit the wives are incompetent witnesses, is sustained.

Depositions—Competency of Witnesses—Time for Taking Exceptions.—In Neilson v. Bowman, 29 Gratt. 750, the court says: "We have not noticed an objection, taken for the first time in the appellate court that the appellants, Mary A. Neilson and Thomas H. Neilson were incompetent witnesses, and that their depositions ought to be disregarded in the appellate court, even though no such objection was taken in the court below, and the case of Statham v. Ferguson, 25 Gratt. 28, was cited in support of that view. Hord v. Colbert, 28 Gratt. 49, is a complete answer to that objection. It was there held that the plaintiffs having cross-examined C. on all the issues in the cause, that was a waiver of the objection to his competency, and it cannot afterwards be made even in the court below." See also, on this point, Warwick v. Warwick, 31 Gratt. 70.

In Simmons v. Simmons, 33 Gratt. 460, the court says: "Notwithstanding some expressions in decided cases, which seems to concede that objections to the testimony of a witness on the ground of his incompetency may be properly made in this court although not made, or considered, or passed upon in the court below, we are of the opinion, that such objections, unless first made in the court below, cannot be relied on here, for the reason that if allowed parties might be taken by surprise." Citing the principal case and Fant v. Miller, 17 Gratt. 187; Beverley v. Brooke, 2 Leigh 425; Hord v. Colbert, 28 Gratt. 49. See also, *note* at the beginning of Simmons v. Simmons, 33 Gratt. 451, and the *foot-note* by the judge in the same case at the bottom of page 460.

Gifts to Fiduciaries.—The rule laid down in the principal case that gifts to a fiduciary by one whose interests are intrusted to his care, will be invalidated unless it appear that undue influence was used to induce the gift is applied in Thomas v. Turner, 87 Va. 1, 12 S. E. Rep. 149, to the relation of attorney and client.

II. **Depositions—Competency of Witnesses—Time for Taking Exceptions.**—Though an exception to a deposition for want of notice, or other irregularity, must be brought to the notice of the court before the hearing of the cause, that it may be then passed upon, or it will be considered as waived, and will not be noticed in an appellate court; when the exception is to the competency of a party to the cause this rule does not apply, and the court, at the hearing may pass upon the exception; and whether so passed upon or not, it may be passed upon by the appellate court.

III. F. dies, leaving a large estate, real and personal. He leaves a widow, M., sixty-five years old, and two daughters, who are married, and the children of a deceased son, all by a former wife. One of these daughters and her husband, T., lived with F. and his wife at his death, and the other and her husband, S., lived in an adjoining tenement given to her by F. on her marriage. The family lived together in much harmony and confidence. F. left a paper intended to be his will, but from a defect in the attestation it was not admitted to probate. The provision made for his widow in this paper was much less than she was entitled to by law. By it T. and S. were appointed executors; and when the paper was rejected, M., the widow, renounced the administration in their favor, and they qualified as administrators on the estate. A few days after their qualification a deed was prepared and executed by the widow, T. and S. and their wives, and the adult grandchildren, by which the parties agreed that the will of F. should regulate the disposition of his estate; M. thereby giving up some $25,000. Upon a bill by M. to set aside this deed—HELD:

29 *1. **Gifts to Fiduciaries.**—The administrators T. and S. held a confidential relation to M.,

which, according to the policy of the law, forbids that a fiduciary should receive any material gratuity, from one whose interests are entrusted to his care, unless it appears that no undue means or influence were used to induce the gift, and that it was made by the donor voluntarily, and with full knowledge of the nature and extent of the act.

2. **Same—Undue Influence.**—Upon the evidence the court held that undue influence had been exerted on M., and that she was not sufficiently informed of the value of the estate or of her rights; and therefore, although no fraud may have been intended, the deed should be set aside.

Thomas Ferguson, an old citizen of Lynchburg, died on the 8th day of January 1870. He left a widow about sixty-five years old, and two daughters, and the children of a deceased son, some of whom were of age, and others were minors. One of his daughters was married to C. W. Statham, and the other to John Otey Taylor. One of his granddaughters was married to Leroy S. Edwards, and another, Lelia S., was single at his death, but soon afterwards married Thomas R. Statham. These were children by a former marriage. He left a paper intended to be his will. It was ascertained, however, that though the paper was attested by two witnesses, it was attested by them at different times; and it being offered for probate on the 14th of January, it was rejected; and Mrs. Ferguson having declined to qualify as administratrix, administration was granted to C. W. Statham and John O. Taylor, who had been appointed executors in the will which was rejected; and they executed their official bond with sureties in the penalty of $75,000.

Thomas Ferguson left a real estate worth about $40,000, bringing in an income of ——, and his personal estate amounted
30 to between $75,000 and *$100,000, the most of it being in money and funds in Europe. The provision which he made for his widow in the paper which was rejected, was very small considering his estate. He gave her $5,000 in money, and a Virginia coupon bond for $1,000; and he directed that certain houses should be rented, and that she should be paid one-fourth of the rents, which, with the house in which he lived, which she was to have jointly with Mrs. Taylor for her life, constituted the whole provision made for her. The houses directed to be rented out seem to have rented for about $1,200.

On the 19th of January 1870, Mary Ann Ferguson, the widow of Thomas Ferguson, and the other parties hereinbefore named, executed a deed, which after setting out at length the paper aforesaid, and the fact that it had not been admitted to probate by the court, proceeds:

And whereas said paper was not executed in accordance with all the requirements of the laws of Virginia, and so could not be proved and established as the last will and testament of the said Thomas Ferguson, deceased; and whereas it is known to the parties to this deed, that said Thomas Ferguson departed this life under the belief that said paper would regulate the distribution of his whole estate, real and personal; and whereas it is the earnest desire of all the parties to this deed, who constituted his family, and the larger part of his heirs at law, that his solemnly declared wishes should, in every respect possible, be carried into effect according to their letter and spirit: Now, in consideration of the premises, and of the mutual love and affection which we bear each other, the respect we have for the memory and wishes of said Thomas Ferguson, and also the ad-
31 vantage to be derived *and enjoyed by each of us from the arrangement proposed, we, the said Mary Ann Ferguson, Charles W. Statham and Maria V. his wife, John Otey Taylor and Mary B. his wife, Leroy S. Edwards and Elizabeth his wife, and Lelia S. Ferguson, do hereby bargain, agree, and covenant to declare, set up and forever establish, the aforesaid paper as and for the last will and testament of said Thomas Ferguson, deceased, as fully, and to all intents and purposes, as if the same had been executed according to the technical forms of the law, and had been duly propounded, proved, established, and recorded as the last will and testament of the said Thomas Ferguson by the courts of the country: And we do further bargain, agree and covenant that all the real estate and personal property of which the said Thomas Ferguson died seized and possessed, shall pass and be distributed in accordance with the provisions of said paper, as though the same had been duly executed as his last will and testament, and had been proved as such, except so far as may hereafter be excepted—that is to say:

1. The said Mary Ann Ferguson doth hereby agree, bargain and covenant with the other parties to this deed, that she will accept and receive the property, real and personal, bequeathed to her by said will, upon the terms and with the limitations therein set forth; and in consideration thereof that she will, and she doth hereby release, give up, and forever assign to the other parties to this deed, and the other heirs at law of said Thomas Ferguson, deceased, all that other property, real and personal, which would have come to her as her share of her husband's estate had this deed not been made; and she doth hereby accept the provisions made for her by her said husband's last will, in lieu and
32 as full and complete discharge *and satisfaction of all her interest in and claim to the estate of the said Thomas Ferguson, deceased.

The paper contained similar covenants and releases, in separate clauses, by Statham and wife, Taylor and wife, Edwards and wife, and Lelia S. Ferguson. And there were clauses directing the administrators of Thomas Ferguson to distribute the personal estate in accordance with the provisions of the said paper, and providing that the infant grandchildren shall have the benefit of the deed, and that Thomas

C. Ferguson, a grandchild excluded by the will, should have his share of the estate, to which Mrs. Ferguson was not to contribute.

This paper was executed on the night of the 19th of January, by all the parties except Edwards and wife. They lived in Richmond at the time, and it was executed by them a few days after its date.

On the 4th of April 1870, Mrs. Ferguson instituted her suit in equity in the Circuit court of the city of Lynchburg, against all the parties to the deed of the 19th of January 1870, and the other heirs-at-law of Thomas Ferguson, and the administrators, to set aside said deed as to her, and to recover her dower in the real and her share of the personal estate. After setting out the foregoing facts, she proceeds to state at great length the facts as she alleged they occurred, from the death of her husband up to and including the execution of the deed. And she affirms that when she signed the paper, she was ignorant of its true meaning and import; that she had never been informed by the parties or otherwise understood, what were her rights in her husband's estate, after the rejection of the paper offered for probate as a will. She had never been informed, and does not yet know, of what the estate consisted, and
33 of what value, nor the *amount to which she was, in consequence of that rejection, entitled, and which, by this paper, she was ignorantly made to transfer to them.

Statham and Taylor and their wives answered the bill. They proceed to give a narrative of the facts as they allege they occurred. They say that the first suggestion as to setting up the will came from her; they deny that they exerted or attempted to exert any influence upon her to induce her to execute the deed. They insist that she perfectly understood what she was doing, and both before and after its execution spoke of what she had done for the benefit of the children, and expressed herself as satisfied with the provision which had been made for her by the will. And they insist that Mrs. Ferguson having executed the deed voluntarily, with a full knowledge of what she was doing, and of the sacrifice she was making, it was valid and binding upon her.

Edwards and wife also answered, but as they did not reside in Lynchburg, and were not cognizant of the facts, they referred to the answer of their co-defendants.

Mrs. Ferguson's deposition was taken on her behalf. Before commencing it, the defendants entered their objection to it, on the ground that the other parties to the transactions involved in the suit being incompetent to testify on their behalf, by reason of their being husbands and wives of parties interested, Mrs. Ferguson was not a competent witness in her own favor.

It is impossible to state the evidence filed in the cause: so much of it as this court deemed material is given by Judge Moncure in his opinion.

Whilst the cause was pending in the court below, Mrs. Ferguson died, and the suit was revived in the name of Theodore D. Crawford, as her administrator.
34 *The cause came on to be heard on the 17th of August 1871, when the court held that the deed of the 19th of January 1870 was made under such circumstances as to render it invalid, and of no binding force or effect against Mrs. Ferguson; and that it ought (in equity) to be set aside, whether any actual fraud was intended or perpetuated on her in its procurement or not; a question not deemed necessary to be decided. It was therefore decreed that the said deed be vacated and annulled, and delivered up to the plaintiff to be cancelled. And the administrators were directed to render an account of their administration, &c. And, thereupon, Statham and wife, and the other parties to the deed, applied to this court for an appeal from the decree, which was allowed.

Kirkpatrick & Blackford, and Ould & Carrington, for the appellants.

Mosby & Brown and John H. Lewis, for the appellees.

MONCURE, P. delivered the opinion of the court.

Before we consider the merits of this case we will have to dispose of two or three preliminary questions which lie in our way; as,

1st. Whether Mrs. Mary Ann Ferguson, the plaintiff in the suit, was a competent witness to testify therein?

She had a deep and direct interest in the result of the suit, and would undoubtedly have been an incompetent witness therein at common law. If she was competent when she testified it could only have been by reason of the statute contained in the Code, ch. 172, sections 21 and 22, pp.
35 1109 and 1110. Section *21, among other things, declares that "no witness shall be incompetent to testify because of interest; and in all actions, suits or other proceedings of a civil nature, at law or in equity, before any court," &c., "the parties thereto, and those on whose behalf such action, suit or proceeding is prosecuted or defended, shall, if otherwise competent to testify, and subject to the rules of evidence and of practice applicable to other witnesses, be competent to give evidence on their own behalf, and shall be competent and compellable to attend and give evidence on behalf of any other party to such action, suit or proceeding, except as hereafter provided," &c. If that section had stood alone, without the exceptions referred to near the end of it, it would certainly have made the plaintiff a competent witness in this case.

But section 22 embodies the exceptions referred to in the preceding section; and, among other things, declares that "nothing in the preceding section shall be construed to alter the rules of law now in force in respect to the competency of husband and wife as witnesses for or against each other,

during the coverture or after its termination, nor in respect to attesting witnesses to wills, deeds or other instruments; and where one of the original parties to the contract or other transaction which is the subject of the investigation, is dead, or insane, or incompetent to testify by reason of infamy, or any other legal cause, the other party shall not be admitted to testify in his own favor, or in favor of any other party having an interest adverse to that of the party so incapable of testifying, unless he shall be first called to testify on behalf of such last mentioned party," &c.

The "parties to the contract, or other transaction, which is the subject of
36 the investigation" in this case, *are the parties to the deed of the 19th day of January 1870; which is between Mary Ann Ferguson, widow of the late Thomas Ferguson, of the first part, Charles W. Statham and Maria V. his wife, of the second part, John Otey Taylor and Mary B. his wife, of the third part, Leroy S. Edwards and Elizabeth his wife, of the fourth part, and Lelia S. Ferguson, of the fifth part; the said Elizabeth Edwards and Lelia S. Ferguson being the adult children of Calvin W. Ferguson, deceased. All the said parties to the said deed are parties to this suit; the said Mary Ann Ferguson being plaintiff and the others being defendants therein. And all of the said defendants are husbands or wives; the said Lelia S. Ferguson, the only one of them who was sole when the said deed was executed and when the original bill in this suit was filed, having intermarried with Thomas Statham since the institution of the suit, and before the deposition of the plaintiff was taken therein, and her said husband having been made a defendant to the suit. As husbands and wives are clearly incompetent to testify for or against each other, both on the ground of interest and public policy, and as the above named defendants are all directly interested in the result of this suit, it follows as a necessary consequence, that for the legal cause aforesaid, they are, all and each of them, incompetent to testify in this suit. And the plaintiff not having been first called to testify on behalf of the said defendants, could not, legally, be admitted to testify in her own favor, and her deposition cannot be considered or read as evidence in the decision of this case.

In the case of Murphy's adm'or v. Carter, &c., 23 Gratt. 477, it was held by this court, that husbands and wives are not competent witnesses for or against each other; which decided in effect, that the statute
37 *aforesaid did not make them so, though the statute was not expressly referred to in that case.

Several cases were cited in the argument from the New York reports, to show the construction which had been there put upon section 399 of the Code of that state, which declares that "a party to an action or proceeding may be examined as a witness in his own behalf, the same as any other witness." In 15 How. Pr. R. 165, and 26 Barb. 612, it was held that the said section did not make husbands and wives competent witnesses for or against each other, while in 19 How. Pr. R. 86, the contrary was held. But that section is radically different from our statute, as it contains no exception in regard to husband and wife, which our statute expressly does; ours being in that respect similar to 6 and 7 Vict., ch. 85, on the same subject. In New York an act has been recently passed (May 10, 1867) enabling husband and wife, or either of them, to be a witness for or against the other, except in certain cases.

When the plaintiff was introduced as a witness in this case, and before her examination was commenced, an exception was taken and written at the head of the deposition in these words: "Defendants by counsel except to the taking of the deposition of Mrs. Mary Ann Ferguson, the plaintiff in this cause, and to the reading of the same, on the ground that she is incompetent to testify on her own behalf, being a party to the contract, the validity of which is in controversy in this suit; and John Otey Taylor and Mary his wife, Charles W. Statham and Maria his wife, L. S. Edwards and Lizzie his wife, and Lelia Ferguson (who, since the execution of said instrument, has intermarried with Thomas Statham), parties to said instrument, are
38 incompetent to testify in *their own behalf." It does not appear that this exception was otherwise brought to the notice of the court below, and it certainly was not expressly passed upon by that court. The counsel for the appellee contended that it was therefore waived by the appellants.

An exception taken to a deposition for want of notice or other irregularity must be brought to the notice of the court at or before the hearing, in order that it may then be passed upon, or it will be considered as having been waived, and will not be noticed in the appellate court. Fant v. Miller, &c., 17 Gratt. 187, 227, 228, and cases there cited. But this principle does not apply to an exception to the deposition of a party to the suit on the ground of incompetency; and in such a case, though the matter of the exception be not brought to the notice of the court at the hearing, otherwise than by the exception, it may be passed upon by that court, and whether so passed upon or not, it may be passed upon by the appellate court, and the deposition be either read or excluded in the decision of the case by that court as may be proper. 2 Rob. Pr., old ed., p. 337; Beverley v. Brooke, &c., 2 Leigh 425; Mohawk Bank v. Atwater, 2 Paige's R. 54, 60. We therefore think that in this case, in which the objection to the competency of the witness was that she was a party to the suit, deeply and directly interested in its result, and plainly incompetent by the express term of the statute, this court may and ought to sustain the objection, though the exception to the deposition on that ground, which was written at the head and before the commencement of the deposition, may not have been

otherwise brought to the notice of the court below, and may not have been expressly passed upon by that court. *In the case before cited of Murphy's adm'or v. Carter & als., in which the depositions were excluded by this court, it does not appear that the exceptions taken to them were brought to the notice of the court below, or passed upon by that court.

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2. The next preliminary question to be disposed of is, "How far the answers are to be considered as evidence in behalf of the defendants?" They are such evidence only so far as they may be directly responsive to an allegation of the bill, or to a call therein made for a discovery. In such a case, the answer is not only evidence for the respondent, but it is considered to be true, unless disproved by at least two witnesses, or one and corroborating circumstances. In this case there was no call for a discovery. The defendants had a right, and, indeed, were bound to respond to the material allegations of the bill. By directly responding to them, they had a right to make their answers evidence in their favor as aforesaid. But affirmative allegations in the answers, not directly responsive to the bill, are not evidence for the defendants. These are well settled rules of chancery practice, which require no citation of authority to sustain them. The "narrative of the facts," as set out in the answer of the principal defendants in this case, is, therefore, not evidence for them, except so far as it may be directly responsive to the bill.

3. Another preliminary question to be disposed of is, "Whether the parties to the deed, which is the subject of controversy in this suit, that is, Mrs. Ferguson, and the other parties to the deed, or any of them, stood in that confidential relation towards each other, which, according to the policy of the law, forbids that the fiduciary should receive any material *gratuity from one whose interests are entrusted to his care, unless it appears that no undue means or influence were used to induce the gift, and that it was made by the donor voluntarily, and with full knowledge of the nature and extent of the act.

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The law upon this subject is fully stated in 1st Story's Eq. Ju., §§ 307-323, under the head of constructive fraud. Among the confidential relations there enumerated, as coming within the operation of the principle, we find those of parent and child (including the case of a person who has put himself in loco parentis towards another), attorney and client, medical adviser and patient, agent and principal, guardian and ward, trustee, and cestuis que trust, &c. In treating of the relation of parent and child, the author says: "The same general principles apply to other family relations besides those of parent and child. Thus where three brothers induced their sister, who had a reversionary interest in land, devised by their father to the brothers for life, to release her interest to them without any consideration, except a belief, (the only evidence of which was the recital thereof in the deed prepared by the brothers,) that the father intended to devise the land to the brothers in fee; this deed was set aside, it appearing that the sister was in a feeble state of health, and had always relied upon the brothers for advice." Id., § 309 b.

After making the enumeration aforesaid, the author further says: "There are many other cases of persons, standing in regard to each other in the like confidential relations, in which similar principles apply. Among these may be enumerated the cases which arise from the relation of landlord and tenant, of partner and partner, of principal and surety, and various others, where mutual agencies, rights and *duties are created between the parties by their own voluntary act, or by operation of law. But it would occupy too much space to go over them at large, and most of them are resolvable into the principles already commented on. On the whole, the doctrine may be generally stated, that wherever confidence is reposed, and one party has it in his power, in a secret manner for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage. Id., § 323.

41

In treating of the relation of trustee and cestuis que trust, the author says: "In short, it may be laid down as a general rule, that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which have a tendency to interfere with his duty in discharging it. And this doctrine applies not only to trustees, strictly so called, but to other persons standing in a like situation, such as assignees and solicitors of a bankrupt or insolvent estate, who are never permitted to become purchasers at the sale of the bankrupt or insolvent estate. It applies, in like manner, to executors and administrators, who are not permitted to purchase up the debts of the deceased on their own account, but whatever advantage is thus derived by them, by purchases at an undervalue, is for the common benefit of the estate. Id., § 322.

We think the case now under consideration clearly comes within the operation of the principles above set forth. The only parties entitled to the large estate of Thomas Ferguson, deceased, besides his widow, were his only children, Maria V., the wife of Charles W. Statham, and Mary B., the wife of John O. Taylor, and the seven children of his deceased son, Calvin W. Ferguson. The said Charles W. Statham *and John O. Taylor, his sons-in-law, were named his executors in the paper which he intended for his will, but which was rejected by the court of probate, because unduly attested; and after the said rejection they were appointed, and qualified as his administrators, by the consent of the widow. He and she lived together as husband and wife for thirty-three years, and lived hap-

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pily in that relation. She had no children of her own. At the time of his death, his family consisted, besides his wife, of his daughter, Mrs. Mary B. Taylor, and her said husband, and his said grandchildren, or most of them. His other daughter, Mrs. Statham, and her said husband, lived in an adjoining tenement, which it seems she had received as an advancement from her father. Between the widow and her two daughters-in-law and their husbands the most affectionate relations appear to have subsisted. It was natural and reasonable, therefore, that after the death of her husband the widow should look up to her said sons and daughters-in-law for counsel and advice, and that they should have great influence with her. She called them her children, and they, or the daughters at least, called her mother. She had no blood relation living with her. Under these circumstances, certainly such a relation existed between these two administrators of Thomas Ferguson and his widow as to bring the case within the operation of the principle before stated. They had in their hands, or within their power and control, personal estate of their intestate to the amount of from sixty to one hundred thousand dollars, to one-third of which the widow was entitled absolutely; and she had the utmost confidence in them, evinced by her renouncing the administration of her husband's estate (to which she was by law entitled) in their favor.

43 *And now, having disposed of these preliminary questions, we proceed to consider the case upon its merits. Ought the decree of the Circuit court, annulling the deed in controversy, to be affirmed or reversed?

There can be no doubt but that it was legally competent for Mrs. Ferguson, at any time after her husband's death, to have disposed of her interest in his estate according to her pleasure, either by selling or giving away it or any part of it; provided, she knew perfectly well what she was doing, and what was the nature and effect of her act, and was not induced to do it by any fraud or undue influence. And the only question therefore is, whether, when she executed the deed in question, she had such knowledge, and executed it without being induced to do so, as aforesaid. The burden of proving that she had such knowledge and so executed the deed devolves on those who claim the benefit of it, and especially on Charles W. Statham and John O. Taylor, the administrators of Thomas Ferguson, deceased; and the facts aforesaid ought to be clearly proved.

Mrs. Ferguson was clearly entitled at the death of her husband, legally and morally, to one full third of his personal estate, absolutely, after the payment of his debts; and to one full third of his real estate during her life; and it was out of the power of her husband, by his will, to deprive her of it, or to compel her to accept in lieu of it such portion of his estate as he might choose to give her; and this right is entirely independent of the question, whether he acquired any and what estate by his intermarriage with her, or in her right since the marriage; as to which facts the record affords no evidence. It does not appear that her husband ever intended to deprive her of that

44 *right, and it is not probable that he ever did; for he seems to have been a very just man, and to have had due affection for and confidence in his wife. He certainly intended to make a will giving her less of his estate than the law would give her; but he no doubt knew that she would have the right to renounce that provision of his intended will and take what the law gave her; and that she would have one year after his will should be recorded to make up her mind whether to elect the one or the other. He doubtless knew that she could not, by any act done during the coverture, bind herself to accept that provision in lieu of what the law would give her; and he, doubtless, would not have desired that she should if she could. He was willing to give her the right of election, to be exercised after she became discovert and free from disability and from the marital influence, and after she had ample time to inform herself fully of the facts necessary to enable her to make a wise and discreet election. In making the deed, therefore, she must be considered as having disposed, or attempted to dispose, of property which was as absolutely hers, in law and equity, as if she had acquired it by her own labor or inherited it from her own father. That she acquired it from her husband, who intended by his will to make a sufficient provision for her support may have been a strong inducement with her to give it the same destination that he intended to give it, and to accept, in lieu of it, the provision he intended to make for her; in other words, to set up his intended will. And if, with full knowledge of the extent and nature of her rights, and without any undue influence, she had voluntarily done so, we might well have said, in the language of Judge Garland, that "her regard for the wishes of her husband were honorable to her." But

45 the question *is, did she execute the deed voluntarily, with such knowledge and without such influence? and that question we proceed now to consider.

The first thing that strikes our minds in this investigation is, the extraordinary haste which occurred in the execution of so important an act, and the circumstances attending its execution. Thomas Ferguson died on the 8th day of January, 1870, and was buried on the 11th of that month. On the next day, the 12th, his papers were examined in the presence of his family, including his widow; and his will was read in her hearing, and, with his other important papers, was entrusted to the keeping of T. C. S. Ferguson, a friend of the family. At that time it was not known that the will had not been duly attested. A day or two thereafter, however, that fact was discovered by the two gentlemen named in the will as executors, on a conversation with

the attesting witnesses; and they were advised that the will could not be recorded, but that they had better offer it for probate and let it be rejected, and then it would be necessary to have administration taken on the estate. They were told by their counsel that the widow had precedence in the matter as administrator, and were asked by him "what were her views on the subject; whether she wished to take the administration." They said "she did not; she did not regard herself capable of administering the estate, and did not wish to enter into it." Now at this time she had not been informed that the will could not be recorded, and that administration on the estate would be necessary; and of course could not have declined to undertake the administration. So that Messrs. Statham and Taylor, in the above mentioned communication which they made to their counsel, 46 *Major, now Judge, Garland, undertook to speak for her what they no doubt anticipated, from their knowledge of her, would be her sentiments on the subject. Their counsel, on being informed by them that the widow did not wish to undertake the administration, told them it would be necessary for her to certify that fact to the court in writing. They asked him then to prepare the writing, which was accordingly done. On his way to the court-house from his office, on the 14th of January, Judge Garland called on the widow, Mrs. Ferguson; "told her that the will could not go to probate, stating what the defect was; that she had priority of administration if she chose to exercise it. She answered that she was old and infirm, and did not wish to take the administration; that she had entire confidence in Messrs. Statham and Taylor, and desired that they should take the administration." Judge Garland then read to her the paper that had been drawn; after which she signed it, and he, at her request, witnessed it. After reading the paper, he told her that it should be witnessed, and asked her if he should witness it; and she said "yes." He "gave her no advice about it, whether to take the administration or not; simply that she had a right to it." The foregoing account is taken from the deposition of Judge Garland, who was examined as a witness for the defendants. After stating, in his answer to the 6th question, what occurred at the time of the execution of the paper as above mentioned, he says: "This is all that passed upon that or any other subject at that time, that I have any recollection of." But in his answer to the next (the 7th) question, he says: "She, at the conversation alluded to, expressed her regret that the probate of the will had failed." It had not 47 *then failed, for the will had not then been offered for probate. On the same day on which the said paper was signed, to wit, the 14th day of January, the will was offered for probate and rejected, and Statham and Taylor were appointed and qualified as administrators.

In regard to the deed in controversy, which was executed by Mrs. Ferguson, and most of the parties thereto, on the 19th day of January 1870, Judge Garland gives the following account of it, and of its execution, in his answer to the 9th question of the defendants: "I was present at the time of the execution of that deed. Previous to its execution I had no connection with it. I had no hand in its making or advising the execution of the contract, or anything to do with it. One or two evenings before the execution of the deed, there was a pencil note on the slate at my office, requesting me to go that evening to the store of Lee & Taylor, which I did. When I got there, Mr. Taylor told me that Mrs. Ferguson had expressed a desire to carry out and execute the will of her husband, if it could be legally done, and asked me if it could be done. I told him that I thought it could be done by a deed between the adult parties, and through the instrumentality of the court as to the infants. He then told me that that was the opinion of Mr. Blackford, and that he had requested Mr. Blackford to prepare a deed, and to take the necessary steps in court as to the infants; but that he wished me to see and examine the deed before it was executed. The next day, or the day after (I don't distinctly recollect which), the deed was brought to me, and I examined it, and approved it, with a slight alteration. I was then requested to attend at Mrs. Ferguson's that evening, or the evening 48 after, at 7 *o'clock, for the purpose of reading and explaining the legal effect of the deed to her. I went according to the appointment; but before I went into Mrs. Ferguson's room, I suggested to the parties that they had better get two or three of the neighbors, in whom all of them had confidence, to see that the whole transaction was fair and proper; and according to this suggestion Dr. Langhorne and Mr. Thaddeus Ferguson were sent for, and came. We went into Mrs. Ferguson's room, and I told her what I had come for. Before reading the deed, I told her what were her rights under the will, and what were her rights by law in case the will was set aside. I told her also, that by executing the deed, she would sustain a considerable pecuniary loss. She answered that she was aware of that, but she wished to execute the will of her husband; that it was his estate; she was satisfied with the provision for her, and wished the rest to go as he desired it. I most think I told her that the executors estimated the personal estate at from sixty to seventy-five thousand dollars, of which she was entitled to one-third absolutely. I then proceeded to read the deed, clause by clause. At the end of each provision I asked her if she understood it, and she answered that she did, until it came to that provision in which she relinquished her interest in Mr. Ferguson's estate. When I read that, she asked me, "What? Do I relinquish all my interest in my husband's estate?" I answered by no means, it only relinquished that portion of the estate which was not given to her by the will. She

seemed satisfied, and I finished reading the deed. I think I then repeated the reading. I am not so distinct in my recollection about that, but I think I did. I then asked her if she was satisfied; she said she was; and took the pen and ink and sat
49 *down at her table and subscribed her name to it. I gave her no advice, whether to sign the deed or not; nor was I asked any. After the deed was executed, and attested, and closed, some little conversation ensued, in which I remarked to Mrs. Ferguson, that I thought her regard for the wishes of her husband were honorable to her; and I left. After that I had nothing to do with the matter whatever: and that is the whole agency I had in the matter."

In answer to the next (10th) question by the defendant he said: "I think somebody said (I don't recollect who it was) that the executors estimated the real estate at $40,000. I said I thought the estimate was too high." In answer to the defendants' 15th question, viz: "From Mrs. Ferguson's demeanor on that occasion, did you have any doubt that she heard your explanation and reading?" he answered, "I believed at the time that she distinctly understood it. From the relevancy of her answers to my questions, and from what she said, I was satisfied she understood it; but I can't undertake to say she did. It was my belief at the time that she did, and my belief now. I sat close to her when I read the deed, and read it in a loud voice. I saw nothing in her demeanor that indicated she was ignorant of it or did not hear it." In answer to the defendants' second question the witness said: "I was acquainted with Mr. Ferguson from near about the time I came to Lynchburg, in 1841, till his death. Our relations were friendly, and for about the last ten years I was his legal adviser. I wrote three wills for him." And in answer to the fifth question he said: "The will offered in January last was written by my daughter, Mrs. Christian, from a draft taken by me. After it was written and before its execution, Mr. Aurelius Christian, my partner,
50 delivered *it to Mr. Ferguson, and I did not see anything more of it until it was presented in court for probate."

On his cross-examination by the plaintiffs' counsel, Judge Garland said that Mrs. Ferguson never did, in any matter or manner whatever, retain him as counsel; that before the will was offered for probate, Messrs. Statham and Taylor, the executors of the will, engaged the services of Mr. Christian and himself as counsel for the estate, and as such he offered the will for probate as before stated; that he regarded himself as counsel for the estate until the 14th of April 1807, when he was appointed judge of the Corporation court of Lynchburg; that in relation to the transaction of the deed, he had not been spoken to as counsel; the only thing he had to do with it was to give an opinion in relation to the deed after Mr. Blackford had prepared it. All he had to do or was asked to do, was to examine the deed and see if it were sufficient to carry out the object of the parties. He did not receive nor charge a fee for that service. Mr. Statham or Mr. Taylor, or both, handed him the deed which had been prepared by Mr. Blackford, and he examined it and suggested some alterations in one part of it. The deed was then carried back to Mr. Blackford, who prepared another deed according to that suggestion, which other deed was brought to him, and is the same deed which bears date and was executed on the 19th of January 1870 as aforesaid. The alteration he suggested in the first draft of the deed was in relation to the provision wherein Mrs. Ferguson relinquished her interest in her husband's estate. He thought that such relinquishment was not sufficient to pass her entire interest. Being asked if his answer to the sixth question-in-chief, referring to what took place at the time of the execution of the
51 *deed by Mrs. Ferguson, contained a statement of all that he said to her or she said to him on that occasion, he answered, that it was not all, but was substantially all that passed with reference to the business on which he went, with the exception that he told her that if the will was set aside she would get one-third of Mr. Ferguson's real estate for life. In answer to a question as to the length of time which elapsed from the time he commenced reading the deed to Mrs. Ferguson until she signed it, he answered: "I have no distinct recollection of the time; I think it may have been from three-quarters of an hour to an hour. I think I read it over twice. I read it slowly and distinctly. I don't say positively, but I have a pretty strong impression that I read it over twice." In explanation of his answer to the seventh question-in-chief, he said: "If that answer imports that she said that the will had been offered for probate and failed, it was certainly not what I intended to say. I am not mistaken in the fact that she expressed her regret that the will could not go to probate."

We have stated substantially the most material part of the evidence of Judge Garland, especially in regard to what transpired at the time of the execution of the deed in controversy, because his testimony is the most important in the cause, and his connection with the subject enabled him to testify in regard to nearly all the facts which we deem it material to notice in this opinion. Other witnesses were examined, some of them in behalf of the plaintiff and some in behalf of the defendants. The plaintiff herself was examined in her own behalf at very great length; but we have already expressed the opinion that she was an incompetent witness, and therefore excluded her testimony.

Dr. Payne, one of the plaintiff's
52 witnesses, had *known her nearly forty years, and had sometimes prescribed for her. He said her probable age was upwards of sixty. Her health was feeble. She was very nervous, and very deaf. According to his knowledge of her case,

and her deafness, it is difficult to make her understand ordinary conversation. The deed in controversy (an instrument of some twelve pages in length) being shown and read to him, and being asked, from his knowledge of her nervousness and deafness, to say whether or not he believed she could intelligibly have comprehended the legal meaning and import of the instrument from a single reading of it in her presence, by the counsel of the parties interested in procuring its execution by her, without ever having before seen or known of its existence, he answered: "If she had heard as well as I do, I think it would have been scarcely probable that she would have comprehended it in one reading; and taking into consideration the nervous condition in which she was, together with her deafness, to have understood the paper from hearing it read once, would amount to almost an impossibility."

Dr. Langhorne and Mr. T. C. S. Ferguson were invited by the administrators to be present at the execution of the deed, and attended accordingly. Judge Garland, before he read the deed to Mrs. Ferguson, suggested that two disinterested persons, friends of the family, should be sent for to witness the proceedings; and when Messrs. Langhorne and Ferguson arrived, he supposed they had been sent for in pursuance of his suggestion; but in fact, they had previously been invited by the administrators to attend. Dr. Langhorne was examined as a witness in behalf of the plaintiff.

He stated that he was a practising physician, and a near neighbor of
53 *the late Thomas Ferguson, and was well acquainted with the plaintiff; supposed her to be from sixty to sixty-five years of age; regarded her as rather a delicate woman; would say, from general observation, that she was rather a nervous person. She was very perceptibly deaf. It was difficult, but not by any means impossible, to communicate with her intelligibly by such efforts as are practicable in ordinary social intercourse. He was present when the paper referred to was signed by Mrs. Ferguson; had been invited by Mr. Statham to hear a paper read by Major Garland of interest to that family, Mr. Statham believing that it would be agreeable to Mrs. Ferguson for him (the witness) to attend. He attended about 8 o'clock P. M. When he entered Mrs. Ferguson's room, Mrs. Ferguson, Major Garland, Mr. John O. Taylor and Mrs. Taylor, Mr. and Mrs. C. W. Statham, Misses Selina and Lelia Ferguson, Mr. T. C. S. Ferguson, and Messrs. Christian and Mayo, notaries public, were present. Did not remember that any one else came before the instrument was read and signed. Being asked on his examination in chief, "Was the plaintiff dressed in her usual manner when in company, or in apparent haste, and in such manner as at the time to attract your observation, or somewhat your surprise?" he said: "I don't remember ever seeing Mrs. Ferguson dressed in that manner in company before. The dress was suitable for the place, her chamber; it being a calico wrapper. I can't say I was surprised at her dress; but after going home I remarked that the old lady must be much distressed, as she was not dressed with her usual care in the presence of strangers." In answer to other questions propounded to him on his examination in chief, he made substantially the following statements.
54 *Before reading the paper, Major Garland stated that he was about reading a paper having for its object the carrying out of Mr. Ferguson's wishes, as expressed in his will, inasmuch as the will itself could not be executed, or words to that effect—that all parties, he believed, were desirous of carrying out Mr. Ferguson's wishes, and that this paper had been prepared to effect that object. The general scope of his words was to that effect. At one time during the reading of the paper, Mrs. Ferguson interrupted Major Garland with an inquiry to this effect: "Am I to give up all my interest in the real estate?" Witness could not remember very distinctly the Major's answer, but he stated something in regard to carrying out the object of the will, and intimated that when she heard him read further she would understand it. Witness did not remember that there was anything very definite said in regard to her legal rights. He was very confident there was no distinct effort made to set forth the legal rights of Mrs. Ferguson or the heirs, in consequence of Mr. Ferguson's will not going to probate. Did not remember that anything was said in regard to the value of the estate, nor did he think there was anything said as to the relative values of the real and personal estate.

On his cross-examination Dr. Langhorne, in answer to questions propounded to him by counsel for defendants, said: Mrs. Ferguson was a lady of good ordinary average intelligence. Her manner on the occasion of the execution of the deed was her usual manner. Witness remembered no appearance of surprise or disturbance. In reading the deed and conversing with her about it, Major Garland raised his voice and spoke as a person would speak to one that is deaf, trying to make him understand. Ma-
55 jor Garland's *is a very audible voice, though not of unusual distinctness. Mrs. Ferguson exhibited no reluctance or aversion whatever to executing the deed. She seemed to appreciate exactly what she was doing. She said she understood the deed. Either when the whole had been read or when the clause during the reading of which she interrupted Major Garland had been read, it was suggested that it be read over again, or Mrs. Taylor, witness thinks, suggested that she read it herself. She replied that she understood it perfectly, and a re-reading was not necessary, or words to that effect. Witness, after having his memory refreshed by the questions put to him, stated, that at some time before or after the reading, Major Garland remarked

that Messrs. Statham and Taylor had valued the real and personal estate of Mr. Ferguson in accordance with the figures mentioned in the question to which this statement was an answer (the personal estate at about $75,000 and the real estate at about $40,000 in value), but that he, Major Garland, thought they had placed too high an estimate upon it. This remark of Major Garland was addressed to the whole company; not more to Mrs. Ferguson than to the other persons present. It was made so that she might have heard it, and it was intended that she should hear it, at least witness so supposed; it had that appearance. Witness could not say that she heard it, or that she heard anything. She acted as if she had heard it. He had no doubt but that she heard and understood this and the rest of Major Garland's remarks. If witness had had any doubt, he would, as a neighbor and friend, have had the paper read over to her again. He was very confident that Major Garland, at some time during the interview, said to Mrs. Ferguson that she would be a loser by signing the 56 *deed, or that she was giving up more than she got, or words to that effect.

On his re-examination by plaintiff's counsel, witness said: "Mrs. Ferguson listened very attentively to the reading of the paper, and there seemed a disposition on the part of all present, as they were aware of her difficulty of hearing, to enable her to understand what was going on; the paper was, however, a long and complicated one, and, doubtless, tested very strongly both her intelligence and sense of hearing; but, notwithstanding, she seemed so conscious of what she was doing I cannot help believing she comprehended the meaning of the paper as read to her by Major Garland, and, so far as I know, she arrived at this understanding by and through the means of hearing said paper read by Major Garland on that occasion." In answer to another question, witness said: "I thought, at the time, I understood the paper sufficiently to have acted on it, if my own interest had been involved; though, as a matter of precaution, I think, if I had been brought to act for myself I should have had the paper re-read."

It appears very clear from the evidence of this witness, that Major Garland was mistaken in supposing that he read the paper twice to Mrs. Ferguson. He merely stated it, however, as his impression.

We have stated thus fully the material portions of Dr. Langhorne's testimony, because he was requested by the administrators to be present when the deed was read to and executed by Mrs. Ferguson, for the purpose of taking notice of what was said and done on that occasion; and because he seems to be an intelligent and impartial witness. T. C. S. Ferguson also attended on the same occasion and for the same purpose, by request of the administra- 57 tors; but it is unnecessary *to make any statement of his testimony, as the material facts to which he testified have already been stated. He was a near relation of Thomas Ferguson, and a near connection of the defendant John O. Taylor; though there is nothing in his testimony, or in the record, which casts any discredit on his veracity. The only other evidence which will be here noticed is that of three receipts given by Mrs. Ferguson to Statham & Taylor, administrators of Thomas Ferguson, deceased; two of them dated February 19th, 1870, one of the two being for $2,000, described as "being part of the sum coming to me under the will of the said Thomas Ferguson, deceased, as per agreement recorded in the Hustings court clerk's office of Lynchburg"; the other of the two being for one Virginia coupon bond for $1,000, with all coupons attached from the 1st of January 1869, inclusive, described as "being the same coming to me under the will of said Thomas Ferguson, deceased," &c., as above; and the third dated March 4, 1870, for $3,000, described as "being in full of that portion of the estate of my late husband coming to me under his will, per agreement filed in the clerk's office of the Hustings court of the city of Lynchburg."

In less than three months after the death of Thomas Ferguson, his widow, the said Mary Ann Ferguson, brought this suit, to have the paper aforesaid, of the 19th of January 1870, decreed to be as to her null and void, and to recover her dower in the real and her full third part of the personal etsate of her said intestate husband.

After making the foregoing statement of all the material facts that are proved in the case, we repeat the question we now have to solve, Did she execute the deed in controversy voluntarily, without being 58 *induced to do so by undue influence, and with full knowledge of the meaning and effect of the deed?

She never read the deed, nor was it ever read to her but once, when it was read to her by the counsel of the administrators of her husband; and it was never in her hand but once, when it was handed to her to be signed. It was prepared by counsel employed by the administrators, and its preparation was completed a short time, perhaps not more than an hour, before it was read to her. Until a short time before it was completed, its details had not been fully agreed upon between the counsel consulted on the subject. It was a paper of considerable length, and it is not probable that she could have fully understood it upon a single reading under such circumstances. She was very deaf, and must have heard it imperfectly. She was old and nervous, and no doubt wholly inexperienced in business. She was a lady of ordinary intelligence only, and had just lost her husband, with whom she had lived for thirty-three years, during which time it does not appear that she had occasion to attend to business of any kind, except her domestic duties. The only portion of the deed which seemed to strike her attention was that part which related particularly to herself, and that she certainly misunderstood. The only remark or enquiry she made during the reading of

the paper was made when that part was read, and then she asked Major Garland, "What? Do I relinquish all my interest in my husband's estate?" Or, as Dr. Langhorne expresses it, "Am I to give up my interest in the real estate?" The witnesses who were present doubtless believed she understood it, because she said so, and because no doubt they believed that the matter had been fully agreed upon between the parties before hand, and that they
59 were only called *together to attest the formal execution of the papers.

The deed was executed under circumstances, the influence of which upon Mrs. Ferguson it would have been extremely difficult for her to resist. She had just lost her husband, and was therefore in deep distress. She supposed that he had left a will which had been duly executed, and would in due time be duly admitted to probate. It does not appear that she had ever read the paper which he intended for his will, or been informed of its contents in his lifetime. She had confidence in her husband, doubtless, and trusted that he would make due and ample provision for her in his will. When she heard the paper, which he intended for his will, read to her the day after he was buried, she was not in a condition to understand how it affected her interest, and she could have had no adequate idea of the value of his estate. She had neither time nor opportunity, if she had been disposed, to consult with counsel or disinterested friends on the subject. When, two or three days thereafter, it was ascertained that the will had not been duly attested, and could not be established and recorded, she shared in the surprise which that discovery caused to the family, and it seems also in the impulse by which they were soon moved to set up the will, if it could be done, and give it the same effect as if it had been duly attested, according to the manifest intention of the decedent. That the heirs at law should strongly desire that that should be done is not at all strange, seeing the great benefit they would derive therefrom, except only one of his grandsons, who was excluded by the intended will. Nor was it strange that Mrs. Ferguson should at first be moved by this impulse, before she was informed that to set up her husband's will, and accept
60 *the provision therein made for her, would very injuriously affect her interest. She, therefore, no doubt yielded at first to what seemed to be the strong desire of the rest of the family, and consented to join them in carrying into effect, or at least in setting up as far as they could, her husband's intended will. She could hardly have expected to be so soon called upon to execute such a paper as that of the 19th of January, 1870, before she could have time or opportunity to inform herself and take proper counsel on the subject. The preparation of that paper, however, must have been very soon commenced after it had been agreed upon, if it can be said to have been agreed upon by the family, including herself, to set up the will of her husband as far as they could. Probate of the will was rejected, and the administrators qualified on the 14th of January. Several days elapsed in the preparation of the paper, and yet it was concluded and signed on the 19th of January, just five days after the rejection of the will; so that counsel must have been retained to prepare that paper a day or two only after the rejection of the will. Such counsel was retained by the administrators, and all his information in regard to the motives and objects of the paper, must have been derived only from them. Mrs. Ferguson never saw him, and never had any communication with him on the subject. The recital in that paper therefore must have been made by the learned and honorable counsel who prepared it, on the faith of information derived by him from his clients. After setting out in the paper verbatim et literatim, the intended will of Thomas Ferguson, the deed recites: "And whereas said paper was not executed in accordance with all the requirements of the laws of Virginia, and so could not be
61 proved and *established as the last will and testament of said Thomas Ferguson, deceased; and whereas it is known to the parties of this deed that said Thomas Ferguson departed this life under the belief that said paper would regulate the distribution of his whole estate, real and personal; and whereas it is the earnest desire of all the parties to this deed, who constituted his family, and the larger part of his heirs at law, that his solemnly declared wishes should, in every respect possible, be carried into effect, according to their letter and spirit: Now, in consideration of the premises, and of the natural love and affection which we bear each other, the respect we have for the memory and wishes of the said Thomas Ferguson, and also the advantage to be derived and enjoyment by each of us, from the arrangement proposed, we, the said Mary Ann Ferguson," &c. (naming all the other parties to the deed), "do hereby bargain, agree and covenant to declare, set up and forever establish the aforesaid paper as and to be the last will and testament of said Thomas Ferguson, as fully and to all intents and purposes as if the same had been executed according to the technical forms of the law, and had been duly propounded, proved, established and recorded as the last will and testament of the said Thomas Ferguson by the courts of the country. And we do further bargain, agree and covenant that all the real and personal property," &c.

Now the deed containing these recitals, even supposing it to have been fully understood by Mrs. Ferguson when read to her, was well calculated to strengthen and confirm her first impulse to give effect to the will of her husband, which had failed of effect, as was supposed, only by a technical omission; and also was well calcu-
62 lated, though not designed, *to mislead her into the idea that so far from being injured by, she would actually derive

an advantage "from, the arrangement proposed." She was evidently taken by surprise by the large assemblage in her chamber on the night of the 19th of January, when she was called on to hear the deed read and explained to her, and to sign it. She could hardly have expected to see Major Garland even until a few moments before he was ushered into her chamber. She had put on her "calico wrapper," when it was announced to her that Major Garland would, in a few moments, call on her. She expressed her willingness to see him, even in her then condition of dress, and had him invited into her chamber. But soon there came into her room, besides Major Garland and the family (of which there were many in number), Dr. Langhorne, Mr. T. C. S. Ferguson and Messrs. Christian and Mayo, notaries public. In this large company, assembled thus unexpectedly, this long deed containing these recitals, was read by the counsel of the administrators to this deaf, nervous old lady, at night, in her chamber, just eleven days after the death of her husband. There was not in the large assemblage then present one human being besides herself who was not interested against her in the execution of the deed, or who was not invited to be present on that occasion by those who were so interested. Nor does it appear that since the death of her husband she had had an opportunity of seeing or consulting with counsel or disinterested friends on the subject, if she had been inclined to do so. Under the influence of these surrounding circumstances, and in her state of information, or rather ignorance, it is not strange that she joined other members of the family of her husband
63 *in the attempt to set up his will as far as they could. On the contrary, it would rather have been strange if she had not yielded to the pressure, and if she alone of all her husband's family then present, had been the one who had not sufficient respect for his memory and wishes to induce her to consent to give effect to his will as far as she could.

But the deed was executed by her, not only under undue influence, as aforesaid, but without any definite idea of the nature and value of the estate of her husband, or of the effect of the deed upon her interest, and without having had an opportunity of consulting counsel and disinterested friends on the subject, and placing herself in a condition to be able to choose and act wisely and discreetly in the matter. She probably knew little or nothing of the nature or value of the estate, except that part of it which consisted of realty and the furniture of the house in which she lived. His estate consisted chiefly of money due him in foreign countries, of which there was a large amount, some sixty or seventy thousand dollars, and of which she could have known but little, if anything. It does not appear that she had any curiosity or felt any interest, while her husband lived, to make any enquiry, or that he gave her any information on the subject. It does not appear that she received any such information until the meeting in her chamber for the purpose of having the deed executed, as aforesaid. She certainly received little, if any, on that occasion. Major Garland in his deposition says: "I most think that I told her that the executors estimated the personal estate at from sixty to seventy-five thousand dollars, of which she was entitled to one-third absolutely." But Dr.
64 Langhorne, who attended on *the occasion at the request of the administrators, for the purpose of witnessing the transaction, in his deposition says: "I don't remember that there was anything very definite said in regard to her legal rights. I am very confident there was no distinct effort made to set forth the legal rights of Mrs. Ferguson, or the heirs, in consequence of Mr. Ferguson's will not going to probate. I do not remember that anything was said in regard to the value of the estate; nor do I think there was anything said in regard to the relative values of the real and personal estate." To be sure, this witness afterwards said on cross-examination, after having his memory refreshed, that "at some time, before or after the reading, Major Garland remarked that Messrs. Statham and Taylor had valued the real and personal estate of Mr. Ferguson," the former at about $40,000 and the latter at about $75,000; but that "he thought they had placed too high an estimate upon it." The witness further says, however, that this remark was addressed to the whole company, not more to her than to the other persons present; though it was spoken loud enough for her to hear, and was intended to be heard, and, he believes, was heard by her; but he could not say that she heard it, or that she heard anything. If this was all the information she had, and it is all that the record shows she had, in regard to the value of the estate, it was certainly not sufficient to make the deed which she executed a valid deed as to her, unless it clearly appears that without being induced to do so by any undue influence, she voluntarily determined to execute the deed, however great the value of her interest in the estate might be; and this certainly does not appear.

But she must have been ignorant at
65 the time of the *execution of the deed by her, of other facts which it was necessary for her to know in order to render the deed valid as to her. It does not appear that she knew, and she doubtless did not know, that the law gave her one-third of the personal and real estate which her husband left at his death, the former absolutely and the latter during her life; which he had not the power, by his will to take away from her, without her consent freely given after his death; and that if his will had been duly executed and recorded the law gave her a right at any time within one year from the time of the admission of the will to probate, to renounce the provision therein made for her, and to take, in its stead, the provision made for her by law.

She may have supposed, and doubtless did suppose, that her husband had a right to dispose by will of his own personal estate, at least, according to his pleasure; and she may have been willing to give effect to his intended will, notwithstanding its defective attestation, although it gave her much less than one-third of his personal estate, while she would not have been willing if she had known how much of said estate the law gave her and how it was secured against his power to dispose of it by will, without her consent as aforesaid. Here, then, are two important facts which were doubtless unknown to her when she signed the deed. First: Her right to have one-third of his personal estate, notwithstanding his will to the contrary; and secondly: her right, at any time within one year after the probate of the will, to make her election between the provision made for her in the will and that portion of the estate to which she was entitled by law. Had she known both of these facts, even though she may have been inclined, at the time she was called on to sign the deed, to set up
66 and abide by her husband's *will, she might well, and doubtless would, have declined signing the deed at that time, and availed herself of the same opportunity to obtain the necessary information and make up her mind, which the law would have afforded her if the will had been duly executed and recorded. She would then have seen that there could be no good reason for placing the matter on any different ground in this respect from that which would have existed if the will had been admitted to probate. The only idea which she seems to have had of the meaning and object of the deed was to set up and establish, as far as could be done, the will of Thomas Ferguson, and give to it the same effect, as if it had been duly executed and admitted to probate; and she seems to have had no idea, that she was thereby giving away her own property, to the amount of twenty-odd thousand dollars. And no sufficient explanation, on that subject, was made to her.

Again, it does not appear that she knew, and doubtless she did not know, that though her husband's will was not duly executed and admitted to probate, she might at any time; if she chose, give effect to it, to the extent of her full legal portion of the estate or any part thereof, by deed or by will, executed at any time during her life. So that, if she had but known it, she had the whole matter in her own hands, and might have disposed of it deliberately and advisedly, instead of hastily and ignorantly, as she seems to have done. She probably did not know the difference between disposing of her property by deed and by will; that the former was irrevocable, while the latter would have been ambulatory and revocable till her death.

Now, upon all these subjects she needed information and the advice of counsel
67 and of disinterested friends; *and she needed time to obtain them. The law presumes that a widow in such case stands in such need, and therefore it gives her one year to obtain such information and advice, so that she may make her election wisely and discreetly. She has just emerged from a state of disability, during which she has had no occasion to judge and act for herself, because she has had a husband to judge and act for her in all matters affecting her temporal welfare. She is presumed to know little or nothing about his property or his business; and the law, in its wisdom and humanity, considers that one year is not too much time to give her for obtaining the information and advice she so much needs. In the case now under consideration, the deed was signed by the widow just eight days after her husband was buried. By it she professed to give away her full portion of her husband's estate, except that part which he intended to give her by his will; the amount thus given away being not less than twenty or twenty-five thousand dollars. During the short interval between the death of her husband and the signing of the deed by her, she remained in his last residence, surrounded by his children and grandchildren, who alone were to be benefited by the execution of the deed. It does not appear that one of her own next of kin was with her during that interval; but, at all events, not one of them was present when she signed the deed. It does not appear that she consulted counsel, or advised with a single disinterested friend on that subject, or was advised by anybody to do so.

It was the duty of the administrators of her husband, invested as they were by law with the title to his whole personal estate, and standing as they did in the confidential relation in which they stood towards
68 *her, to take care that before she made a donation of her estate, or a large portion of it, to themselves, as she did, she should be fully informed of her rights on the subject, and the effect of her act, or at least should have ample time and opportunity to consult counsel and advise with disinterested friends; and they should have advised her to avail herself of those advantages. That uberima fides, which the law expects and exacts of persons standing in such a confidential relation to another, required them to do so. Instead of doing so, if they did not advise and encourage, they, at least by their acts, facilitated the preparation and execution of the deed, when they must have known that she had not the necessary information and proper advice to enable her to act wisely and discreetly in so important a transaction.

We have referred to very little authority in support of the views we have expressed, because we think the principles of law and equity which govern the case are very well settled. Besides, Story's Eq. Ju., to which we have already referred, the case of Huguenon v. Basely, 14 Ves. R. 273, in 3d Leading Cases in Equity, top pages 94–153, edition of 1859, with the English and American notes appended, may be referred to as containing almost all the law which

is extant upon the subject. We would refer specially to some of the cases, but for the great length to which this opinion has already been extended. We think, however, we can safely say, that though perhaps no case can be found precisely like this in its main features, yet not one of the cases is in conflict with this opinion, while many of them strongly support and sustain it.

In regard to the receipts which were given by Mrs. Ferguson to the administrators of her husband for the *legacy intended to be given to her by his 69 will, and which were relied on as confirmation of the deed signed by her, those receipts were given very shortly after the deed was signed, under the same influence under which the deed appears to have been signed, and when she remained, so far as appears from the record, still uninformed as to her rights; or, if so informed, she doubtless supposed that the deed would be binding upon her. They cannot therefore have the effect of such a confirmation.

For the foregoing reasons we concur in the opinion of the Circuit court, that the paper writing in the bills and proceedings mentioned, of the date of the 19th day of January, 1870, was made under such circumstances as to render it invalid, and of no binding force or effect against the said Mary Ann Ferguson; and that it ought in equity to be set aside, whether any actual fraud was intended or perpetrated on her in its procurement or not; (a question not deemed by this court any more than by the said Circuit court, necessary to be decided); and we therefore affirm the decree of the said Circuit court.

STAPLES, J. concurred in the opinion, except as to the competency of Mrs. Ferguson as a witness. He had not examined that question, and expressed no opinion upon it.

Decree affirmed.

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70 *Hall's Ex'or v. Smith & als.

March Term, 1874, Richmond.

1. **Application of Rule in Shelly's Case.***—W. died in 1831. By his will he gave the residue of his estate to be equally divided among his children, naming them, to them and their assigns forever; "except my daughter Mary C.; and her portion, after deducting forty-nine dollars, I lend unto her during her life, and after her death I give the same to the lawful issue of her body, to them and their heirs and assigns forever." Mary C. took an absolute interest in the slaves received by her under this clause of the will.

*Real Property—Words of Purchase.—See Walker v. Lewis, 90 Va. 578, 19 S. E. Rep. 258, for a case where the word *son* in a devise to one for life, and after his death to his sons and their heirs forever, to be equally divided among them, etc., was construed as a word of purchase vesting a contingent estate of inheritance in the sons. See also, Taylor v. Cleary, 29 Gratt. 448, and *note*.

2. **Equitable Jurisdiction—Discovery.**—Bill to recover a female slave and her children. The only allegation in the bill as ground of jurisdiction is that plaintiffs did not know the names of the children; though a further discovery is asked of names, number, &c. It being apparent from the bill and answer that the plaintiffs did not need a discovery, the bill should be dismissed.

This was a suit in equity in the Circuit court of Chesterfield county, brought in March 1856, by Robert Smith and others, the children of Mary C. Smith, and grandchildren of William Womack, against Wilkins Hall, to recover from Hall a negro woman named Martha and her children. The plaintiffs claimed that their grandfather, William Womack, had by his will left the slave Martha to their mother, Mary C. Smith, for her life, and at her death to her children. The case is sufficiently stated by Judge Bouldin in his opinion. The cause came on to be heard upon the 23d of November 1861, when the court made a decree that Hall should deliver the slaves to the plaintiffs, and render an account of profits. And thereupon Hall applied 71 *to this court for an appeal from the decree; which was allowed.

McRae and Christian, for the appellant.

Crump, for the appellees.

BOULDIN, J. The question in this case (on the merits) grows out of the construction of that clause of the codicil to the will of William Womack, deceased, in which, after directing an equal division of the residue of his estate among his children, Francis Jefferson, James Madison, Nancy, Susan and Mary C., to them, their heirs and assigns forever, he qualifies the provision for Mary C. as follows: "Except my daughter Mary C.; and her portion, after deducting forty-nine dollars, I lend unto her during her life, and after her death I give the same to the lawful issue of her body, to them and their heirs and assigns forever." The question is, what estate did Mary C. take in the residuum under this clause.

The codicil was executed in 1830 or 1831, and was admitted to probate in 1831; and the clause in question brings again before the court for consideration the application and effect of the oft-occurring and much tortured rule in Shelley's case. The question has been carefully and ably argued by appellant's counsel; but it is not my purpose to enter upon an examination of the cases in which it has arisen; for, as was well said by Lord Eldon, in Jesson v. Wright, "the mind is overpowered by their multitude, and the subtlety of distinction between them." I shall not, therefore, at this late day undertake to discuss the question; but for an able and exhaustive investigation of this and kindred questions, beg leave to commend to the bar and cu- 72 rious *enquirers, the very powerful arguments of counsel in Moon v. Stone, 19 Gratt. 130; which for pains-taking

industry and thorough research have rarely, if ever, been equalled, and never surpassed, by any argument before this court.

I think I may assume, as a proposition too plain to be questioned, that the words used in the testator's will, "I lend to my daughter Mary C. her portion during her life, and after her death I give the same to the lawful issue of her body," are, when used in a will, standing alone, apt and appropriate words, under the rule, to create an estate tail in Mary C. as to the realty, and an absolute estate as to the personalty. The question supposed to be debatable is, whether the application of the rule is defeated by the superadded words of limitation, "to them and their heirs and assigns forever:" whether these words plainly indicate the purpose of the testator to provide for a new stock to take by purchase. The contrary has been held by a decided majority of the cases. It must be conceded, however, that there was at one time much conflict in the cases, both in England and America, as to the effect on the rule of such words, and others of like character. See the English cases on the subject as collected and classified by Mr. Hayes in his excellent treatise, 7 Law Libr. p. , tables 1, 2, 3 and 4, where all the cases will be found. In the case of Jesson v. Wright, above cited, decided by the House of Lords, in 1820, the whole subject was fully considered, after an elaborate argument at the bar, in which Lord Eldon said: "No case was ever better argued at this bar;" and words appropriate to create a tenancy in common, superadded to words creating an estate tail, were disregarded as repugnant to the
73 *previous words of limitation; and the rule was strictly applied.

This decision was regarded at the time as settling the law of England in favor of a rigid application of the rule as settled by the earlier cases, regardless of such superadded words of limitation; and in that sense it was adopted and approved by this court in the case of Moore v. Brooks, 12 Gratt. 135. Judge Allen delivering the opinion of the majority of a full court in that case, says, p. 146: "Several cases have occurred since the case of Jesson v. Wright, and although in some instances the principle of that case may not have been followed out, yet the weight of authority is in favor of the rule there announced. The cases on this subject are reviewed in 2 Jarmin on Wills 271, ch. 37, and he concludes that the doctrine of Jesson v. Wright has prevailed, and stands on the soundest principles of construction. Hayes on Estates Tail 100, 7 Law Libr. 54, sustains the same proposition. See also to same effect, Powell on Devises 464, ch. 23, 22 Law Libr. 245." And at p. 154, same case, Judge Allen concludes his opinion as follows: "I also think that the cases in this court are not in harmony with each other, and that it would be more in conformity with the spirit of the later, as well as of the earlier cases in this court, and the true doctrine in regard to the rule in question, to hold that the superadded expressions do not clearly indicate an intention to use the terms as descriptive of any other class than heirs."

I think the case under consideration is ruled by the principle of the cases of Jesson v. Wright and Moore v. Brooks. It is true that the superadded expressions here are not the same used in the cases referred to; but I regard the principle established
74 by those as ruling *this. In the cases referred to, the superadded words would create a tenancy in common, whilst here they amount to a limitation in fee; but neither are sufficient to take the previous limitation out of the operation of the rule, as the cases show. In 1822, in the case of Tidball v. Lupton, 1 Rand. 194, Judge Roane held it to be unquestionable, that an estate tail would be created by words the same in effect, and, indeed, almost identical with those we are considering. By the first clause of the testator's will in that case, he devised the premises in question to his daughter, "Hannah Lupton, and to her and the heirs of her body, and to them and their heirs and assigns forever." Here, the language is, "to the lawful issue of her body, to them and their heirs and assigns forever." The superadded words of limitation are identically the same in both cases. Judge Roane held that these superadded expressions were not sufficient to show an intention on the part of the testator, that the heirs of Hannah Lupton should take by purchase as a new stock and not by limitation. He says, p. 204: "I am clearly of opinion that if there were nothing else in this will than the first clause, Hannah Lupton took an estate tail in the premises."

It is proper to add, that I have cited this opinion of Judge Roane, to show his individual views of the law on the question under consideration. His construction of the first clause was fortified by another clause; and the decision did not rest on the first clause alone. His views of the question, however, are in accord with a majority of the cases.

I am of opinion therefore that the testator's daughter, Mary C., took an absolute estate in the slave Martha, and that the bill in this case should have been dismissed on the merits.

75 *But were this otherwise, my opinion is that the claim is purely a legal one, that the plaintiff in the court below showed no good reason for going into a court of equity, and that his bill should have been dismissed for want of jurisdiction. The only colorable ground for equitable jurisdiction is the following allegation: "That the said slave Martha is still in the possession of said Hall, and has several children, whose names are unknown to your complainants, and the said Hall refuses to make any disclosure, or give them any information on the subject. The prayer, it is true, is for a disclosure by Hall of the names and number of Martha's children, whether any had been sold, and if so to whom, and what was their value, that an account of hires might be taken of the

slaves, and their profits decreed to them, and for general relief. But it will be observed that the only matter of which the complainants allege ignorance in the charging part of the bill was the names of the children, not their number; and they no where allege that they had no means of ascertaining the names except by a discovery from Hall. The answer alleges that the defendant, Hall, had never sold any of the slaves, and denies that he had "refused to state the number and the names of the children, further than to say that he did not know the names of all, as he does not now. The number he has always stated when called on, and the names might at any time have been obtained by inquiring at his house; and there was no obstacle to their proceeding at law, which they might not by common diligence have removed."

No evidence was taken on either side, and the question is, "Was there proper ground shown for coming into a court of equity to assert the legal title to the slaves in controversy?"

76 *The principle by which we should be governed in responding to this question, was very clearly laid down by Judge Baldwin, speaking for the court, in the case of Armstrong v. Hunton, 1 Rob. R. 323, 326-'7; and has been approved by this court in the recent case of Childress v. Morris, decided at Staunton, 23 Gratt. 802. Judge Baldwin said: "It is perfectly clear as a general rule, that in a bill to substitute an equitable for a legal forum, a prayer for a discovery, without any averment showing its materiality or necessity, is naught. If this court has tolerated a departure from this rule in regard to slave property, (Gregory's adm'or v. Marks' adm'or, 1 Rand. 355,) it is when the necessity for a discovery was supposed to be incidental, at least prima facie, to the nature of the demand; as where the suit is to recover a stock of slaves, after a considerable lapse of time, and there has been such an increase as to raise a fair presumption that the plaintiff is ignorant of their names, ages and residences. But even under such circumstances, if it may be inferred from the statements in the bill, or the evidence in the cause, that no such difficulty in point of fact exists, a court of equity will not take cognizance of the case unless there be some other ground for the exercise of its equitable jurisdiction." Citing Hardin's ex'ors v. Hardin, 2 Leigh 572. See also Jones v. Bradshaw, 16 Gratt. 355, and Hale &c. v. Clarkson &c., to be reported 23 Gratt. 42, where this qualification of Judge Green's doctrine in Marks v. Gregory is approved. I think it perfectly apparent from the bill and answer in this case—and there is nothing else—that there existed, in point of fact, no difficulty on the part of the complainants in reaching the facts of their case at law; and there was no ground or necessity for a discovery. They allege in the

77 bill ignorance of but *one fact, and that an unimportant fact, the names of the slave Martha's children. They do not pretend that they are ignorant of their number or residence, or that they believe that any of them have been sold. The prayer on that subject is purely colorable. Whilst, on the other hand, the defendant swears positively that he had informed them of their number, that none of them had been sold, and that they were all still in his possession. They knew the name of the mother, for they name her in the bill; and we have a right to infer from the pleadings that they knew also the number of her children; and the conclusion is almost irresistible from the whole, that they could, without difficulty, have ascertained their names, if deemed important.

But it was not at all necessary to know the names of the children to maintain a suit at law for them. An action of detinue could have been maintained for the slave Martha and her six children, without setting forth their names, and a jury could readily and easily have ascertained their value and hires. The ground alleged for coming into a court of equity was colorable only, and my opinion is that the bill should have been dismissed for want of jurisdiction.

On both grounds I am of opinion that the decree of the Circuit court is erroneous, and should be reversed with costs to the appellant; and a decree should be entered dismissing the bill with costs to the defendant in the Circuit court.

The other judges concurred in the opinion of Bouldin, J.

Decree reversed.

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78 *Pollock's Adm'r v. Sutherlin.

Buford v. Pollock's Adm'r.

March Term, 1874, Richmond.

Absent, CHRISTIAN and BOULDIN, Js.*

1. **Awards — Presumptions.**† — Upon the question whether an award is within the terms of the submission, all fair presumptions shall be made in favor of the award; and if, on any fair presumption, the award may be brought within the submission, it shall be sustained.
2. In this case—HELD: The award of the arbitrator is within the submission.

These were actions of covenant in the Circuit court of the town of Danville, brought by Berryman Green, administrator of Morris Pollock, deceased, one against William T. Sutherlin, and the other against A. S. Buford. Both actions are founded on the same award. The defendant, Sutherlin, filed a plea, denying that a valid award had been made by the arbitrator, to which the plaintiff replied specially; and to this special replication the defendant demurred. Buford filed two pleas, to which the plaintiff demurred.

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*BOULDIN, J., had been counsel in the causes.

†The principal case is distinguished in Coons v. Coons, 95 Va. 438, 28 S. E. Rep. 885. See also, Henley v. Menefee, 10 W. Va. 781.

Upon the hearing of the cases, the court below sustained Sutherlin's demurrer to the plaintiff's replication, and rendered a judgment in his favor; and sustained the plaintiff's demurrer to Buford's pleas, and rendered a judgment against him in pursuance of the award. And, thereupon,
79 Pollock's administrator applied *for a supersedeas in the first case, and Buford applied for one in the second. The cases are sufficiently stated by Judge Moncure in his opinion.

The cases were argued by Marshall & Johns, and Ould & Carrington, for Buford; Robertson and Jones and Bouldin, for Pollock's administrator; and Ould & Carrington and F. L. Smith, Jr., for Sutherlin.

MONCURE, P. These two cases are founded upon an award, and upon the same award. The controversy in them lies in a narrow compass. I think both cases depend upon a single question, and that is: "Whether the award is within the submission or not as to Sutherlin?" If it be, then I think it is valid both as to Sutherlin and Buford. But if it be not within the submission as to Sutherlin, then it is clearly void as to him, and a question will in that case arise, "Whether it is not therefore void also as to Buford?" Other questions were noticed in the argument, but they seem to me to be free from any doubt or difficulty, and will perhaps be sufficiently answered by what I may say in answer to the main question above stated; though I may notice some of them more particularly in the sequel of this opinion. I will therefore proceed at once to consider the main question, "Whether the award be within the submission or not as to Sutherlin?"

There is no principle of law better settled, than that an award to be valid must be within the submission. It would be a waste of time to cite cases in support of a principle so well settled. Indeed, it is a self-evident principle. An arbitrator derives all his authority to make an award from the submission. He has no more authority, outside of the submission, to make
80 *an award between the parties than has any other person. In other words, he has no such authority at all. There is another principle of law just as well settled as the one already referred to, and that is, that an award, being the judgment of a judge of the parties own choosing, ought to be favorably viewed by the courts; and effect ought to be given to it by them, whenever that can be done consistently with the rules of the law. One of these rules, as we have seen is, that the award must be within the terms of the submission.

In 1859, Pollock, a resident of Scotland, sold to Fitzgerald, a resident of Virginia, a tract of land lying in Pittsylvania county, and deposited the deed therefor to the purchaser in the Bank of Virginia in Danville, it seems, as an escrow, to be delivered on the payment of the purchase money, which, or the greater part of which, was payable in deferred instalments. Before the money was paid, or the deed was delivered, the war came on, which, of course, cut off all communication between Pollock and Fitzgerald. During the war, a sale of the land was made by Fitzgerald to Sutherlin, through the instrumentality, it seems, of Buford, who claimed to be the agent of Pollock, with full authority from him to do what he did. By these means the deed was obtained from the bank and delivered to Fitzgerald, who then conveyed the land to his vendee, Sutherlin. It seems that the latter paid a large portion of the purchase money due by him in Confederate currency to Buford, who received the same, and deposited it from time to time as received in bank to the credit of Pollock. After the war was over, the representative of Pollock (who had died in the meantime), upon inquiry into the state of the case, ascertained what had been done as afore-
81 said, *and that Fitzgerald and the bank had both become insolvent, leaving the purchase money due to him by the former, or the greater part of it, unpaid. Thus, of course, a controversy at once arose between Pollock's representative, and Sutherlin and Buford; Pollock's representative claiming that what had been done by Buford as his agent, in regard to the delivery of the deed to Fitzgerald, the receipt of the money from Sutherlin, and the deposit of the same to his, Pollock's credit in bank, was wholly unauthorized, and that he was entitled to a lien on the land for the payment of the purchase money and interest, which still remained due to him from Fitzgerald. On the other hand, Sutherlin claiming that the said deed was duly delivered; that the purchase money due from Fitzgerald was fully paid, and, at all events, that the said land then in his possession was not liable for the payment of the said purchase money, or any part thereof; and the said Buford claiming that he did not exceed his authority as attorney for said Pollock, and that the money received by him for said Pollock was deposited in the bank of Virginia at Danville to the credit of said Pollock, and had been lost without default on his part by the political and financial results of the late war.

Such being the controversy between these parties, it was necessary to have it determined, either by the action of the courts established by law, or by the award of an arbitrator mutually chosen by the parties for the purpose. The country was then subject to military power, and the courts were composed of judges who had not the confidence of the public. The parties, therefore, naturally preferred to have so important a controversy determined by the award of an arbitrator chosen by
82 themselves. They succeeded *in finding and choosing one who, by their own admission, was suitable in every respect to perform the duty, and who was willing and consented to do so.

Having agreed to refer the controversy to an arbitrator, and having chosen an ar-

bitrator so fit an competent in every respect, and who seems to have had the entire confidence of all the parties, it was natural and reasonable that they should invest him with the amplest powers to settle the controversy in such manner as he might think to be just and right. And now let us look at the submission, and see whether and to what extent such was actually the case.

The submission is by deed, under the hands and seals of the parties, who were Berryman Green, administrator of Morris Pollock dec'd, Morris Pollock Jr. (son and sole heir of Morris Pollock deceased), by H. Robertson, his attorney in fact, A. S. Buford, and W. T. Sutherlin. It bears date the 24th of March, 1869; and after reciting the facts in regard to the nature of the controversy, and the conflicting claims of the parties, it further recites that "the said Edmond Fitzgerald and the said Bank of Virginia are both insolvent, and the matters of controversy aforesaid involve novel and difficult questions of law as well as of fact." And then, after stating the qualification of Berryman Green as administrator of Morris Pollock deceased, and the authority of Harrison Robertson as attorney in fact of Morris Pollock Jr., sole devisee and legatee of Morris Pollock deceased, to submit to arbitration any matter affecting his interest in the premises, it concludes the recitals with one in the following words: "And whereas all the parties interested (except the insolvent Edmond Fitzgerald 83 *and the Bank of Virginia) are willing to settle and adjust all the matters in controversy aforesaid with the least possible delay and expense, consistent with justice to all, and to that end have agreed to refer all the said matters of controversy, both of law and of fact, to the arbitrament and decision of Gustavus A. Wingfield, of Liberty, Bedford county, Virginia, and to be bound by his award as final and decisive, having all confidence in his industry, skill, learning and judgment, and his impartiality and integrity of character."

After making these recitals, the submission thus proceeds: "Now, therefore, the said" (parties, naming them,) "do hereby submit to the arbitrament, award and decision of the said G. A. Wingfield, all the matters of controversy aforesaid, both of law and fact; and do hereby covenant severally, each with the others, and any one of the others, in the penalty of $10,000, to abide by, keep, perform and fulfill, in all things well and truly, the award, arbitrament, decision and orders of the said G. A. Wingfield in the premises, so as such award," &c., "shall be given in writing under the hand of the said G. A. Wingfield within, at the farthest, twelve months next succeeding the date of these presents.

"And we do further agree that in ascertaining the facts of the matters of controversy hereby submitted, the said G. A. Wingfield shall and may consider and weigh all the testimony that he can find, or that may be produced to him, relevant to the subject matter, whether the same would be admissible according to the strict rules of evidence in court or not, giving to such testimony such weight as he may think due and proper; and having ascertained the facts of the case, to the best of his means, 84 skill and ability, he shall decide *and order the rights and duties of the parties in the premises, according to the principles of a court of equity, and shall order and award what shall be done by any or all of the parties."

After empowering the arbitrator to fix his own compensation, and prescribe how the same and his travelling or other expenses should be paid by the parties, or any of them, the submission contains the following concluding clause:

"And we do further agree that he shall be at liberty, if he thinks proper, to make his award as to any one or more of the parties, or to any portion of the matters in controversy as aforesaid at any time within the period of twelve months aforesaid, without waiting for a full and final award of all the matters aforesaid; and such award in part shall be binding upon the parties, and in such case he shall go on to complete the full and final award as to the remaining matters as soon as practicable."

We thus see from the submission, that, as might well have been expected from the nature of the controversy, the character and qualifications of the arbitrator, and all the surrounding circumstances, he was invested with the amplest powers for the settlement of the matters in dispute between the parties, and putting an end to all controversy on the subject. To be sure, he was not expressly empowered to settle any matter whatever of controversy which might possibly exist between the parties, but to settle a particular matter of controversy, which was in fact, no doubt, the only matter of controversy between them. But in regard to the settlement of that matter, and everything involved in it, he was invested with ample and, indeed, with extraordinary powers. It would have been difficult to have used expressions stronger than 85 those which were *used in the submission, to give the arbitrator full and complete power over the subject referred to him.

And yet the learned counsel of Sutherlin and Buford contend that these provisions, or some of them, were intended to restrict and not to enlarge the powers of the arbitrator; and they refer to those relative words, such as "matters of controversy aforesaid," which they say are carefully used in connection with all the powers conferred on the arbitrator, for the purpose of indicating that they are to be exercised only in regard to the particular claims of the different parties recited in the preamble of the submission.

Certainly the submission relates only to the controversy which actually existed between these parties, and which is referred to in general terms in the preamble; but it was plainly intended that the most ample powers should be conferred on the arbitrator

in regard to the decision of that controversy and every question involved in it. No intention is manifested in the instrument that those general terms should be construed in any narrow and restricted sense, in ascertaining what was the subject of the reference. On the contrary, the preamble expressly declares that "the matters of controversy aforesaid involve novel and difficult questions of law as well as of fact," and that the parties "are willing to settle and adjust all the matters of controversy aforesaid with the least possible delay and expense consistent with justice to all."

To construe the submission in the restricted sense contended for as aforesaid, would be contrary to the settled rules of law in regard to the subject of arbitration and award, according to which rules that amicable mode of settling controversies has alway been highly favored, and has
86 recently become much more *so both in England and in this country. It would also be contrary to the manifest intention of the parties in this case, as indicated, not only by the terms of the submission itself, but by all the surrounding circumstances. Can we doubt that the parties intended to refer the whole matter of controversy to the final decision of such an arbitrator, one so competent to decide it, and so worthy of confidence in every respect? Can we suppose that they intended to refer only the narrow and single question of lien or no lien as to Sutherlin, and to leave the further and final settlement of the matter to the action of the courts? Their declared object was "to settle and adjust all the matters of controversy aforesaid," including the novel and difficult questions of law as well as of fact involved therein, "with the least possible delay and expense consistent with justice to all," and that they should "be bound by his award as final and decisive." And they conferred on him the fullest and most extraordinary powers in regard first "to the ascertainment of the facts, and then to the decision and award to be made thereupon. What is said in the award about "the principles of a court of equity," was manifestly intended, I think, not as a restriction upon the powers of the arbitrator, but rather as an enlargement of such power, and expressly to show that in settling the controversy and making his award he might apply to the case any principles of a court of equity that might be applied to it by such a court if the case were properly before it.

Having examined and considered the submission, I will now proceed to examine and consider the award.

It is a very brief and plain instrument, consisting, besides a short preamble, of but three clauses; not setting out any of the testimony in the case, nor any
87 *part of the process by which the facts were ascertained by the arbitrator; but (after "having ascertained the facts of the case to the best of his means, skill and ability,") simply deciding what were "the rights and duties of the parties in the premises according to the principles of a court of equity," and awarding what should "be done by any or all of the parties."

The preamble recites that the arbitrator, in pursuance of the submission, proceeded to arbitrate and determine the several matters of difference specified therein, the several parties being present in person, except Morris Pollock, Jr., who appeared by Harrison Robertson, his attorney in fact; and after having heard the parties, examined their witnesses and documentary evidence, and fully considered the same, as well as the arguments of the counsel of the several parties, had decided and determined, "and do hereby decide, determine and award, as follows, viz": and then follow the three clauses of the award:

"1st. That the said William T. Sutherlin do pay to the said Berryman Green, administrator with the will annexed of Morris Pollock, deceased, the sum of $7,574.67, with interest thereon after the rate of six per cent. per annum from the first day of May 1865 until payment; and that upon the payment of the same, the said deed from the said Morris Pollock, the elder, to the said Edmond Fitzgerald, bearing date the first day of December 1859, shall be taken and held to be the absolute deed of the said Morris Pollock, and conclusive and effectual for the conveyance of all his right and interest in or to the tract of land therein mentioned, and the said Morris Pollock, Jr., shall be thereby forever concluded and barred from having or claiming the said land as the heir or devisee of the said Morris Pollock, the elder.

88 *"2d. That the said A. S. Buford do pay to the said Berryman Green, administrator as aforesaid, the sum of $4,456.29, with interest thereon after the rate of six per cent. per annum from the first day of May 1865 until payment; and that the said Buford shall be entitled to receive and have for his own use, whatever sum the said Bank of Virginia may be liable to pay on account of deposits in its branch at Danville, made in the name of or to the credit of the said Morris Pollock, after the first day of January 1863; and may use, and the said Berryman Green, administrator as aforesaid, shall allow the said Buford at his own proper costs, to use the name of him (the said administrator) in any proper suit or proceedings, to recover the same from the said bank or any other party who may be liable for the same; and the said Green, as such administrator, shall be entitled to recover all of the said deposits deposited in the branch bank in the name of or to the credit of his said testator before the said first day of January 1863. And

"3d.," &c. This clause relates only to the compensation of the arbitrator.

Now, it is not pretended that this award was procured by corruption or other undue means; or that there was any, the least, partiality or misbehavior in the arbitrator. But the objection is that the award is not within the terms of the submission, and that the arbitrator exceeded his authority.

If he did, the award, to that extent at least, is certainly void. I will now proceed to enquire whether he did or not.

The only objection which has been made to this award to show that the arbitrator exceeded his authority is, that it awards a sum of money to be paid by Sutherlin, instead of awarding, as to him, that Pollock's representative had a lien upon the land
89 *claimed by Sutherlin for the balance of the purchase money due to the former by Fitzgerald for the said land; and that in that respect the award is not in pursuance of the submission.

If this were so, it is manifest that the objection would be purely technical, and that Sutherlin would be actually benefited by the arbitrator's making the award as he did. We may presume, as no doubt was the fact, that the land was worth, and would at any time command in the market, a great deal more money than was awarded against Sutherlin; that Sutherlin was a man of wealth, had the command of money, and would instantly, of course, have paid the amount of the lien upon the land so soon as it was ascertained, and not incur the risk of a sacrifice of the land at a public sale. The arbitrator may therefore very reasonably have supposed that all that Sutherlin desired to know was, whether his land was liable to the lien claimed by Pollock, and, if so, how much money he would have to pay to relieve the land of the incumbrance, and thus to perfect his title; and, taking this view of the subject, the arbitrator therefore may have apportioned the amount due to Pollock's administrator from Fitzgerald, between Sutherlin and Buford on equitable principles, and awarded the payment by them of their portions respectively, and that upon the payment of Sutherlin's portion the land should be discharged from the said incumbrance, and the deed from Pollock to Fitzgerald become valid and effectual.

Of course the arbitrator had no right to exceed his authority, and, if he did so, his award to that extent is invalid, even though he may have supposed, and it may be true in point of fact, that the parties would be benefited by such excess of authority, unless, indeed, they confirmed it afterwards.

90 *But the question is, "Did he exceed his authority?" And upon that question what I have just said sheds a stream of light. What authority did the parties intend to confer upon the arbitrator by the submission liberally construed in the light of all the surrounding circumstances? It is not an unreasonable answer to that question to say that they intended to give him authority to do precisely what he did do by his award.

If the arbitrator did not exceed his authority in awarding the payment of a sum of money by Sutherlin, instead of merely awarding that the land was liable to a lien therefor, then the award is not invalid in that respect, even though he may have erred in matter of law or fact in so awarding. All the said matters of controversy, both of law and of fact, were expressly referred to the arbitrator by the parties, who agreed to be bound by his award as final and decisive. If therefore his award, being within the terms of the submission, was manifestly wrong, both in law and fact, no court could for that cause set it aside: Because the parties preferred to submit their controversy to the final decision of a judge of their own choosing, rather than a court constituted by law; and it would be not merely an excess, but a usurpation of authority in such a court to set aside an award, however unjust it might appear to be, merely upon the ground that there was an error of law or of fact in the decision of the arbitrator.

But can we say that there is an error of law or fact in the decision of the arbitrator in this case? We do not know what documentary or other evidence there was, or what was said by the parties of their counsel before the arbitrator. None of these matters are set out in the award, nor
91 was it necessary that they should *be.

But the award does expressly affirm that the several parties were present in person, or by attorney in fact, before the arbitrator; and that he heard the parties, examined their witnesses and documentary evidence, and fully considered the same, as well as the arguments of the counsel of the several parties: and thereupon decided and determined the several matters of difference specified in the submission, and made his said award accordingly. "Everything is presumed in favor of awards;" is the language of Cabell, J. delivering the opinion of this court in Richards v. Brockenbrough's adm'or, 1 Rand. 449, 456. Now let us presume in favor of this award (and it is certainly not an unreasonable nor an improbable presumption), that it appeared to the arbitrator, from the documentary and other evidence which we see was before him, that it was agreed between the parties that Sutherlin should apply the purchase money due by him for the land to the payment of the balance remaining due by Fitzgerald to Pollock for the same land, and thus should indemnify Fitzgerald, the intermediate vendee of Pollock and vendor of Sutherlin; and that at the time of the award there remained due for the land, by Fitzgerald to Pollock, a balance of $12,030.81, and by Sutherlin to Fitzgerald a balance of $7,574.67. Can there be a doubt but that a court of equity in such a case, at the suit either of Fitzgerald or of Pollock, would decree the balance due by Sutherlin to be applied pro tanto to the payment of the balance due by Fitzgerald to Pollock, and would therefore give a personal decree, as the arbitrator has given a personal award in favor of Pollock's administrator against Sutherlin for the said balance of $7,574.67, taking care in the decree, as the arbitrator took care in his award, that upon such payment Pollock's deed to Fitzgerald
92 *should become good and valid, and Sutherlin should hold the land free from any lien or claim on the part of Pol-

lock or his representative? Certainly Fitzgerald would have had a right to such relief in a suit in equity brought by him; and Fitzgerald being insolvent, certainly Pollock's representative would have had an equal right to such relief in a suit in equity brought by him. All the parties, except Fitzgerald (who was not only insolvent, but I believe also a non-resident of the state), having referred the matters in controversy between them to the decision of an arbitrator, and expressly empowered him to "decide and order the rights and duties of the parties in the premises, according to the principles of a court of equity," and to order and award what should be done by any or all of the parties, it follows, as a necessary consequence, that the arbitrator had power to award, and upon the presumption aforesaid, properly awarded as he did, that Sutherlin should pay to Pollock's administrator the said sum of $7,574.67, with interest thereon as mentioned in the award.

But even if the arbitrator erred, and plainly erred, in his decision in this respect, no court has a right to set aside his decision, and make one of its own. All the said matters of controversy, both of law and of fact, were expressly referred by the parties to his decision, which, whether right or wrong, must be final and conclusive, unless the award be invalid; which it cannot be upon the ground that the arbitrator erred in his judgment, either upon the law or the fact. Smith &c. v. Smith &c., 4 Rand. 95, is authority upon this point. The question submitted in that case was, whether certain slaves were to be considered as undisposed of by a testator, or were to go to his residuary legatee. The arbitrators
93 decided *that the property was not bequeathed by the testator; and the court of appeals was clearly of opinion that they mistook the law. But the award was nevertheless held to be binding. 2 Rob. Pr., old ed., p. 195.

Other presumptions could, no doubt, be fairly made to sustain the validity of the award; but surely I have already said enough for that purpose; and I am therefore of opinion that the arbitrator did not exceed his authority in awarding that Sutherlin should pay to Pollock's administrator the sum of $7,574.67, with interest, as aforesaid.

These cases were very ably argued by the counsel on both sides, and I would be glad to notice in detail other grounds of objection taken by the counsel of Sutherlin and Buford, and also to review the authorities referred to by them; all or most of which I have examined. But I do not think it necessary to do so, after what I have already said. The learned counsel for those parties contended that the arbitrator awarded what he was not authorized to award, to wit: the payment of money by Sutherlin and Buford respectively to Pollock's administrator; and omitted to decide what alone he was authorized to decide, to wit: in regard to the conflicting claims recited in the preamble, and especially the claim of Pollock's administrator to a lien upon the land for the payment of the balance claimed to be due to him by Fitzgerald. They seemed to think that the proper and only office of the arbitrator was, to respond directly to the question of lien or no lien, and other like questions arising on the recitals of the preamble. And that the question of lien or no lien lies at the foundation of the controversy, and was necessary to be decided before and above all other questions
94 in the case. With the highest *respect for the learning and ability of these gentlemen, I think they place a too narrow and restricted construction upon the submission, when it ought to be liberally construed, according to the rules of law which govern all arbitrations, but especially in view of all the surrounding circumstances before referred to. The question of lien or no lien was certainly an all important question in the case, but it was as a means rather than an end which the parties had in view. The end of the controversy was the receipt and payment of money, and the quieting of a title to land. Pollock's administrator claimed that money was due to him by Fitzgerald for the purchase of land which had not been conveyed to Fitzgerald by a valid deed, but which the latter had sold to Sutherlin; and that he, Pollock's administrator, had a lien on the land for the payment of said purchase money. Now it was necessary that the arbitrator should enquire into and satisfy himself upon all these and other like questions arising in the case; but it was not at all necessary that he should state in detail in his award, all the steps taken, and all the facts ascertained by him in the course of his enquiries. The body of the submission, not the preamble, expressly prescribes his duty in this respect. The parties there agree, "that, in ascertaining the facts of the matters in controversy hereby submitted, the said G. A. Wingfield shall and may consider and weigh all the testimony that he can find, or that may be produced to him, relevant to the subject matter, whether the same would be admissible according to the strict rules of evidence in court or not, giving to such testimony such weight as he may think due and proper; and having ascertained the facts of the case to the best of his means, skill and ability," (now we come to what he is
95 to set down in *his award) "shall decide and order the rights and duties of the parties," &c., and shall order and award what shall be done by any or all of the parties." For example, shall decide and award how much money Sutherlin should pay to Pollock's administrator, if any? What is to be the effect of the deed from Pollock to Fitzgerald upon such payment by Sutherlin? How much money Buford should pay to Pollock's administrator, if any? and what should be his, Buford's, right in regard to the money deposited in bank, &c.? In making such an award, the arbitrator necessarily decided all the questions arising in regard to the claims referred

to in the preamble, and necessarily decided them in a certain way, which we cannot misunderstand.

I have referred to very few authorities in the foregoing opinion, because I think there can be no controversy in regard to the law involved in the case. I might refer to many cases, English and American, in support of what I have said in regard to the favor which is shown to awards; but surely I need not; for their name is legion, and they speak to that effect, una voce. None of those decisions tend more strongly in that direction than do those of this court. Among them are the following: Ross v. Overton, 3 Call 309; Morris v. Ross, 2 Hen. & Mun. 408; 1 Rand. 449, Richards v. Brockenbrough's adm'or, 3 Id. 122; Head v. Muir, &c.; Armstrong v. Armstrongs, 1 Leigh 491; and Bassett's adm'or v. Cunningham's adm'or, 9 Gratt. 684. In Richards v. Brockenbrough, the court say that "everything is to be presumed in favor of an award." In Head v. Muir, &c., Judge Carr, in delivering the opinion of the court, reviews very fully the subject of awards. In Armstrong v. Armstrongs, the same great judge delivered
96 an opinion in which all the *other judges concurred, in which it was held that "all fair presumptions shall be made in favor of an award; and if on any fair presumption the award may be brought within the submission, it shall be sustained." In Bassett's adm'or v. Cunningham's adm'or, Judge Allen delivered an opinion in which all the other judges concurred, in which the same doctrines are maintained.

The result of my opinion is, that in the case of Pollock's adm'or v. Sutherlin, the judgment of the Circuit court must be reversed, the defendant's demurrer to the plaintiff's replication overruled, and the cause remanded for further proceedings to be had therein; and in the case of Buford v. Pollock's adm'or, the judgment of the Circuit court must be affirmed.

ANDERSON, J. concurred in the opinion of Moncure, P.

STAPLES, J. dissented. He thought the arbitrator exceeded his powers.

Sutherlin's case reversed. Buford's case affirmed.

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97 ***Humphreys & al. v. City of Norfolk.**

March Term, 1874, Richmond.

Absent, CHRISTIAN, J.

Municipal Corporations—Foreign Insurance Companies—License.*—The city of Norfolk has authority, under its charter, to impose a license tax upon foreign insurance companies having an agency in the city; and such companies are not exempted from this tax by the act of 1871-'72, ch. 385, § 57, p. 484.

D. Humphreys was the duly authorized agent of the Life Association of America, (a foreign insurance company,) for the city of Norfolk; and this company had complied with the provisions of the laws of this state applicable to such companies, and had paid the state license tax therein required. But the council of the city of Norfolk by an ordinance passed on the 18th of April 1873, imposed a tax of $150 upon insurance agents of each life insurance company having an agency in the city.

In June 1873 Humphreys was summoned before the mayor of the city of Norfolk to show cause why he should not be fined for his failure to pay the tax imposed by the ordinance of the city; and in July the mayor rendered a judgment against him for a fine of $20 and costs. He thereupon appealed to the corporation court of Norfolk, and in September 1873, that court affirmed the judgment. To this judgment Humphreys applied to this court for a supersedeas; which was allowed.

98 *The only question in the case is as to the authority of the council of Norfolk to impose the tax.

Maury and Neeson, for the appellant.

Martin, for the appellee.

STAPLES, J., delivered the opinion of the court.

The first question to be considered is as to the power of the city of Norfolk to impose a license tax upon foreign insurance companies doing business within the limits of that city. This is to be determined upon the provisions of the city charter and the various statutes found in the Code of Virginia relating to the government of towns. The charter provides that "for the execution of their powers and duties, the city councils may raise annually from taxes and assessments in said city such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as they shall deem expedient, in accordance with the constitution and laws of this state and of the United States." Acts of 1870-'71, p. 187, 198, § 42. This provision is substantially if not literally the same as that contained in the sixty-ninth section of the charter for the city of Richmond. Acts of 1869-'70, page 138. In the "Lawyers' case," not yet reported, (23 Gratt. 464), it was decided that the latter section conferred upon the corporate authorities of Richmond the general power of taxation, except only as it may be limited by the laws of the state or of the United States, and includes all persons and subjects of taxation.

The objection was made in that case, that a power to license involves in its exercise the power to prohibit without such license; and that such power vested
99 in a *municipal corporation is incom-

*Municipal Corporations—Foreign Insurance Companies—License.—See subsection 10 in the analysis of the monographic *note* on "Fire and Marine Insurance" appended to Mutual Assur. Society v. Holt, 29 Gratt. 512. See also, Royall v. State of Virginia, 116 U. S. 672, 6 Sup. Ct. Rep. 514; Norfolk v. Landmark Pub. Co., 95 Va. 564, 28 S. E. Rep. 959; Western Union Telegraph Co. v. Richmond, 26 Gratt. 1, and *note*.

patible with the rights of attorneys conferred by their general license to practice in any and every part of the state. This objection did not prevail. Judge Anderson upon this point, speaking for the entire court, conceded that the city authorities could not prohibit attorneys at law, already licensed, from practising their profession within the city limits. The exercise of the vocation was however a civil right and privilege, to which are attached valuable immunities and pecuniary advantages, and is a fair subject of taxation by the state and by municipal corporations. The power to impose a license tax upon the profession is included in the general power of taxation given by the sixty-ninth section of the charter, and is not taken away by subsequent limitations.

It must be remembered that the questions arising in the "Lawyers' case" were not hastily decided; they were twice elaborately argued by very able counsel, and they were very carefully considered by the court. The judges did not agree in their views as to the mode of assessment adopted by the city council of Richmond; but there was an entire concurrence of opinion in regard to the power of taxation. The principles settled by that case are decisive of this. In neither case is the attempt made to prohibit the exercise of the business or vocation. The license required by the corporation is merely a mode of assessing the tax; if it be reasonable and just, it matters but little by what name it is called. The power to impose fines and penalties for a failure to pay the tax required, is not only an incident to the power of taxation, but is expressly conferred by statute. Acts of 1870–'1, sec. 19, page 194; Rev. Code 1873, chap. 54, sec. 32, page 528.

100 *It only remains to consider whether the legislature has by express enactment exempted these companies from all municipal taxation. The claim to this exemption is based upon the provisions of the 57th section, chap. 385, Acts of 1871–'2, page 484. This section imposes a specific license tax of $200 upon each insurance company doing business in the state, and in addition thereto a tax of one-and-one-half per centum upon the gross amount of all its assessments and premiums received in the state.

It further provides, that any company paying this tax, shall be entitled, without payment of any additional tax, to do business in any and every part of the state. It is insisted that the effect of this provision is to relieve insurance companies from the payment of any additional tax, state, county or municipal. As was said in the case of the Orange and Alexandria Railroad Company v. City Council of Alexandria, 17 Gratt. 176, 181, the real purpose of the legislature is the thing to be ascertained; and this is to be done by having regard not only to the literal sense of the words in question, but also to the context in which they stand, the subject-matter of the section, and the reasons and purpose of the exception apparent from its provisions.

In that case, the claim of the railroad company to exemption from all municipal taxation, was based upon the language of the twenty-fifth section of the act of March 18th, 1856. That section provided "that every railroad company paying the tax imposed by that act shall not be assessed with any tax on its lands, buildings or equipments." This language, though very comprehensive, did not, in the opinion of this court, sustain the claim of the railroad company to the proposed exemption.

101 *Judge Joynes, with whom the other judges concurred, said that the act to which that section belonged was a general law, imposing taxes for the support of the government, and related exclusively to taxes to be paid the state. It only changed the form of taxing the companies, and gave the exemption from the tax in one form, where the tax in the other form has been paid. But no considerations of reason or justice required that this exemption shall be extended to city taxes, for which no commutation was provided, and which was wholly independent of the tax to the state. These observations apply with peculiar force to the case under consideration.

The 57th section of chapter 385, Acts of 1871–'2, upon which plaintiff in error relies, cannot be considered in any sense a contract between the state and the insurance companies. It was adopted purely as a revenue measure for state purposes. It was designed as a substitute for another form of taxation under previous statutes. Under these statutes, a specific tax was imposed upon each agency in the state, to be assessed and collected in the district in which the agency was located. The legislature intended to alter this mode of assessment and collection, and to substitute for it one uniform specific tax, to be paid at the capitol; and thus relieve the insurance companies and their agents of the burden and annoyance resulting from a multitude of state assessments and collections. To place the matter beyond all controversy—to remove all ground for dispute as to the purpose to abolish the local assessments—it was declared that any insurance company complying with the provisions of the act shall be entitled, without the payment of any additional tax, to do business in any part of the state.

102 The statute does *not use the words "any other tax," but the phrase "any additional tax," clearly implying an exemption from any further state taxation.

Long anterior to this legislation, insurance companies, foreign and domestic, were subject to municipal taxation. It is not to be presumed that the legislature, merely in reforming its plan of assessment and collection, designed to take from the towns and cities of the state an important branch of their revenue. Certainly no such radical change in the privileges of these municipalities would be established, without any satisfactory and controlling reasons. None such are shown to exist in this case. It may be, as is contended there is, a slight increase of taxation upon these companies;

but still it does not exceed that imposed upon telegraph, express and transportation companies, and others of a like character.

The act makes no discrimination against foreign companies, but places them upon the same footing with the domestic; and thus removes every pretense for the complaint that the state pursues an invidious and discriminating policy in behalf of her own citizens. That this policy is not regarded as harsh or oppressive is apparent from the fact that these companies are multiplying all over the state, establishing their agencies in every city, and, as we may fairly presume, doing a lucrative and valuable business among the people.

They derive their chief revenue from the towns; within their limits the principal officers and agencies are located; the lives and the dwellings they insure are under the protection of the municipal authorities; the fire departments which secure these dwellings from conflagration, the police
103 which guard *the life of the citizen against violence, and all the varied and expensive sanitary regulations which promote health, guarding every avenue against the approaches of pestilence, all these operate undoubtedly to the advantage of the insurance companies. In proportion as life and property are made secure, their profits are increased. Are they to enjoy the benefits of good government, without contributing in any degree to its expense? Are they alone to be exempt from those common burdens which devolve upon all the inhabitants of towns and cities? It is difficult to believe that such was the purpose of the legislature. And until that purpose is disclosed in the most unequivocal terms, the courts ought not to allow an exemption from a just and reasonable public burden—an exemption inconsistent with the rights and privileges uniformly accorded to Virginia towns, and which must, in some degree, diminish their resources, and affect their interests.

For these reasons the judgment of the Corporation court of Norfolk must be affirmed. If by this decision injustice is done insurance companies doing business in the state, it is gratifying to know that redress can be readily obtained by application to the legislature.

Upon the question of the right of appeal in this case nothing has been said, because the judges are not agreed upon the subject. The case has been considered and decided upon its merits, at the earnest request of the counsel on both sides, who desired a final settlement of the questions in controversy.

Judgment affirmed.

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104 ***Moran v. Brent & als.**

March Term, 1874, Richmond.

Absent, CHRISTIAN, J.

Judicial Sales—Taking Account of Liens.*—It is premature and error to decree a sale of real estate where there is a lien by deed on which the amount due is not certain, and also liens by judgment, until the court has ascertained and adjusted the liens thereon and their priorities.

This was a bill filed in May 1871 in the Corporation court of Alexandria, by Anthony Moran against George W. Brent, trustee, and others, to enjoin the sale of a house and lot in the city of Alexandria, under a second deed of trust. The plaintiff, in 1863, purchased the house and lot of Hopkins and Hull, trustees under the will of Joseph Janney deceased, and executed to Reuben Johnson a deed of trust upon it to secure the payment to them of six promissory notes amounting to $4,441.94, and payable from six months to three years from the date. He afterwards, in January 1870, executed another deed, by which he conveyed to George W. Brent the same house and lot, in trust, to secure a debt of $2,000 due to Mrs. Margaret Baldwin. In April 1871, Brent the trustee, advertised the sale of the property under the deed to him, the sale to be made on the 13th of May following.

The plaintiff in his bill, states, that the deed to secure Hopkins and Hull has not been satisfied or released, and Charles B. Shaw claims whatever is due upon this deed. He objects to the sale whilst this deed remains unsatisfied; and that
105 property which he *alleges was worth $8,000 should be sold for cash, as the advertisement proposes. And making Brent, Johnson, Shaw and Mrs. Baldwin parties defendants, he prays for an injunction to the sale, and that an enquiry may be directed to ascertain the liens upon the property.

Charles R. Shaw answered, saying he is the assignee of the residue of the debt secured by the first deed, and that there is due to him as said assignee $500, with interest from the 10th of January 1868. He files with his answer one of the notes secured by the deed, for $1,200.98, on which there had been paid, before the assignment to Shaw, $781. And Shaw did not object to the sale. Mrs. Baldwin answered, admitting that the deed of trust to Johnson had priority over hers, and that it was then for the benefit of Shaw.

Whilst the cause was pending in the court below, J. D. Hammond and John D. Hammond & Co., filed petitions in the cause, stating, that at the January term, 1871 of the court, they had obtained judgments against Moran, which were liens on his said real estate; and praying that they might be made parties defendants in the cause; that the liens upon the property might be

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Moran v. Johnston, 26 Gratt. 108, is a supplement to the principal case.

***Judicial Sales—Taking Account of Liens.**—See Kendrick v. Whitney, 28 Gratt. 646 and *note*, for a collection of the authorities upon this subject. See also, Anderson v. Nagle, 12 W. Va. 98, where it is held that it is wholly unnecessary to refer a cause, in which it appears that there are but two judgment liens, to a commissioner to ascertain the amount and priorities of liens, where the pleadings and proofs show clearly what they are.

ascertained, and the same be sold to satisfy their judgments.

The cause came on to be heard on the 22d of July 1871, when the plaintiff asked leave to amend his bill and make Hopkins and Hull and the immediate assignor of Shaw parties; but this motion not having been made until during the argument on the final hearing of the cause, the court overruled the motion, and decreed that the real estate in the bill and proceedings mentioned be sold upon the terms stated in the decree; and Brent was appointed a commis-
106 sioner to *make the sale. Moran thereupon applied to this court for an appeal; which was allowed.

Smoot, for the appellant.

Wattles and F. L. Smith, Jr., for the appellees.

ANDERSON, J., delivered the opinion of the court.

Upon the authority of repeated decisions of this court, it was premature and error to decree the sale of the real estate in the bill and proceedings mentioned, until the court had ascertained and adjusted the amount of liens thereon and their priorities. Cole's adm'or v. McRae, 6 Rand. 644; Smith & al. v. Flint & al., 6 Gratt. 40; Lipscomb v. Rogers, 20 Gratt. 658; White v. Mech. Building Fund Association, 22 Gratt. 233. A reference should have been made to a commissioner of the court with instructions to convene before him in such manner as to the said court should seem proper, Bassil B. Hopkins and Robert Hull, assignors of Charles P. Shaw, there being nothing in the record to show how much of the whole debt secured by the first deed of trust has been satisfied, and all the lien creditors of Anthony Moran, and to ascertain and report the amount of subsisting liens upon the said real estate and their several priorities, prior to a decree for the sale thereof. It is therefore considered by the court, that the decree of the Corporation court of Alexandria city in this cause be reversed and annulled, and that the appellant recover his costs incurred in the prosecution of his appeal here; and the cause is remanded to the said Corporation court for further proceedings to be had therein in conformity with this opinion.

Decree reversed.

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107 *Kinnaird & als. v. Miller's Ex'or & als.

March Term, 1874, Richmond.

Absent, CHRISTIAN and BOULDIN, Js.

M. died in 1868, having made a will in 1859, by which he gave the residue of his estate to the Board of the Literary Fund (a corporation created by law) and their successors forever, in trust for the benefit of the county of Albemarle, for the purpose of establishing and supporting a manual labor school for poor white children of the county, to be conducted through the agency of the County court of Albemarle—HELD:

1. **Charitable Trust—Validity—Change of Agencies.***—The agencies appointed for carrying out the bequest, where but a secondary consideration with the testator; and the object being consistent with the constitution and laws, the devise and bequest will be held to be valid, though the agencies existing at the time of the bequest or the death of M. have been changed.
2. That the provision is for the education of white children does not invalidate it.
3. The bequest is valid under ch. 80 of the Code of 1860.
4. It is valid as an executory devise, and an act may be passed by the general assembly, as authorized by the testator, to carry the trust into effect.

Samuel Miller, of the county of Campbell, died on the 27th of March, 1869. He had never been married, and his only brother had died before him. He left a very large estate, both real and personal. His real estate was estimated at $75,000, and his personal estate, consisting almost entirely of public bonds, was appraised at $1,-
250,150.92. He left a will which
108 was *made in April 1859, and was admitted to probate in the Circuit court of the city of Richmond in June 1869; and Nicholas M. Page qualified as executor thereof. There were numerous bequests to individuals; and there was a very large bequest to the Lynchburg Female Orphan Asylum. By the 25th clause of his will, he gives "all the rest and residue of his estate not thereinbefore disposed of, whether real, personal or mixed, to 'the Board of the Literary Fund' (a corporation created by an act to be found in the Code of Virginia), and to their successors forever, in trust for the uses and purposes following, and none other," &c. He then proceeds in great detail to direct how the property is to be invested and used for the establishment and maintenance of a manual labor school on a tract of land owned by him in the county of Albemarle; and how and by whom it is to be managed. This is all sufficiently set out in the opinion of the court. In the same clause of the will he says: Should the legislature of this commonwealth pass any act or law which will defeat or prevent the carrying out of the objects or purposes of this clause as hereinbefore declared and set forth, then and in that event I do hereby give, devise and bequeath the trust fund created by this clause, or so much as may remain unappropriated, to the children of Mary D. Davidson; naming them.

Between the time of making his will and

***Charitable Trusts—Validity.**—See Stonestreet v. Doyle, 75 Va. 364, where a somewhat similar bequest was held to be null and void. The court in that case says: "That it is void seems to be very clear under the decisions of this court in Gallego v. Attorney General, 3 Leigh 450; Kelly v. Love, 20 Gratt. 124; unless indeed, it can be brought within the influence of the principles laid down in Literary Fund v. Dawson, 10 Leigh 147; Kinnaird v. Miller's Ex'or, 25 Gratt. 107; and Inglis v. Sailors' Snug Harbor, 3 Peters' R. 99."

his death, Mr. Miller had made changes in the investment of his property, and had made large donations to the Lynchburg Female Orphan Asylum, a corporation which had been chartered in 1868; the corporation by that name, which had been chartered previous to the making of his will, not having been organized.

In 1869 Jesse Miller, claiming to be
109 the only heir-at-law *and next of kin of Samuel Miller, filed his bill, questioning the validity of the devise and bequest in the 25th clause of the will in favor of the manual labor school in Albemarle county, and the alternative bequest in favor of the Davidson children. This claim was, however, compromised, and he released all his interest as heir-at-law and next of kin in the estate.

In May 1870 Nicholas M. Page, the executor of Samuel Miller, deceased, instituted his suit in equity in the Circuit court of the city of Richmond to have the direction of the court in the administration of the estate. He made all the devisees and legatees parties, and set out the difficulties in the way of his administration. In this case the Davidson children filed a cross-bill, in which they insisted that the devise and bequest in favor of the manual labor school in Albemarle was void, and that they were entitled to take under the alternative bequest to them.

In these cases the court made a decree on the 15th of April 1872, holding that none of the legacies given in clauses previous to the 25th were specific, and that none of them had been satisfied by any donations made to the legatees by Samuel Miller in his lifetime; and that the devise and bequest in the 25th clause in favor of the manual labor school in Albemarle county was not valid under ch. 80 of the Code of 1860, but that it was good as an executory devise, being limited on the passage of an act of the general assembly to effectuate the intention of the testator, for which he was authorized by the will to apply.

From this decree the county of Albemarle and the Board of Education applied to this court for an appeal; which was allowed.

After the appeal had been allowed, William H. Kinnaird and others filed their
110 petition in the suit in *the Circuit court of Richmond, in which they claimed to be heirs-at-law and next of kin of Samuel Miller deceased, and contesting the validity of the devises and bequests in the 25th clause of his will. In this case the court made a decree similar to that in the previous case, and dismissed the petition. And thereupon the petitioners applied to this court for an appeal; which was allowed.

In this state of the case, all the parties, including the Davidson children, except the petitioners in the last case, made a compromise, by which all the questions in the cause were settled, except that between the county of Albemarle and the Board of Education on the one part and the heirs-at-law and next of kin on the other; and by an act of assembly approved February 24, 1874, this compromise was confirmed, and provision was made for carrying into effect the bequest in the 25th clause of the will of Samuel Miller for the establishment of a manual labor school in Albemarle county. And the only question in the case was as to the validity of either of the bequests in this 25th section.

Meredith and Wm. Robertson for the appellants.

Stiles, Page & Maury, for the heirs-at-law.

MONCURE, P., delivered the opinion of the court.

The many controversies which have arisen in regard to the construction of Samuel Miller's will, seem to have been settled by compromise between the parties concerned, with a single exception, viz: whether the 25th clause of the said will is a valid disposition of the residuum of his estate as against his heir or heirs-at-law? That question, however, is a most impor-
111 tant *one, as it involves the title to almost the whole of the immense estate of which said Miller died seized and possessed, and as upon its solution against the said heir or heirs the said compromise expressly depends. This will fully appear by reference to an act of the general assembly approved February 24, 1874, entitled "an act to give effect to a compromise of the litigation in respect to the construction and effect of the will of Samuel Miller deceased, and to establish the manual labor school provided for in the twenty-fifth clause of said will." Acts of Assembly 1873-'4, p. 52. The Circuit court of the city of Richmond decided that question against the claim of the heirs-at-law, and this appeal was taken by them, or some of them, from that decision; and thus the same question comes up for decision by this court.

In the solution of this question it is only necessary for us to decide whether the said clause is a valid disposition of the said residuum against the said heir or heirs-at-law, and not whether it is a valid disposition of said residuum in favor of the charity therein mentioned and provided for, or in favor of the Davidsons, the alternative or contingent residuary devisees and legatees therein named. In other words, it is not necessary for us to decide the question which was in controversy between these conflicting claimants, the charity and the Davidsons, and which is a subject of the compromise aforesaid. But if it shall appear to us, and we shall accordingly decide, that the said clause is a valid disposition of said residuum in favor of either of the said conflicting complainants, no matter which, it will then follow as a necessary consequence, that the said clause is a valid disposition of said residuum, as against the said heir or heirs-at-law.

We are of opinion that the said
112 clause is a valid *disposition of the said residuum in favor of the charity

aforesaid, either as a devise and bequest under section 2 of chapter 80 of the Code of 1860, p. 419, or as an executory devise independently of that statute. And,

First. As a devise and bequest under the statute, the second section of which is in these words: "Every gift, grant, devise or bequest which since the second day of April in the year one thousand eight hundred and thirty-nine, has been, or at any time hereafter shall be, made for literary purposes, or for the education of white persons within this state (other than for the use of a theological seminary), whether made to a body corporate or unincorporated, or to a natural person, shall be as valid as if made to or for the benefit of a certain natural person, except," &c.

The third and fifth sections are in the following words:

3. "When such gift, grant, devise or bequest is to the Board of the Literary Fund or any other corporation, or any county or natural person, the subject shall be taken and held by them respectively. If any such corporation, county or natural person refuse to take and hold, the subject shall be taken and held by trustees appointed as hereinafter directed. In either case it shall be taken and held for the uses prescribed by the donor, grantor or testator, or such as have been prescribed in any particular case, by any law passed since the said act of the second day of April in the year 1839."

"5. When any such gift, grant or will is recorded, and no trustee has been appointed, or the trustee dies, or refuses to act, the Circuit court of the county or corporation in which the trust subject, or any part thereof may be, in the case of a gift
113 or grant, or in which the *will is recorded, may, on the motion of the attorney for the commonwealth in such court, (whose duty it shall be to make such motion) appoint one or more trustees to carry the same into execution. The trustees, whether appointed by such instrument, or under this section, may sue and be sued in the same manner as if they were trustees for the benefit of a certain natural person; and for enforcing the execution of such trust, a suit may be maintained in the name of the commonwealth, when there is no other party capable of prosecuting such suit.

"8. In case any devise or bequest, authorized by the second section of this chapter, shall hereafter be made, the legislature, as to any such, reserves the right at any time to suspend or repeal the authority thereby given. But if in any case it shall do so, it will provide that the subject of such devise or bequest shall vest or be vested in such person, his heirs, executors or administrators, as would have been entitled had the devise or bequest not been made."

We think the devise and bequest of the residuum in this case come within the true intent and meaning, and, indeed, within the literal terms of the statute aforesaid. The said devise and bequest were "made for literary purposes, or for the education of white persons within this state, (other than for the use of a theological seminary)." They were made to "the Board of the Literary Fund" (a corporation created by law) and to their successors forever, "in trust for the benefit of the county of Albemarle, in the state of Virginia, to be appropriated to the uses and purposes, and in the manner following and none others; that is to say, that the said Board of the Literary Fund shall, through the agency of the County court of the said county of Albemarle,
114 appropriate the income and *profits of the stocks and securities, to be purchased as aforesaid, to the founding, establishment and perpetual support of a school on the manual labor principle, on the tract of land in the county of Albemarle," &c., "to be superintended by a competent teacher or teachers, wherein at all times there shall be fed, clothed and instructed in all the branches of a good, plain, sound English education, the various languages, both ancient and modern, agriculture and the useful arts, and wholly free of expense to the pupils, as many poor orphan children, and other white children, whose parents shall be unable to educate them (the said orphans and other children being residents of the said county of Albemarle), as the profits and income of the funds herein devised and bequeathed will admit of or compass," &c., &c.

The clause, among other things, further provides for erecting and keeping in good repair such buildings of brick, or other durable materials, as shall be sufficient for the comfortable accommodation of one hundred pupils and their teachers; for the appointment, annually, by the County court of Albemarle, of two respectable, intelligent and well educated gentlemen, to act as visitors of the said school during the year, whose duty it shall be to select and employ, whenever necessary, competent and suitable teachers for the said school (subject, however, to the approval of the said County court), to visit the said school quarter-yearly, examining into its condition minutely, and make written reports thereof to the said County court; that "the school commissioners of the said county of Albemarle, if any there be, and if there be none, then the overseers of the poor of said county, shall, from time to time, select and designate the poor orphans and other chil-
115 dren of the *description hereinbefore mentioned who shall be admitted into the said school, and shall determine the length of time they shall respectively continue there, and shall make written reports semi-annually of the said selections to the said County court:" the charges and expenses attending the establishment and support of said school, &c., "shall, when examined, allowed and certified by the said County court of Albemarle, be paid by the said board of the literary fund, out of the income and profits of the trust fund created by this clause," &c.; and that the second auditor (who, by the act of assembly creating the said board, is constituted the ac-

countant thereof) shall open and keep a separate account of the trust fund created by said clause, to be denominated "the Miller fund," and make out and render annually a true and accurate account of said fund, a copy of which account, verified by his oath, shall, as soon thereafter as may be, be delivered to the Governor of the commonwealth, to be by him laid before the legislature thereof; and another copy, verified in like manner, shall be published forthwith, for one month, in certain newspapers. And the said clause contains the following provisions:

"Should the legislature of this commonwealth pass any act or law which will defeat or prevent the carrying out of the objects and purposes of this clause, as hereinbefore declared and set forth, then, in that event, I do hereby give, devise and bequeath the trust fund created by this clause, or so much thereof as may remain unappropriated, to the children of Mary D. Davidson, hereinbefore named, to wit," &c.

"My executors are authorized and requested, if necessary, to petition the legislature of Virginia for the passage of any laws which may be requisite for
116 *more effectually carrying out the objects and purposes of this clause in regard to the school therein mentioned," &c.

We think that the said clause provides for the education of white persons only; for although the word "white" is not expressed, it is plainly implied, before the word "children," in the phrase, "as many poor orphan children;" that phrase being immediately followed by the words, "and other white children." Moreover, the draftsman of the will seems to have had the provisions of chapter 80 of the Code of 1860, before his eyes, or in his mind, when he drew the will, and must have known that at that time a school could not lawfully be created for the education of colored children within this state.

We think that the provisions in the said clause, that the school should be established on the manual labor principle; that the pupils should be fed, clothed and instructed, wholly free of expense to them; and that they should be instructed not only "in all the branches of a good, plain, sound English education, and the various languages, both ancient and modern, but also in agriculture and the useful arts;" are perfectly consistent with, and in strict pursuance of, the plain and express intent and meaning of the statute aforesaid, in regard to the validity of a gift, grant, devise or bequest "made for literary purposes, or for the education of white persons within this state (other than for the use of a theological seminary)."

We think that the changes which have been made by the constitution and laws of the state, or either of them, since the date of the said will, or the death of the said testator, in regard to the Board of the Literary Fund, the County court, school commissioners, overseers of the poor, and
117 the second auditor, do not *at all affect the validity of the said devise and bequest for the purpose of establishing and supporting a school as aforesaid; that those agencies were merely adopted and pointed out by the testator as convenient and appropriate means for carrying into execution his main intent to establish and support such a school; that the continued existence of those public agencies, in form or substance, as they were at the date of the will, or death of the testator, were not intended to be conditions of the said devise and bequest; but, on the contrary, it was obviously intended by the testator that if those agencies, or any of them, should cease to exist, or could not or should not perform the offices assigned to them respectively by him, for the purpose of carrying into effect his scheme of charity aforesaid, application should be made to the legislature to provide other and suitable and sufficient agencies for the purpose. That such was his intention, seems to be clearly shown by the provision contained in the said clause as aforesaid, authorizing and requesting his executors, if necessary, to petition the legislature for the passage of any laws which may be requisite for more effectually carrying out the objects and purposes of the said clause in regard to the school therein mentioned. In conformity with the said provision, the executors petitioned for the passage of such a law, and accordingly the act aforesaid was passed, which seems to remove every difficulty which might otherwise have existed in regard to the execution of the charitable purpose of the testator, as set forth in the said clause of the will.

We do not think that the validity of the said devise and bequest is at all affected by the fourteenth amendment to the constitution of the Untied States. The first section of that amendment is in these
118 words: *"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The only portion of this amendment which can have any bearing on the subject we are considering, is that which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Negroes are made citizens of the United States by the fourteenth amendment, and the question is, "Are their privileges or immunities abridged by chapter 80 of the Code of 1860, which makes valid every gift, &c., made for the education of white persons (and not of colored persons) within this state, &c.?

Certainly when that law was made, it did not abridge the privileges or immunities of

citizens of the United States. It certainly was then valid, and continued to be so, at least until the fourteenth amendment of the constitution of the United States was adopted. Did that amendment make it invalid, and render its enforcement thereafter unconstitutional? We think clearly not. What privilege or immunity of any citizen of the United States does that law or its continued enforcement abridge? How can it injure any colored citizens of the United States, even such as reside in the state, that a gift for the education of white persons only is authorized by law to be made and enforced? Have such citizens any privilege or immunity in regard to
119 gifts, &c., for their education? *Is it not a question alone for the legislature to decide whether such gifts shall be valid or not, and to what extent, and for what purpose? And if the legislature deem it proper to authorize a gift for the education of white persons only to be made and enforced, how can it benefit colored persons to have such a law declared to be void? What they need in the matter is, the enactment of a similar law as to them; and certainly, as things now exist, there are strong reasons for such an enactment. But those reasons must be presented to the legislature and not to the courts. They have, in fact, been presented to the legislature, and with prevailing effect; for we find that by an act approved March 28, 1873, entitled "An act to amend and re-enact section 2, of chapter 80 of the Code of 1860, in relation to funds from gifts, grants, devises and bequests" (Acts of 1872-'73, p. 243, chap. 265), a gift, &c., for the education of colored persons within this state, &c., is made valid. So that there is now no just ground of complaint on this score, even against the legislature, if there ever was any. But in fact there was not.

But in this case there is no person complaining that his privileges or immunities as a citizen of the United States would be abridged by an enforcement of the laws aforesaid, and that it is therefore unconstitutional. The controversy is confined to white persons, no privilege or immunity of whom can possibly be abridged by the law. In such a case a court will certainly not go out of its way to declare a law to be unconstitutional. On this subject the authorities referred to by Judge Meredith, one of the counsel of the county of Albemarle, have great force. Hoover v. Wood, 9 Ind. R. 287.

The case of Kelly &c. v. Love's
120 adm'rs &c., 20 Gratt. *124, is the only decision of this court in regard to the construction and effect of chapter 80 of the Code of 1860, and it has an important bearing upon this case. It was held in that case (all the judges concurring in the opinion delivered by Judge Staples), that the devise there in question was void at common law upon the authority of numerous decisions of this court (which are cited), but that it was valid under chapter 80 of the Code. The charity was at least as indefinite in that case as it is in this.

Secondly. We are of opinion that the 25th clause of the will of Samuel Miller is a valid disposition of the residuum of his estate in favor of the charity aforesaid, independently of chapter 80 of the Code of 1860, and considering the said clause as an executory devise and bequest.

That this is so we think is conclusively shown by the cases of Literary Fund v. Dawson and others, 10 Leigh 137, and Literary Fund v. Dawson's ex'or & heirs, 1 Rob. R. 402, which are like this case in all substantial respects; and we have no doubt the draftsman of the will in this case had those cases in his view as well as chapter 80 of the Code, and endeavored so to draw the 25th clause of the said will as to make it effectual, under one or the other or both of those authorities, for the establishment of the charity which the testator had so much at heart and to which he devoted the main body of his estate. The principle maintained by both of those cases is, that wherever a devise or bequest is made to a corporation, to be afterwards, within a period not too remote, created by law for the purpose of carrying into effect a charitable intention of the testator, expressed in his will, the same may be good and valid as an executory devise or bequest, and will be-
come absolute and executed, if, and
121 when, such *a corporation shall be created accordingly. It must of necessity be created, if at all, within the period prescribed by law in regard to perpetuities; that is, within the term of a life or lives in being and twenty-one years thereafter. The same principle had before been declared and acted upon by the Supreme court of the United States in Inglis v. The Trustees of the Sailors' Snug Harbor, 3 Peters R. 99. In that case the residuum of the testator's estate was given by his will to the chancellor of the state of New York, &c. (naming several other persons by their official description), to have and to hold the same unto them and their respective successors in office, to the uses and trusts, &c., declared in the will; which were out of the rents, issues and profits thereof to erect and build upon the land on which he resided, which was given by the will, an asylum or marine hospital to be called "The Sailor's Snug Harbor," for the purpose of maintaining and supporting aged, decrepit and worn-out sailors, &c. After giving directions as to the management of the fund by his trustees, and declaring that the institution created by his will should be perpetual, and that those officers and their successors shall forever continue the governors thereof, &c., he adds, "it is my will and desire that if it cannot legally be done according to my above intention by them, without an act of the legislature, they will, as soon as possible, apply for an act of the legislature to incorporate them for the purpose above specified," &c. Within five years after the death of the testator, the legislature of the State of New York, on the application of the trustees, also named as executors of the will, passed a law constituting the persons

holding the offices designated in the will, and their successors, a body corporate by the name of "The Trustees of the
122 *Sailors' Snug Harbor," and enabling them to execute the trusts declared in the will. This was held to be a valid devise to divest the heir of his legal estate, or, at all events, to affect the lands in his hands with the trust declared in the will.

In the cases of Literary Fund v. Dawson &c., supra, the testator gave the residuum of his estate to be used by his executors in constituting a part of the literary fund of the state of Virginia, to be used by the school commissioners of the counties of Albemarle and Nelson in the same way that the school fund allotted to said counties is used, and in the proportion of two-thirds to the former and one-third to the latter county. The will contained a further provision in these words: "And from time to time, as the legislature may think advisable, the principal may be used for like objects for the benefit of the said counties, in same proportions as the interest is directed to be used. An act of assembly for said object supposed can be obtained." A bill was filed by the heirs-at-law and next of kin of the testator, Martin Dawson, to have the said devise and bequest declared void, and the executors and the president and directors of the literary fund and others were made defendants. The court of chancery deemed the said devise and bequest to be void for the vagueness and uncertainty of the charity and of the beneficiaries thereof. From the decree the president and directors of the literary fund obtained an appeal; and upon the appeal, this court, 10 Leigh 147, reversed the decree. Tucker, P., being of opinion, that the will was equivalent to a devise of the testator's real and personal estate to the executors in trust for the purpose of procuring an act of assembly with the necessary provisions for constituting the funds devised a part of the literary fund, in strict
123 conformity *with the terms, provisions and conditions of the will; that by such an act of assembly all the difficulties suggested by counsel would be avoided, and the benevolent intentions of the testator carried into complete effect; that as this act was to be obtained by the executors, the contingency of its passage was within a life or lives in being, and therefore not too remote; and that the case was very much the same with that of the Sailors' Snug Harbor, 3 Peters R. 99.

An act of assembly was accordingly passed March 10, 1841, entitled "an act concerning the estate of Martin Dawson, deceased, and for other purposes." Acts of Assembly 1840-'41, chap. 26, p. 52. This act was passed on the petition of the president and directors of the literary fund. Under this act the said president and directors filed their bill against the executor and heirs of said Martin Dawson, to recover the said residuum and its profits. The executor filed an answer, in which he claimed that he was the only person in the universe authorized or capable to take the steps necessary to carry the testator's designs into effect, that is, to obtain the act of assembly requisite for the purpose. The adult heirs-at-law demurred to the bill. The court of chancery, upon the said demurrer of the heirs and answer of the executor, dismissed the bill with costs. From this decree also the president and directors of the literary fund obtained an appeal; and upon the appeal this court, in 1 Rob. R. 402, reversed the decree. This case, as well as the other, in 10 Leigh, was argued with very great ability by very able counsel. Judges Allen and Baldwin, in their several opinions delivered in the case, fully sustain the validity of the residuary devise and bequest for the purpose of the charity. One great question in the case was, whether the testator did not refer
124 to the executors *alone the question. whether an application should be made to the legislature for the contemplated act, and devolve on them the duty of making it if they thought fit to do so. But the court considered that the great and chief intent of the testator was to establish the charity, and that the means which he marked out for that purpose were entirely subordinate to the main intent, and must give way to other and more suitable means that might be provided for the purpose by the legislature if necessary. "The question now before the court," said Judge Baldwin, "is simply and exclusively whether the contingency has occurred upon which the trust for the literary fund, created by the will, and engrafted upon the devise to the executors, was to take effect. To determine this, we must, of course, look to the nature of the contingency; and that must depend altogether upon the intent of the testator. He had resolved to establish a charity, to be administered by the president and directors of the literary fund, through the agency of the school commissioners; and that resolution was fixed and final, so far as he and his representatives were concerned. But it required for its accomplishment the concurrence of another will, that of the legislature; and it required nothing more. It was wholly immaterial whether such concurrence was granted with or without solicitation, whether upon or without the application of the trustee or cestui que trust, whether at the suggestion of a member of the legislature or a stranger, whether as an act of grace or favor on the part of the government, or of public duty as the representative of a great public interest." P. 419. "'The general and leading intention," said Judge Allen, "to dedicate this estate to the purposes of education within the counties of Albemarle and Nelson, is clearly established.
125 As regarded *his relations, he had made such provision for them before as he thought proper. His first and favorite scheme is developed in the sixteenth section. But he seems to have apprehended that difficulties might obstruct its execution. He looked to the possibility of its failure; and to provide for that contingency, and ensure an application of this estate to the leading intention of his will, he made the

devise contained in the seventeenth clause. Is there anything which indicates an intention to confide this matter to the discretion of the executors; to leave it to their judgment, whether this leading intention should or should not be carried into effect?" P. 425. "The testator no doubt had confidence in the good faith of his executors, and did not contemplate any failure on their part to perform the trust confided to them. He intended that they should apply for the act. An act was necessary to effectuate the end he had in view, and an application by his executors the means of obtaining it. But if they refuse to apply, and the end is attained in another mode, is the whole will to be defeated because this particular intent fails?" P. 427. And the same judge quoted with approbation from the case in 3 Peters 117 the words, that "where the court can see a general intent consistent with the rules of law, it is to be carried into effect, though the particular intent shall fail."

We cannot fail to see how strikingly appropriate are these cases decided by this court, and what was said by the judges in them, to the case we now have under consideration. In this case the general intent of the testator was to devote the bulk of his great estate to the creation and perpetual support of a school upon the manual-labor principle, in his native county of Albemarle, for the education of poor orphan
126 *and other white children, residents of said county, whose parents should be unable to educate them. He had and expressed many particular intents in regard to the mode of effecting his general intent. He pointed out such public agencies then existing as, in his opinion, would be most likely to carry out his views. But he knew that those agencies were liable to continual change; and he actually provided for a particular change, which he seemed to anticipate might take place. And he certainly could not have intended that a change of any or all of those agencies should have the effect of defeating his general intent. He relied on the legislature to supply suitable means to take the place of those which he had marked out, but which it might destroy. And he therefore expressly provided in the 25th clause of his will that "my executors are authorized and requested, if necessary, to petition the legislature of Virginia for the passage of any laws which may be requisite for more effectually carrying out the objects and purposes of this clause in regard to the school therein mentioned." This petition was to be made by the executors, as in the case of Dawson's will, and of course the legislation contemplated was to be within the period prescribed by law for a good executory devise. The acting executor in this case did, in a reasonable time petition for such legislation as he was advised was necessary, and as the court below decided to be necessary, to effectuate the intention of the testator; and accordingly the act was passed which has been before referred to, and which seems fully to supply the necessary means for that purpose. But, if it should be found that it does not, the deficiency can at any time be provided for by additional legislation.

This testator, after providing boun-
127 tifully for all *those who seemed to have any claims upon him, devoted the most of his immense estate, the fruit of a long life of labor and toil and self-denial, to the endowment of a school for the education of orphan and other poor white children of his native county of Albemarle. Few men ever did more for their native counties than did this testator, by this act, for his. He has conferred on it the best of all boons, the means of securing a good education to all its poor. May we not hope that all the benefits which he anticipated will be realized from his bounty. The matter rests with the legislature, and with the agents whom it his entrusted, and may hereafter entrust with the administration of this great charity. Fidelity on their part, seems to be all that is necessary to make it productive of the greatest possible good to those for whose good it was intended.

We are therefore of opinion, in any view of the case, that the 25th clause of the will of the said Samuel Miller is a valid disposition of the residuum of his estate as against his heir or heirs-at-law; that there is no error in the decree appealed from; and, without deciding any other question arising in the cause (it being unnecessary to do so), that the said decree ought to be affirmed.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, and also a copy (filed with the record in this cause) of an act of the general assembly approved February 24, 1874, entitled "an act to give effect to a compromise of the litigation in respect to the construction and effect of the will of
128 Samuel Miller deceased, *and to establish the manual labor school provided for in the twenty-fifth clause of said will," is of opinion and doth decide and determine, that the twenty-fifth clause of the will of said Samuel Miller deceased is a valid disposition of the residuum of his estate as against his heir or heirs-at-law. Therefore, without deciding any other question arising in the cause (it being unnecessary to do so), the court is of opinion that there is no error in the decree appealed from in this cause, and it is decreed and ordered that the said decree be affirmed, and that the appellants pay to the appellees thirty dollars damages, and their costs by them about their defense in this behalf expended.

Which is ordered to be certified to the said Circuit court of the city of Richmond.

Deeree affirmed.

129 *Adams v. Hubbard.

June Term, 1874, Wytheville.

I. An injunction to a judgment is obtained; and whilst it is pending the matter in dispute is referred to arbitrators, who, after reading the pleadings and depositions, and hearing oral evidence, including that of the parties, make an award that the injunction be dissolved. On a motion to set aside the award, on the ground of after discovered evidence—HELD:

1. **Equitable Jurisdiction—New Trials in Actions at Law—Awards.**—The rules governing courts of equity in awarding new trials in actions at law, on the ground of after discovered evidence, apply equally to motions to set aside an award on that ground.

2. **Same—Evidence Required to Set Aside an Award.**—Where all the evidence that was before the arbitrators is not before the court on the motion to set aside the award, the motion must fail.

3. **Same—Award—New Trial.**—Though the evidence in the cause before the reference was made, might have warranted the court to direct a new trial, yet the award is in fact a new trial, and the party is not entitled to another trial on that evidence.

II. **Affidavit Taken without Notice—Effect as Evidence.***—An affidavit taken without notice, if read without objection in the court below, will be considered as evidence in the appellate court; but it will not have the weight it might have had if regularly taken on notice.

In September 1870 John Hubbard filed his bill in the County court of Patrick county, to enjoin a judgment for $1,000 and interest, which had been recovered in that court by Isaac Adams against himself and William G. Price and Jonathan W. Hubbard, as partners. The bill alleged that the plaintiff was not a partner with Price and Jonathan W. Hubbard, and was no party to the contract upon which the action at law was brought. And the plaintiff's excuse
130 for not *defending the action is, that in February 1868, when the case was tried, he, who is a very old and feeble man, seventy-six years of age, was confined to his bed more or less, and totally unable to attend court and make a defense; and in fact did not know what defense he was or could be required to make. The injunction was granted.

*Affidavits Taken without Notice—Effect as Evidence.—In Tennant v. Divine, 24 W. Va. 392, the rule laid down in the principal case in regard to the admissibility in evidence of *ex parte* affidavits in support of awards in cases at law is affirmed. Citing the principal case and Pleasants v. Ross, 1 Wash. 156; 2 Tuck Com. 39.

New Trials—After-Acquired Evidence.—The rule laid down in the principal case that in order for the appellate court to interfere with the decision of the trying court upon the ground of after-acquired evidence it must have before it all the evidence heard in the latter court, is approved in Wynne v. Newman, 75 Va. 811. See also, Callaghan v. Kippers, 7 Leigh 608. For a collection of authorities upon the subject of after-discovered evidence as a ground for a new trial, see *note* to Cody v. Conly, 27 Gratt. 313.

Adams answered, insisting that the plaintiff was a partner of the firm of Hubbard, Price & Hubbard, and that defendant made the contract referred to, personally with the plaintiff. He said that the plaintiff, though an old man, was in his usual health when said action was brought and judgment obtained, and was physically as fully able to make his defense at law as he now is in equity.

Whilst the case was pending in the County court a number of depositions were taken and filed in the cause; and there was some evidence of connivance between Adams and Price and Jonathan Hubbard in obtaining the judgment. In March 1871 the parties entered into an agreement under seal, by which they agreed to submit all matters involved in said suit to C. H. Harbour and William Critz, and if they failed to agree they were to choose an umpire to decide any question upon which they might differ. They were to settle the whole merits of the case, to examine the testimony already filed in the cause, and such other evidence as either party might produce, and decide the case upon the equity and rights of both parties. And their decision was to be made the judgment of the court: and an order referring the cause was made.

The arbitrators chose an umpire, and in April 1871 proceeded to hear the case. Both parties were present with their counsel, and announced themselves ready. The bill and answers and all the written evi-
131 dence in *the case was read; the plaintiff and defendant and several other witnesses were examined orally. And after full hearing of the case, the arbitrators and umpire united in the award, that the injunction granted the plaintiff should be dissolved: And that the same be certified to the County court of Patrick.

In July 1871 the cause came on to be finally heard upon the award, and upon the motion of the plaintiff to set it aside, upon the grounds of mistake of both law and fact by the arbitrators, and also upon the ground of newly discovered evidence by the plaintiff since the award was made. And in support of the motion to set aside the award, the plaintiff read the affidavit of Lester McAlexander, taken before a notary public in the county of Floyd, on the 27th of June 1871. The affidavit details conversations between the affiant and Adams, and between Adams and one Ross, in relation to the subject of the action and the manner of obtaining the judgment at law, which indicated that the claim on which the judgment was obtained was fraudulent, and that the judgment was obtained by the connivance of one or both of the other defendants in the action; neither of whom was worth anything.

The court made a decree setting aside the award; and proceeding to decide the cause set aside the judgment, and directed the action at law to be reinstated on the docket, and that a new trial be awarded, with costs. From this decree Adams obtained an appeal to the Circuit court of Patrick county,

where the decree was affirmed. And thereupon Adams applied to a judge of this court for an appeal, which was allowed.

John E. Penn, for the appellant.

132 *There was no counsel for the appellee.

STAPLES, J., delivered the opinion of the court.

The rules governing courts of equity in awarding new trials in actions at law are well settled. The party applying for relief must show that he has a good defense, of which either he had no knowledge until after judgment, or that he was prevented from making it by fraud or accident or some act of the adverse party, unmixed with negligence or fault on his part. 2 Rob. Prac. 213; Green & Suttle v. Massie, 21 Gratt. 356.

The question to be considered by us is, whether John Hubbard, the appellee, consistently with these principles, is entitled to relief against the judgment recovered against him by the appellant Adams. It is very apparent that the appellee, though regularly served with process in the action at law, made no preparation for the trial. He did not employ counsel; he summoned no witnesses. It does not appear that he exercised the least diligence from the inception to the termination of the case. His excuse is, that he was not able to attend the court on account of sickness. But it is certain that he was neither mentally nor physically incapable of employing an agent to look after his interests. He was as competent to make his defense at law as to bring this suit in equity. The same counsel might have been employed; the same witnesses examined as well in the one case as in the other. So far as the appellee is concerned, it is a case of the grossest negligence. The appellant, however, is not free from suspicion of unfair conduct. The evidence of Mr. Shelton, the counsel first spoken to by Price, one of the defendants, tends strongly to show that the judg-
133 ment was obtained by some *management and contrivance on the part of Adams. Notwithstanding the gross and culpable neglect of the appellee, the judge of the County court, under all the circumstances, would, perhaps, have been justified in setting aside the judgment and awarding a new trial. But before the case was ready for a hearing, the parties submitted the matter in controversy to arbitration. It was agreed between them that the arbitrators should determine all the questions in dispute between them; that they should examine the testimony already taken and filed in the cause, and such other evidence as either party might produce, and decide the case upon the equity and rights of both parties. It is very apparent it was the intention of the parties that the merits of the whole controversy should be fully investigated by the arbitrators, and settled upon equitable principles, unaffected by the judgment.

Accordingly the bill, the answer of the defendants, and all the depositions then taken, were read before the arbitrators, the appellant and appellee respectively were examined orally along with other witnesses introduced by them. It seems that the fullest investigation was had, and upon the whole case an award was rendered declaring that the injunction shall and ought to be dissolved.

Now it is very clear that the appellee has obtained all that he sought by his bill, a new trial before judges of his own selection, and that he was afforded ample opportunity of making his defense upon the merits, untrammelled by technical rules of law. The award is regular on its face, and no complaint is made of any partiality, or improper or illegal conduct on the part of the arbitrators. Surely, an award thus made, cannot and ought not to be set aside,
134 except upon very *clear and convincing grounds. What are the grounds suggested here? I have looked carefully through the record, and can find nothing that affords even a plausible pretext for interfering with the decision of the arbitrators, unless it be the affidavit of Lester McAlexander. It is very probable the decree of the court below was based upon the facts there stated. This affidavit was taken about two months after the award was made. It does not appear that any notice was ever given to the appellant of the examination of this witness. As no objection seems to have been made on this ground in the court below, I suppose we must consider the affidavit as regular, though the form in which it appears, and is certified in the record, deprives it of much of the weight due to a deposition regularly taken.

The witness undertakes to repeat conversations held in his presence more than three years before. He does not pretend that his attention was particularly called to what was said. During all this time he keeps his knowledge carefully concealed from the parties until the controversy is about to be terminated, and then for some reason, and in some manner not explained, he contrives to communicate the facts to the appellee. And although much of his testimony, if true, was capable of confirmation by other witnesses, no attempt is made to introduce them. His unsupported declarations thus made, constitute the sole ground for setting aside the judgment and the award.

The most that can be said of this evidence is that it creates a strong suspicion of improper conduct on the part of Adams in the action at law. But if it be conceded that it establishes fraud in procuring the judgment, the result would be a new trial of the action. That result was substantially
135 attained by the submission. *The arbitration as effectually removed the verdict and judgment out of the way, as though a new trial had been directed by a court of equity. If the award was fairly obtained we are not authorized to set it aside because a judgment preceding it may

have been the result of a fraudulent combination.

The rules in regard to the setting aside verdicts of juries upon the ground of after-discovered evidence equally apply to awards. These rules are too familiar to require any extended discussion. They were the subject of consideration by this court in the case of the Commonwealth v. Read, 22 Gratt. 924. The principle there stated, and it is sustained by all the authorities, is that after-discovered evidence in order to afford a proper ground for granting a new trial, must be material in its object, and not merely cumulative and corroborative or collateral; and must be such as ought to produce, on another trial, an opposite result on the merits.

As has been already seen, a part of the matter stated in the affidavit relates to the manner in which the judgment was obtained. This has already been considered and requires no further notice. The other matters contained in the affidavit have some bearing upon the merits of the controversy. But they are merely corroborative of the evidence in the record, and relied upon before the arbitrators. If these additional facts had been before them the arbitrators might have arrived at a different conclusion. It is impossible to say whether they would or not. We cannot affirm that a different result would or ought to have been produced. Unless this can be done, the court is not, upon any rule applicable to after-discovered evidence, authorized to interfere with the award.

But there is a still more decided objection in the way. We are not in the pos-
136 session of all the testimony *before the arbitrators. It is true that we have all the depositions taken before the award was made; but a number of witnesses, including the parties, were orally examined. What testimony they gave, or what it proved or tended to prove, we have no means of ascertaining. It may be that the facts stated in the affidavit were the subject of investigation. The appellee may have offered evidence bearing on the same points, and the appellant, on the other hand, may have met such evidence by testimony of the most satisfactory character. In Callaghan v. Kippers, 7 Leigh 608, Judge Cabell in discussing a nearly similar proposition, said, "It (the record) gives us only the newly-discovered evidence, which, if it was the only evidence in the case, would show the verdict to be wrong. But other evidence was given to the jury, and that evidence may have justified the verdict, even if the newly-discovered evidence had also been before the jury." This case plainly establishes the rule, that the appellate court will not undertake to interfere with the decision of the trying court upon the ground of after-discovered evidence, unless it has before it all the evidence heard in the latter court. The observance of this rule is necessary to prevent the granting of new trials in consequence of the discovery of mere cumulative facts and circumstances relating to matters which may have been controverted on the former trial.

This doctrine received the unanimous approval of this court in Markham v. Boyd, 22 Gratt. 548. It equally applies to awards as to verdicts, and is decisive of this case. For these reasons the decree of the Circuit and County courts must be reversed, and the bill of complainants be dismissed with costs.

Decree reversed.

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137 *Nowlin v. Reynolds.*

June Term, 1874, Wytheville.

I. In 1845 N. sold a tract of land to his son C., who was then seventeen years of age, received the entire purchase money, executed a deed or title bond thereto, which was lost or mislaid, and never entered of record, and delivered it to C., and put him in possession of the land, who immediately went to work and erected a dwelling house thereon, and put up other buildings. Soon after this sale was made to C., N. conveyed this land and other property to S., to secure certain debts; and in 1869 the trustee sold the land under the trust deed to R., who brought ejectment against C. to recover the land. On the trial, after R. had introduced the said deeds, C. proved the above facts, and then proposed to prove that he had been in actual adverse and peaceable possession of the land for more then twenty years before the institution of the suit—HELD:

1. **Adversary Possession—Mere Intruders.**—It is clear that the possession of a mere intruder on the land of another, without pretence or color of title, no matter how long such possession may continue, will not be deemed in law adverse to the title of the true owner, and can never ripen into a good title.
2. **Same—Possession under Color of Title.**—But it is equally clear, that possession under color or claim of title, does amount to adverse possession; and if held long enough, will, under our laws, ripen into a good title. And it is not necessary to constitute an adverse possession, that there should be a rightful title.
3. **Same—Vendee Holding under Equitable Title.**—But the holder and claimant of property, under an equitable title derived from a vendor or grantor, who retains the legal title for future conveyance, does not hold adversely but in subordination to the grantor's title; and no length of possession under such title will ripen into a legal title.

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*For monographic note on Adversary Possessions, see end of case.

Adversary Possession—Vendee Holding under Equitable Title.—The rule laid down in the principal case that the holder of property under an equitable title derived from a vendor, who retains the legal title, for future conveyance does not hold adversely to the vendor's title, is affirmed in Chapman v. Chapman, 91 Va. 399, 21 S. E. Rep. 813, citing the principal case, and Clarke v. McClure, 10 Gratt. 305; Creigh v. Henson, 10 Gratt. 231. See also, Whitlock v. Johnson, 87 Va. 328, 12 S. E. Rep. 614; Core v. Faupel, 24 W. Va. 244; Ketchum v. Spurlock, 34 W. Va. 597, 12 S. E. Rep. 832. See general *note* on "Adversary Possession" at end of case.

4. **Same—Questions for Jury.**—Whether the contract is executory or executed; whether the defendant or vendee claims title under an absolute deed or not, is a question of fact for the jury, and not of law for the court.

138 *5. **Same—Claiming under Deed.**—If the claim of C. was under a deed purporting to convey the title to the property, whether recorded or not, an exclusive possession under such title is adverse, not only against the grantor himself, but against all the world.

6. The evidence should be admitted.

This was an action of ejectment in the Circuit court of Patrick county, brought in August 1869 by Hardin W. Reynolds against Christopher C. Nowlin, to recover a tract of sixty-four acres of land lying in that county. On the trial, the plaintiff, to sustain his action, introduced a deed from James Nowlin, the father of the defendant, to Samuel J. Staples, bearing date the 2d day of March 1846, by which Nowlin conveyed to Staples the tract of land in controversy and several houses and lots in the town of Taylorsville, and all his personal property, including slaves, horses, cattle, hogs, hides, saddlery, farming utensils, and household and kitchen furniture, in trust to secure the payment of a number of debts mentioned in the deed. And he further introduced a deed from John E. Penn, who had been substituted as trustee in the place of Staples, to the plaintiff, bearing date the 21st of July 1869, by which after reciting the advertisement and sale of the property in pursuance of the provisions of the trust deed, Penn conveyed to the plaintiff the tract of land in controversy.

The defendant then proved that before the execution of the deed of trust, to wit: in 1845 or 1846, James Nowlin bargained and sold said tract of land to the defendant, Christopher C. Nowlin, his son, who was then seventeen years of age, receiving the entire purchase money, executed a deed or title bond thereto, which was lost or mislaid and never entered of record, and delivered it to the said Christopher C. Nowlin, and put him in possession of the premises,
139 who immediately *went to work, erected a dwelling-house thereon, and put up other buildings.

The defendant then introduced another witness and asked the question, whether or not the defendant had not been in actual, adverse and peaceable possession of the land in controversy for more than twenty years before the institution of this suit? To the answering this question the plaintiff, by counsel, objected; and the court sustained the objection; holding that adversary possession without title could be shown by the defendant before the execution of the deed of trust from Nowlin to Staples, but not afterwards. To this ruling of the court the defendant excepted.

There was a verdict and judgment for the plaintiff, and a motion for a new trial, which was overruled, and an exception taken; but it is unnecessary to state it. The defendant applied to a judge of this court for a writ of error; which was awarded.

Shelton, for the appellant.

Lybrook, for the appellee.

BOULDIN, J., delivered the opinion of the court.

This case comes before us on a writ of error to a judgment of the Circuit court of Patrick county, in a case of ejectment. Both parties claim under the same person, James Nowlin; the plaintiff in ejectment, under a deed of trust executed by said Nowlin on 2d of March, 1846, and the defendant under a sale by the same party, made prior to the execution of the deed of trust aforesaid, accompanied by delivery of the possession of the premises, payment in full of the purchase money, and the execution and delivery of a deed or title bond for the property, which was mislaid and never recorded, and on adverse pos-
140 session of the property *under this claim and color of title for more than twenty years prior to the institution of the suit.

On the trial, the plaintiff below made out a complete paper title under James Nowlin, proved the value of the rents, and rested his case. The defendant then proved the sale above mentioned as the foundation of his claim or title; and proved further, that after he had purchased and paid for the land in dispute, as above set forth, and had received a deed or title bond therefor, and had been put in possession of the premises, he "immediately went to work, erected a dwelling house thereon, and put up other buildings." And then, in further support of his claim to the land, he introduced a witness, to prove that he had been in actual adverse and peaceable possession of the premises in controversy for more than twenty years before the institution of the suit; but the court excluded the testimony, being of opinion "that adversary possession without title could be shown before the execution of the deed of trust from Nowlin to Staples, but not afterwards." To this ruling of the court the defendant below excepted, and his bill of exceptions was signed and sealed by the court. The case was then submitted to the jury, who rendered a verdict for the plaintiff below for the premises in controversy, and $25 damages.

The defendant below then moved the court to set aside the verdict and award him a new trial, because the plaintiff had wholly failed to prove that the defendant was or ever had been in possession of the premises claimed. This motion was overruled by the court, and judgment was entered for the plaintiff below in accordance with the verdict; and, thereupon, the defendant below again excepted.

To this judgment a writ of error was awarded by a judge of this court, on which the case is now before us.

141 *It is very clear that the possession

of a mere intruder on the land of another, without pretence or color of title, no matter how long such possession may continue, will not be deemed in law adverse to the title of the true owner, and can never ripen into a good title. But it is equally clear, that possession under color and claim of title does amount to adverse possession; and if held long enough will, under our laws, ripen into a good title; and "it has never been considered as necessary to constitute an adverse possession that there should be a rightful title." Adams on Ejectment, appendix, p. 552, and cases there cited. "Adverse possession is a possession under color and claim of title." Ibid, p. 553, and cases cited. And it is wholly immaterial whether this claim of title be "under a good or a bad, a legal or an equitable title." Shanks v. Lancaster, 5 Gratt. 510.

This latter proposition should be qualified, however, by stating that the holder and claimant of property under an equitable title derived from a vendor or grantor, who retains the legal title for future conveyance, does not hold adversely, but in subordination to the grantor's title, and no length of possession under such title will ripen into a legal title. See opinion of this court delivered by Judge Allen, in Clarke v. McLure, 10 Gratt. 305. The case is different, however, when the defendant in ejectment or vendee claims absolute title under a deed purporting to convey title. In such case he enters and holds adversely to all the world. In the language of Judge Allen, in Clarke v. McLure, he enters and holds "as vendee of the absolute estate, and not in subordination to a title which he supposed to be extinguished by his own deed. The defendant holding in his own right, by a deed which purported to pass the legal title, 142 there was nothing in *the relation of the parties which estopped him from showing the plaintiff had no title whatever." Ibid, p. 312-13. And on same page, commenting on the case of The Society for the propagation of the Gospel v. Clarke, 4 Peters R. 480, Judge Allen said: "The court held that the town claimed as grantee of the state; that their title, though derivative from and consistent with the plaintiff's title, was a present claim in fee, in exclusion of the plaintiff's, and their possession was adverse. This, therefore, was the ordinary case of a vendee, to whom a deed has been made. He claims through, but recognizes no subsisting title in the vendor." And in commenting on another case, referred to in the same opinion, Bradstreet v. Huntington, 5 Peters R. 402, Judge Allen says: "The court held, that one who enters under a deed purporting to convey to him an estate in fee, claiming to be sole and exclusive and absolute owner in fee thereof for forty years, may be regarded as holding adverse to all the world." And the judge goes on to say: "In this the same principle is affirmed as in the other cases, the entering and holding was not in subordination to a subsisting admitted title in another." These principles, he says, are entirely consistent with the principles established by this court in the case of Williams v. Snidow, 4 Leigh 14. "They establish the rule as the law of that tribunal, that a person having complete legal title and possession, or entering under a deed purporting to convey the legal title, and holding the exclusive possession, is considered as holding adversely to all the world, including those from whom his title and possession are derived. The entry, or the holding in such case, imports no recognition of a subsisting title in another, by whose permission and in subordination to whose subsisting and continuing title the party enters and holds." And 143 *he attributes the same effect to a defective conveyance, believed to be good by the parties. The continuing title of the grantor is not recognized by taking possession under such a deed, "the quo animo with which he enters and holds is the same as if the conveyance clothed him with the complete title; and, therefore, such possession, so taken and held, may be adverse to the legal owner." When the contract is executory, however, and the legal title is left with the grantor for future conveyance, the privity between the parties forbids the idea of adverse holding.

Whether the contract is executory or executed, whether the defendant or vendee claims title under an absolute deed or not, is a question of fact for the jury, and not of law for the court. Adams on Ejectment, appendix, p. 600, and cases there cited.

Now, the proofs in this case show that prior to the execution of the deed of trust under which the plaintiff below claims "the said James Nowlin bargained and sold the said tract of land to his son, who was then seventeen years of age, received the entire purchase money, executed a deed or title bond thereto, which was lost or mislaid and never entered of record, and delivered it to the said Columbus Nowlin, and put him in the possession of the premises, who immediately went to work, erected a dwelling house thereon and put up other buildings." The defendant below then offered a witness to prove that he had been in actual, adverse and peaceable possession of the land thus acquired, for more than twenty years before the institution of the suit. The court excluded this testimony; being of opinion, as above stated, that "adversary possession without title could be shown by the defendant before the execution of the deed of trust from Nowlin to Staples, but not afterwards."

144 *How a possession conceded by the court to be adversary against the father before the execution by him of the deed, could cease to be adversary against the trustee after the execution of the deed of trust, without action or consent on the part of the son, we are wholly at a loss to conceive. It would seem to be much more reasonable to hold the converse of the proposition to be true—that there was no such actual privity between the son and the trus-

tee as should prevent the former from holding adversely to the latter—whilst as between the son and father on the facts proved, there might perhaps, in one aspect of the case, be such privity. But, however that may be, and without deciding what privity, might exist between the father and son, or the grantee of the father and the son, should the jury believe from the testimony that the claim of the son was under a title bond and not a deed; it is perfectly clear under the principles of law above laid down, that if the claim was under a deed purporting to convey the title to the property, whether recorded or not (which is wholly immaterial to its validity as a deed as between the parties), an exclusive possession under such title is adverse not only against the grantor himself, but against all the world. Whether the claim of the plaintiff in error in this case was under a deed or a title bond was purely a matter of fact for the consideration of the jury. If the claim was under a deed, although not recorded, the evidence of adversary possession was clearly admissible, and the period of the continuance of such possession offered to be proved was, under the Virginia statute of limitations, more than sufficient to constitute a good title, and bar the demand of the defendant in error. By the action of the Circuit court the plaintiff in error
145 was deprived of this defense, *and the case, in effect, was taken from the jury and decided, both on the facts and the law, by the court. In this we are of opinion that the Circuit court erred. The judgment must therefore be reversed, with costs to the plaintiff in error, the verdict set aside and a new trial awarded, and the cause remanded to the Circuit court with instructions on the same or a like state of facts to admit the excluded testimony.

Judgment reversed.

ADVERSARY POSSESSION.

I. Generally.
- a. What Constitutes Adverse Possession.
  - 1. West Virginia Cases.

II. The Essential Elements Necessary to Perfect Title by Adverse Possession.
- a. Must Be an Ouster of the True Owner.
- b. Possession Must Be Actual.
- c. Must Be Notorious and Visible.
- d. Must Be Exclusive.
- e. Must Be Continuous.
  - 1. Effects of Entry by True Owner.
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III. Color of Title.
- a. Defined.
- b. Title Need Not Be Good.
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- a. Generally.
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- c. Adverse Possession by Co-Parcener—What Is Necessary.
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- d. Between Mortgagor and Mortgagee.
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- f. Between Trustee and *Cestui Que Trust.*
  - 1. What Necessary on Part of Trustee.
- g. Between Life Tenant and Remainderman.
- h. Between Tenant and Landlord—What Necessary on Part of Tenant.
- i. Where Claimant Has Acknowledged Title of Owner—What Necessary.

VI. Other Matters.
- a. The Law Looks at the Intention, with Which Possession Was Taken.
- b. *Tempus Regi Non Occurrit.*
- c. The Statute as against Municipal Corporations.
  - 1. West Virginia Cases *contra.*
- d. What Title True Owner Possesses after Adverse Claimant's Title Ripens into a Good Title.

I. GENERALLY.

a. What Constitutes Adverse Possession.—To constitute an adverse possession, there must be a possession under claim of title; or in reference to conflicting claims, and the statutory prescriptive bar, it must consist of an actual, exclusive, continued, visible, notorious, and hostile possession, under a colorable claim of title. 2 Min. Inst. (4th Ed.) 578.

"This possession, however, to bar the plaintiff's right of entry must continue, not only through the period of statutory limitation, but it must be of the quality and character which the law requires. It must be uninterrupted, honest and adverse. Such possession for the period prescribed by the statute, not only gives a right of possession which cannot be divested by entry, but also gives a right of entry and of action, if the party is plaintiff, which will enable him to recover, even against the strongest proof of a title, which, independently of such continued adversary possession, would be a better title. This possession must be adverse, grounded upon an ouster or dispossession of the real owner; a possession under claim of title, is in reference to conflicting claims and the statutory prescriptive bar; it must consist of an actual, exclusive, continued, visible, notorious, and hostile possession under a colorable claim of title." The court, in Hollingsworth v. Sherman, 81 Va. 671.

Adversary possession must be actual, exclusive, open and notorious, accompanied by a *bona fide* claim of title against that of all other persons, and it must be continued for the period of the statutory bar. Creekmur v. Creekmur, 75 Va. 481.

1. West Virginia Cases.—The elements of an adversary possession of land, with reference to the statutory bar, are (1) It must be under color or claim of title. If under claim of title only, it does not require the act of any vendor or other party, but in such case the possession is limited to the party's inclosure. Color of title is a deed or other writing from some one which shows the nature of the party's claim, and defines its extent. (2) The possession must be

actual. The land must bear on some part of it permanent, visible, open marks of his ownership, as by occupation, cultivation, or such like use and enjoyment, such as may be seen by one who sees fit to pass that way. (3) It must be adverse. It must be held exclusively for the claimant as owner, and against all others. (4) It must be *bona fide*, but it is not necessary that the party should believe his claim to be a good or valid one. He may know some other one has the better right. It is not necessary for his claim to be thought good in its inception, for it generally begins in and presupposes wrong; but it must not be fraudulent, nor, except in certain cases well settled, involve any breach of trust. In this state the tenant may assert in some cases his adverse colorable title against his landlord without first restoring the possession, but his possession will not be adverse until and unless notice of his disclaimer has been distinctly and unequivocally brought home to the landlord; and, having entered under his landlord's title, he cannot dispute it, in the sense of putting him to the proof of title. But, being liable to great abuse, in such case it will be subjected to rigid scrutiny,—a great strictness of proof. (5) Such possession must be continuous and uninterrupted for (10 years by our law) the period prescribed by the statute,—"continuous," in the sense of not being abandoned by himself; "uninterrupted," in the sense of not being effectively broken by another. Swann v. Young, 36 W. Va. 57, 14 S. E. Rep. 426.

II. THE ESSENTIAL ELEMENTS NECESSARY TO PERFECT TITLE BY ADVERSE POSSESSION.

a. Must Be an Ouster of the True Owner.—There must be an entry that will amount to an ouster of the true owner. Creekmur v. Creekmur, 75 Va. 430; Core v. Faupel, 24 W. Va. 238.

b. Possession Must Be Actual.—The possession of the demandant must be actual. Dawson v. Watkins, 2 Rob. 259; Turpin v. Saunders, 32 Gratt. 27; Pasley v. English, 5 Gratt. 141; Anderson v. Harvey's Heirs, 10 Gratt. 386; Core v. Faupel, 24 W. Va. 239.

Surveying Land Not Enough.—The demandant in a writ of right claims the land (of which the tenant is in possession) under a patent bearing date the 17th of June 1786, and the tenant disproves the constructive seisin of the demandant, by showing a patent for a large tract embracing the same land, which issued as early as the first of December 1778. Whereupon the demandant, to establish a seisin in deed by a *pedis positio*, proves that the patentee under whom he claims came, in 1824 or 1825, to the county in which the land lies, and employed an agent to enter upon and survey the said land and various other tracts in the same county; that the said agent procured a surveyor and chain carriers immediately thereafter, who went upon the land in question, and surveyed and remarked the same for the patentee. *Held*, these facts are not sufficient to authorize a jury to find a seisin in the demandant. Dawson v. Watkins, 2 Rob. 259.

Fact That Claimant's Cattle Wander over Land Not Enough.—The mere fact that herds of cattle wander over wild and uncultivated lands do not constitute adversary possession in favor of the owner of such cattle. Turpin v. Saunders, 32 Gratt. 27.

Claimants Cutting Timber Not Enough.—A temporary possession of land by cutting and sawing timber upon it, is not such an adversary possession as will give title. Pasley v. English, 5 Gratt. 141; Anderson v. Harvey, 10 Gratt. 386.

Usual Modes of Actual Possession.—The most usual mode of actual possession is by occupancy, use or enjoyment, residence, cultivation, enclosure and improvement. Core v. Faupel, 24 W. Va. 239.

Wild and Uncultivated Lands Not Subjects of Adversary Possession—Must Be a Change of Their Condition.—Wild and uncultivated lands cannot be the subject of adversary possession whilst they remain completely in a state of nature. A change in their condition, to some extent, is essential; without such change, accomplished or in progress, there can be no occupation, use or enjoyment. Evidence short of this may prove an adversary claim, but cannot establish an adversary possession. Turpin v. Saunders, 32 Gratt. 28.

While patent lands remain uncleared, or in a state of nature, they are not susceptible of adversary possession against the elder patentee, unless by acts of ownership effecting a change in their condition. Koiner v. Rankin's Heirs, 11 Gratt. 420.

c. Must Be Notorious and Visible.—The ground upon which an adversary title is established is the supposed laches of the true owner. The possession of the adverse claimant must not only be with claim of title, but must be visible, and of such notoriety that the true owner may be presumed to know of it. Turpin v. Saunders, 32 Gratt. 28; Core v. Faupel, 24 W. Va. 239; Hollingsworth v. Sherman, 81 Va. 671.

Secret Lease Taken by Tenant.—If a tenant takes a secret lease or conveyance for the land from a third party, claiming to be the owner, without the knowledge of his landlord, the character of his possession will not be changed. Voss v. King, 33 W. Va. 236, 10 S. E. Rep. 402.

d. Must Be Exclusive.—Adverse possession in any case, in order to effect an ouster of the owner, must in its nature possess such notoriety, that the owner may be presumed to have notice of it and of its extent. It must be open, visible and exclusive. Core v. Faupel, 24 W. Va. 239; Hollingsworth v. Sherman, 81 Va. 671.

e. Must Be Continuous.—In an action of ejectment, where the defendants rely upon their adversary possession of the premises, they must show not only entry, but they must show that their possession has been continuous during a period necessary to give title under the statute of limitations. A break in the possession restores the seisin of the true owner. Stonestreet v. Doyle, 75 Va. 356.

If the tenant, or those under whom he claims, have abandoned their possession within the 25 years, the statute of limitations is no bar to the demandants' title under his elder patent. Taylor's Devisees v. Burnsides, 1 Gratt. 166.

An adverse possession must be continuous and uninterrupted. There can be no constructive possession against the owner. When there is no actual possession, the law ascribes the possession to the owner. Consequently, if at any time during the statutory period the adverse claimant does not continue in the possession, so that he may be sued as a trespasser, he cannot protect his claim by the statute of limitations. Core v. Faupel, 24 W. Va. 239.

f. Effects of Entry by True Owner.—The tenant cannot sustain his defence of continued adversary possession, so as to make the statute a bar, if the demandants, or those under whom they claim, have within the period of 25 years before bringing the action, entered upon the land in controversy, and taken actual possession thereof, by residence, improvement, cultivation, or other open, notorious

and habitual acts of ownership. Taylor's Devisees v. Burnsides, 1 Gratt. 166.

2. Several Possessions Cannot Be Tacked Unless There Is Privity of Estate.—The court, in Hollingsworth v. Sherman, 81 Va. 674, says: "It is, indeed, a principle well established that where several persons enter on land in succession, the several possessions cannot be tacked, so as to make a continuity of possession, unless there is a privity of estate, or the several estates are connected.

"Whenever one quits the possession, the seisin of the true owner is restored, and an entry afterwards by another wrongfully constitutes a new disseisin. The continuity of possession having been broken before the expiration of the period of time limited by the statute of limitations, an entry within the time destroys the efficacy of all prior possession, so that to gain a title under the statute, a new adverse possession for the time limited is required. The tenant cannot sustain his defence of continued adversary possession if, within the period of limitation, the premises have been abandoned by him or those under whom he claims." Citing Taylor's Devisees v. Burnsides, 1 Gratt. 208-210; Overton's Heirs v. Davisson, 1 Gratt. 223; Koiner v. Rankin's Heirs, 11 Gratt. 427; Cline's Heirs v. Catron, 22 Gratt. 378; Dawson v. Watkins, 2 Rob. 269, 1 Lom. Dig. 797.

f. Must Be under Claim of Right.—A mere naked possession, without a claim of right, no matter how long, never ripens into a good title, but is regarded as being held for the benefit of the true owners. Creekmur v. Creekmur, 75 Va. 431.

Mere Holding Over.—"Adverse possession is not the mere holding over against the will of the party from whom you obtain possession. It is the holding by claim of title adverse to another's title, that constitutes adverse possession." The court, by TUCKER, P., in Williams v. Snidow, 4 Leigh 20, cited in Chapman v. Chapman, 91 Va. 400, 21 S. E. Rep. 818.

It is clear that the possession of a mere intruder on the land of another, without pretence or color of title, no matter how long such possession may continue, will not be deemed in law adverse to the title of the true owner, and can never ripen into a good title. Nowlin v. Reynolds, 25 Gratt. 137.

"Such is the possession necessary to avail against the constructive seisin of the prior patentee. The mere entry by him or his agent is not enough. It is not necessary that the land should be enclosed or built upon, but the entry must be made under a claim of title, with the intention of taking possession, and being accompanied with such visible acts of ownership as from their nature indicate a notorious claim of property in the land. The character of the acts necessary to give to the party the seisin required, varies with the situation of the land and the condition of the country." Hollingsworth v. Sherman, 81 Va. 671.

"The question in cases of adverse possession is not whether the claim asserted is good or bad, but whether there has been a hostile claim of title and continuous possession under it for the statutory period. Neither is it necessary that such hostile claim should be under color of title, that is under a deed or other writing." The court, in Va., etc., R. Co. v. Barbour, 97 Va. 118, 120, 33 S. E. Rep. 554. In this case the disseisor did not have a scintilla of title, when he ousted the plaintiffs.

1. Extent of Possession under Claim of Right.—If a party enter, not under any deed or written title, but merely assumes possession with a claim of right, his ouster of his predecessor, and his own subsequent possession extends no farther than what he occupies, cultivates, encloses, or otherwise excludes the owner from. Hollingsworth v. Sherman, 81 Va. 673.

Where the adverse possession is not under color of title, but under a mere claim of right, the possession of the claimant is confined to his actual inclosure. Va., etc., R. Co. v. Barbour, 97 Va. 118, 33 S. E. Rep. 554; Sulphur Mines Co. v. Thompson's Heirs, 93 Va. 293, 25 S. E. Rep. 282.

III. COLOR OF TITLE.

a. Defined.—Color of title, for the purpose of adverse possession under the statute of limitations as to land, is that which has the semblance or appearance of title, legal or equitable, but which is in fact no title. Any written instrument, however defective or imperfect, no matter from what cause invalid, purporting to pass or convey title to land, which defines the extent of the claim under it, is color of title. Swann v. Thayer, 36 W. Va. 46, 14 S. E. Rep. 423.

b. Title Need Not Be Good.—A deed purporting to convey land in fee under a void sale, made under a deed of trust, by a trustee having no legal authority, gives color of title. Swann v. Thayer, 36 W. Va. 46, 14 S. E. Rep. 423.

A court of equity without jurisdiction pronounces a decree for the sale of a certain parcel of land, and appoints commissioners, with directions to make the sale. They sell the land; the court confirms the sale, and appoints the commissioners to convey the land to the purchaser on payment of the purchase money. The purchase money is paid, and the commissioners make to the purchaser a deed purporting to convey the land in fee. Such deed being proved constitutes color of title. Mullan's Adm'r v. Carper, 37 W. Va. 215, 16 S. E. Rep. 527.

It is immaterial whether an adversary possession under a claim of title be under a good or a bad, a legal or an equitable, title. Shanks v. Lancaster, 5 Gratt. 110.

Any written instrument, however defective or imperfect, and no matter from what cause invalid, purporting to sell, transfer, or convey title to land, which shows the nature and extent of the party's claim, constitutes "color of title," within the meaning of the law of adverse possession. Mullan's Adm'r v. Carper, 37 W. Va. 215, 16 S. E. Rep. 527.

A creditor secured by a deed of trust purchases the land at a void sale under such deed, and the trustee makes him a deed purporting to convey it in fee, and such purchaser afterwards by deed conveys the land in fee to another, and such purchaser and his alienee hold actual possession, claiming the land in their own right, for the period of the statute of limitations. Such possession gives title, and bars the right of the grantor in such deed of trust, and he cannot maintain a bill to redeem and recover the land. Swann v. Thayer, 36 W. Va. 46, 14 S. E. Rep. 423.

c. Office of Color of Title.—The principal office of a claim or color of title is to define the boundaries and fix the extent of the adverse holding. If it is a mere claim of title, the adverse holding will be limited to the actual enclosure of the claimant. But if it is a deed or other paper-title, and the possession is exclusive, it will be regarded as co-extensive with the boundaries contained in such deed or paper. The color of title, however, may be good or bad, legal or equitable. Core v. Faupel, 24 W. Va. 239.

d. Value of Color of Title.—The deed or instrument which is relied on to give color of title must seem to

define specifically the boundaries of his claim. Where a disseisor enters upon and cultivates part of a tract, he does not thereby hold possession of the whole tract constructively, unless this entry was by color of title by specific boundaries to the whole tract. Color of title is valuable only so far as it indicates the extent of the disseisor's claim. Blakey v. Morris, 89 Va. 720, 17 S. E. Rep. 126.

e. Effect of Color of Title.—The effect of color of title is to fix the character of the occupant's possession, and define its extent and limits. As a general rule, the possession of one who has a colorable title, is co-extensive with the boundaries of the instrument under which he claims, in the absence of any actual possession by the true owner; whereas the possession of one entering and holding under a mere claim of title is confined to the land in his actual occupation. Creekmur v. Creekmur, 75 Va. 431.

f. Extent of Possession under Color of Title.—If he enter under the color of title by deed or other writing, the law holds that he acquires possession, to the extent of the boundaries contained in the writing. Hollingsworth v. Sherman, 81 Va. 673.

IV. CONFLICTING GRANTS—INTERLOCKS.

If neither party have actual possession of any part of his grant, the elder seisin in law will prevail. See Koiner v. Rankin's Heirs, 11 Gratt. 427; Cline's Heirs v. Catron, 22 Gratt. 392.

If senior patentee is not in actual possession of any part of his grant, and junior patentee is in possession of part of his, but outside of the interlock, there is no constructive possession of the interlock on the part of either, since there is no actual possession thereof, and hence the elder seisin in law of the senior patentee again prevails. See Koiner v. Rankin's Heirs, 11 Gratt. 427; Cline's Heirs v. Catron, 22 Gratt. 392; Turpin v. Saunders, 32 Gratt. 37-39.

If senior patentee has actual possession of any part of the interlock, he will then have constructive possession of all not in actual adverse possession of junior patentee. As to so much of the interlock as is in the actual possession of neither, the superior constructive possession of the senior will prevail over the mere seisin in law, or the inferior constructive possession, of the junior. See Overton's Heirs v. Davisson, 1 Gratt. 224; Koiner v. Rankin's Heirs, 11 Gratt. 427; Cline's Heirs v. Catron, 22 Gratt. 392; Turpin v. Saunders, 32 Gratt. 37-39; Sulphur Mines Co. v. Thompson's Heirs, 93 Va. 293, 25 S. E. Rep. 232.

If the junior patentee has actual possession of part of the interlock, and senior patentee has possession of no part of his grant, the junior has a constructive possession of the interlock, while the senior has a mere seisin in law. The constructive possession of the junior will prevail as to the whole interlock. See Taylor v. Burnsides, 1 Gratt. 196; Overton's Heirs v. Davisson, 1 Gratt. 224; Turpin v. Saunders, 32 Gratt. 37-39; Andrews v. Roseland, etc., Co., 89 Va. 393, 16 S. E. Rep. 252.

"If senior patentee should enter upon his grant, outside of the interlock, after entry thereon by junior patentee, but before the statute of limitations has barred his claim to any part of the grant, the senior's seisin in law of the interlock is not thereby turned into a constructive possession, for he has no actual possession of the land in dispute. Hence the constructive possession of the junior grantee will prevail over the mere seisin in law of the senior, and this constructive possession will extend to the whole interlock. See Stull v. Rich Patch Iron Co., 92 Va. 258, 23 S. E. Rep. 293." Extract from article on "Adversary Possession," by Mr. Raleigh C. Minor, 3 Va. Law Reg. 845.

Quære:—"When the true title holder is in actual possession of a part of his grant, but outside of the interlock, at the time of the entry of the colorable title holder, does the latter, by an actual possession of a small part of the interlock, gain a prescriptive title to his *pedis positio* only, or to all of the land within the interlock?" This is what is known as the "Open Question," in Virginia. Several very interesting articles on this question have appeared in the Virginia Law Register. 3 Va. Law Reg. 763; 3 Va. Law Reg. 843; 4 Va. Law Reg. 1; 4 Va. Law Reg. 8; 4 Va. Law Reg. 138; 5 Va. Law Reg. 810.

Claimant Must Have Actual Possession of Some Part of Land in Controversy.—To protect himself under the statute of limitations, the claim must show continued adversary possession for the time of limitation of some part of the land in controversy. Actual possession of a part of his land outside of the boundaries of the demandant's elder patent, is not sufficient. Koiner v. Rankin's Heirs, 11 Gratt. 420.

C is in possession of a tract of land under a settlement in 1771, the settlement right confirmed to him by the commissioners of the district in September 1782, and which was surveyed in April 1783, and he lives upon and cultivated a part of the land, and obtains a patent for it in March 1799. In July 1796, W obtains a patent for a tract of land, which covers a part of the tract held by C; but C's cleared land is outside of the interlock, which is in forest; W not knowing that his patent covers any part of the land held by C under his settlement right. *Held*, the actual possession by C outside of the interlock, does not constitute an adversary possession by C, of the land within the interlock, so as to require W to enter upon and take actual possession of it, in order to give him possession under his patent. Cline's Heirs v. Catron, 22 Gratt. 378.

Actual Possession of Junior Patentee Will Prevail over the Elder's Constructive Possession.—The boundaries of two coterminous owners of land interlock; and the party claiming under the elder patent, enters upon his land outside the interlock, and cultivates and improves it, holding continued possession thereof. The party claiming under the junior patent, enters on his land outside the interlock, and clears and improves it and lives upon it, the land in the interlock being uncleared; and he exercises such continued acts of ownership over the whole land lying within the interlock as constitutes an adversary possession thereof, though but a part of it is cleared and enclosed; and after thus living on his land and acting for upwards of five years, he dies in possession, and his heirs continue to hold possession, and claim and exercise like acts of ownership over the land within the interlock. *Held*, the possession of the heirs is not limited to their inclosure. Kincheloe v. Tracewells, 11 Gratt. 587.

Constructive Possession of Elder Patentee Cannot Prevail over Actual Possession of the Junior.—The entry of the demandant, or those under whom he claims upon and possession of the land within his elder grant, not embraced by the junior grant of the claimant, cannot oust the claimant, if at the time of the entry of the demandant, the claimant had actual possession of the land embraced by his grant. Taylor v. Burnsides, 1 Gratt. 166.

Actual Possession by Claimant Necessary—Generally.—If the tenant in a writ of right, would protect himself by the plea of the statute of limitations, he must

show that he entered on the land in controversy, claiming the same under his junior grant, when the demandants had not actual possession thereof, under their elder patent: and took, and held actual possession thereof by residence, improvement, cultivation, or other open, notorious and habitual acts of ownership; and so continued the same, under his said claim, for more than twenty-five years before the commencement of the demandants' suit. Taylor v. Burnsides, 1 Gratt. 166.

Actual Possession of Part Only by Junior Patentee, Can Not Prevail over Elder's Constructive Possession.—If the older patentee, at the time of such entry of the younger patentee, is in the actual possession of any part of the land in controversy, then that the junior patentee can gain no adversary possession, beyond the limits of his mere enclosure, without an actual ouster of the older patentee, from the whole of the land in controversy. Overton's Heirs v. Davisson, 1 Gratt. 224.

Constructive Possession of Junior Patentee Prevails over Elder's Seisin in Law.—"Where the land in controversy is embraced by conflicting grants from the commonwealth, to different persons, and the junior patentee enters thereupon, and takes and holds actual possession of any part thereof, claiming title to the whole under his grant, that such adversary possession of part of the land in controversy is an adversary possession of the whole, to the extent of the limits of the younger patent; and to that extent is an ouster of the seisin or possession of the older patentee, if the latter has had no actual possession of any part of the land within the limits of his grant." Overton's Heirs v. Davisson, 1 Gratt. 224.

V. CLAIMANT'S POSSESSION ORIGINALLY CONSISTENT WITH TRUE OWNER'S TITLE.

a. Generally.—No length of possession will warrant a presumption of title, when the origin of the possession is shown to be consistent with the title of the original owner. 2 Min. Inst. (4th Ed.) 579.

A person living with tenant and helping to pay the rent, admits the title of the landlord, and can acquire no title by adverse possession, against the landlord. Hodgkin v. McVeigh, 86 Va. 751, 10 S. E. Rep. 1065.

In May 1816 A conveys to S a tract of land in trust to secure a debt to C, which is duly recorded on the same day; and in October of the same year he executes to H a title bond for a part of the land; and H immediately enters into possession cultivating and farming, and claiming it under said bond, and continues thus to hold possession. A during his lifetime and his family since having resided on the residue of the tract. In 1827 the trustee S sells under the trust and conveys the land to C the purchaser. In 1848 the heirs of C bring ejectment against H for the land in his possession, and there is a special verdict which does not find an ouster or disclaimer by H. *Held*, that the possession of A after the deed, was as tenant by sufferance, and that the possession by H after his entry, was of the same character; and therefore the statute of limitations is no bar to the action. Creigh's Heirs v. Henson, 10 Gratt. 231.

b. What Is Necessary on Part of Claimant.—Says the court, in Hulvey v. Hulvey, 92 Va. 186, 23 S. E. Rep. 233: "In questions of adverse possession a higher degree of proof is required in those cases in which the possession was begun in privity with the opposing claimant than in cases where no such relation existed. Where possession is originally taken and held in subserviency to, or in privity with, the title of the adverse claimant, a clear, positive, and continued disclaimer and disavowal of the title, and an assertion of an adverse right brought home to the adverse claimant, are indispensable before any foundation can be laid for the operation of the statute of limitations. If this were not so, the greatest injustice might be done. Without such knowledge, the adverse claimant has the right to rely upon the fiduciary relations under which the possession was originally taken and held.

"In such cases the statute of limitations does not begin to run until the possession, before consistent with the title of the adverse claimant, becomes tortious and wrongful by the disloyal acts of the party in possession, which must be so open, notorious, and continued as will fully and clearly show the changed character of his possession, and knowledge of such change on the part of the adverse claimant." Citing Stonestreet v. Doyle, 75 Va. 356; Pillow v. Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. Rep. 32.

A deed of trust, which is duly recorded, provides for the continued possession of the grantor, and for his taking the rents and profits of the property until the creditor should direct a sale after demand of payment. The possession of the grantor and purchasers from and under him cannot be adversary to the title of the trustee or prejudicial to the rights of the trust creditor unless it becomes actually adverse and hostile by acts of disclaimer open and notorious brought to the knowledge of such creditor or his trustee. Bowie v. Poor School Society of Westmoreland, 75 Va. 300.

c. Adverse Possession by Co-Parcener—What Is Necessary.—An actual ouster of one tenant in common cannot be presumed, except where the possession has become tortious and wrongful by the disloyal acts of the co-tenant, which must be open, continued and notorious, so as to preclude all doubt of the character of his holding or the want of knowledge thereof by his co-tenant. This conduct must amount to a clear, positive and continued disclaimer and disavowal of his co-tenant's title, and an assertion of an adverse right; and a knowledge of this must be brought home to his co-tenant. Boggess v. Meredith, 16 W. Va. 1, cited and followed in Rust v. Rust, 17 W. Va. 901. To the same effect, Cooey v. Porter, 22 W. Va. 120.

The statute does not begin to run in favor of one joint tenant against his co-tenant, until actual ouster or disseisin, or some act equivalent to denial of their rights in the premises. Fry v. Payne, 82 Va. 759, 1 S. E. Rep. 197.

"Conceding that the entry and possession by one co-parcener enures to the benefit of all in the absence of proof to the contrary, yet when it appears that the co-parcener entering and taking possession, claimed the property as his own under color of title; that he took the profits to his own exclusive use, and denied the title of the other co-parceners, of all which they had notice; the party so taking and holding is regarded as having disseised his co-parceners." The court, in Caperton v. Gregory, 11 Gratt. 508, citing and following Purcell v. Wilson, 4 Gratt. 16.

The possession of one joint tenant, tenant in common, or co-parcener, is *prima facie* the possession of all the other co-tenants; and the mere possession of the one will not be taken to be adverse to the title and possession of the other. Yet if the defendants prove actual ouster or other notorious act or acts,

amounting to a total denial of the plaintiffs' rights as co-tenants, and of such a character as to afford direct or presumptive proof that the other co-tenants or plaintiffs had had knowledge of the claim of exclusive ownership thus set up and held by the defendants, or those under whom they claim, such possession of the land in suit held continuously and uninterruptedly under such circumstances under color of title for the length of time prescribed by law, constitutes adverse possession, and will ripen into a good and sufficient title in the defendants. Stonestreet v. Doyle, 75 Va. 356.

A silent possession, unaccompanied by any acts which amount to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession. The mere receipt of profits and rents, and the payment of taxes is not such an ouster. Lagorio v. Dozier, 91 Va. 502, 508, 22 S. E. Rep. 239, citing and following Rowe v. Bentley, 29 Gratt. 760; Purcell v. Wilson, 4 Gratt. 16; Hannon v. Hounihan, 85 Va. 429, 12 S. E. Rep. 157; Creekmur v. Creekmur, 75 Va. 436.

1. Presumption of Disseisin—For the Jury.—Though a great lapse of time, with other circumstances, may warrant the presumption of a disseisin or ouster by one co-parcener or tenant in common, of another not labouring under disabilities, this presumption is a matter of evidence for the consideration of the jury, and not a question of law for the decision of the court upon a special verdict. Purcell v. Wilson, 4 Gratt. 16.

d. Between Mortgagor and Mortgagee.—Neither a mortgagor nor his assignee can hold adverse possession to the mortgagee, unless the assignee has taken a conveyance without notice. Otherwise they are mere tenants at will. Newman v. Chapman, 2 Rand. 93; Chapman v. Armistead, 4 Munf. 382.

e. Possession under Executory Contract of Sale.—A vendee who enters under an executory contract which leaves the legal title where it was, and contemplates a future conveyance, enters in subordination to it, holds under and relies upon it to protect his possession in the meantime. And in such case, as also in the case of lessee, mortgagor, *cestui que trust* and the like, where one is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession under the statute of limitations. Nowlin v. Reynolds, 25 Gratt. 137.

1. Purchase Money Paid.—The possession of a purchaser under an executory contract is not adverse to his vendor, although he has paid all the purchase money and used and occupied the land for his exclusive benefit. His contract being executory and made in contemplation of a further conveyance of the legal title, recognizes the title in his vendor, and his holding will be regarded as in subordination thereto and not adverse. But where the purchaser is in possession under a complete legal title, such as a deed purporting to convey the land, he will be considered as holding adversely to all the world including his vendor from whom his title and possession are derived. Core v. Faupel, 24 W. Va. 239.

2. What is Necessary on Part of Vendee.—"Before adverse possession can arise between a vendor and his vendee, or between the grantee of the vendor and such vendee, where the vendor has retained the title, and the statute of limitations commences to run the vendee must have dissevered the privity of title between them by the assertion of an adverse right, and openly and continuously disclaimed the title of his vendor, and such disclaimer be clearly brought home to the knowledge of the vendor or his grantee." Chapman v. Chapman, 91 Va. 400, 21 S. E. Rep. 813; Creekmur v. Creekmur, 75 Va. 430; Whitlock v. Johnson, 87 Va. 323, 12 S. E. Rep. 614; County of Alleghany v. Parrish, 93 Va. 615, 25 S. E. Rep. 882.

Where a person is in possession of land, claiming it under a writing conferred upon him a right to the land, such possession is regarded as adverse *prima facie* against all persons except his vendor, where such writing is an executory agreement, contemplating a future conveyance; and, if such writing is a deed conveying the legal estate, it is adverse also to the vendor. Where such person is in possession claiming under such deed by occupation, cultivation, and inclosure, his possession has *prima facie* the quality or character of exclusiveness requisite as one of the elements constituting adversary possession. Ketchum v. Spurlock, 34 W. Va. 597, 12 S. E. Rep. 832.

f. Between Trustee and Cestui Que Trust.—No lapse of time, however long will give a trustee a right to the property by adverse possession, as against the *cestui que trust*. Heiskell v. Trout, 31 W. Va. 810, 8 S. E. Rep. 557.

1. What Necessary on Part of Trustee.—Land is sold under an order of court and such sale confirmed, the purchase money paid, but no deed is given, and the former owner's heirs remain in possession. *Held*, equity looks upon the heirs as trustees, and in such a case before the statute begins to run in their favor, they must make a clear, positive, and continued disclaimer and disavowal of title in the purchaser and his heirs, and the assertion of an adverse right, brought home to the knowledge of the purchaser or his heirs. Whitlock v. Johnson, 87 Va. 323, 12 S. E. Rep. 614. Citing and following Creekmur v. Creekmur, 75 Va. 436.

g. Between Life Tenant and Remainderman.—The possession of the life tenant, and those claiming under him or subject to his control, is not adverse to those entitled in remainder. Austin v. Brown, 37 W. Va. 634, 17 S. E. Rep. 207.

In 1833 W made his will and died. By a clause he gives to his daughter, D, a designated tract of land, to her and the heirs of her body; but should D "die without heir, as above mentioned, my wish is that said land shall return to my other heirs, and be sold, and the money arising from the sale to be equally divided among all my heirs." D sells the land, and conveys it with general warranty; and then dies, without ever having had a child. *Held*, though the deed of D purported to convey the fee, it only conveyed, and did convey, her interest in the land, and the purchaser could not hold an adversary possession thereof before the death of D without leaving a child. Elys v. Wynne, 22 Gratt. 224, citing and following Clarkson v. Booth, 17 Gratt. 490.

h. Between Tenant and Landlord—What Necessary on Part of Tenant.—A person who, while in the possession of land, accepted a lease therefor from one claiming to be the owner, may, after his term expires, by disclaimer and notice to such person, terminate his tenancy; and he will not, in such case, be required to surrender the possession before he will be allowed to set up an adverse title in himself, or a third person. Voss v. King, 33 W. Va. 236, 10 S. E. Rep. 402.

Though a tenant cannot deny his landlord's title while the relation of landlord and tenant exists, yet if the tenant accept a deed from another, purporting to convey the land to him in fee, and later conveys it in fee to another, and both he and his alienee claim the land in their own right under such con-

veyances, and the landlord has knowledge of such conveyances and claim, possession by such tenant and his alienee after such knowledge on the part of the landlord for the period fixed by the statute of limitations will be adversary, and will bar the landlord's right. Swann v. Thayer, 36 W. Va. 46, 14 S. E. Rep. 423.

Although a party may enter into possession in privity with the true owner, he may, without first surrendering the premises, dissever such relation, and claim by adverse title, where possession is originally taken and held under the true owner, a clear, positive and continued disclaimer and disavowal of that title, and the assertion of an adverse one, must be brought home to the true owner before any foundation can be laid for the operation of the statute of limitations; and this was done in this case. Creekmur v. Creekmur, 75 Va. 431, cited and followed in Va. Midland R. Co. v. Barbour, 97 Va. 118, 33 S. E. Rep. 554; Whitlock v. Johnson, 87 Va. 323, 12 S. E. Rep. 614; Reusens v. Lawson, 91 Va. 226, 21 S. E. Rep. 347; Chapman v. Chapman, 91 Va. 397, 21 S. E. Rep. 813; Hulvey v. Hulvey, 92 Va. 182, 23 S. E. Rep. 253.

i. Where Claimant Has Acknowledged Title of Owner—What Necessary.—When the possessor of land has acknowledged a title in the claimant, then the possession will not be deemed adverse; and whenever the act of the possessor acknowledges a right in the claimant, the statute of limitations will not operate, because such acknowledgment deduced from circumstances negatives the idea of adverse possession. Erskine's Ex'ors v. North, 14 Gratt. 60.

VI. OTHER MATTERS.

a. The Law Looks at the Intention, with Which Possession Was Taken.—An adverse possession depends upon the intention with which the possession was taken and held. Whenever the act itself imports that there is a superior title in another, by whose permission and in subordination to whose still continuing and subsisting title, the possession is held, such possession cannot be adverse to the owner of the legal title. Clarke v. McClure, 10 Gratt. 305, cited and followed in Flynn v. Lee, 31 W. Va. 487, 7 S. E. Rep. 430; Hudson v. Putney, 14 W. Va. 561.

b. Tempus Regi Non Occurrit.—After the forfeiture of the land to the commonwealth no possession thereof adverse to the proprietor in whose name it was forfeited, can run against the commonwealth. Staats v. Board, 10 Gratt. 400.

Time does not run against the commonwealth. Though an adversary possession of land had commenced to run against the true owner, yet upon the forfeiture of the land to the commonwealth, under the delinquent land laws, the possession, until the land is sold by the commonwealth, is no longer adversary against her, or her grantee claiming under a conveyance from a commissioner of delinquent lands. Levasser v. Washburn, 11 Gratt. 572.

The statute of limitations does not apply to the commonwealth. Hurst v. Dulany, 84 Va. 701, 5 S. E. Rep. 802.

c. The Statute as against Municipal Corporations.—In the case of Taylor v. Com., 29 Gratt. 780, this court held that a "valid dedication of a street to the public use, perfected by acceptance, makes it a highway—and unlawful obstruction of which is not legalized by lapse of time. *Nullum tempus occurrit regi* applies in this state to the commonwealth, as it does in England to the King," and again, "Nor can there be any doubt or difficulty in the case, as to the question of law, in regard to the effect of the lapse of time and adverse possession upon the public right." The court, in Yates v. Warrenton, 84 Va. 337, 339, 4 S. E. Rep. 818. See also, Manchester Cotton Mills v. Manchester, 25 Gratt. 825; Norfolk v. Chamberlaine, 29 Gratt. 584.

It must be observed that a municipal corporation bears a double character. One public and the other in a certain sense private. In its private capacity the statute runs against the city as in the case of private individuals. But when the property is held for the benefit, or on inalienable public trusts, such as streets, parks and other public places, no laches on the part of the municipality can defeat the right of the public thereto. Lile's Notes on Mun. Corp. 256, and cases cited. Mr. Dillon recognizes this distinction. 2 Dillon Mun. Corp. (4th Ed.) 667.

1. West Virginia Cases Contra.—The statute of limitations, in the absence of an express provision to the contrary runs against a municipal corporation, the same as against a natural person. City of Wheeling v. Campbell, 12 W. Va. 36; Teass v. St. Albans, 38 W. Va. 1, 17 S. E. Rep. 400; Taylor v. Philippi, 35 W. Va. 554, 14 S. E. Rep. 130.

d. What Title True Owner Possesses after Adverse Claimant's Title Ripens into a Good Title.—If a party has been in adverse possession of land for the statutory period, and the land is sold for delinquent taxes the purchaser from the commonwealth acquires no better right or title to the land than the original owner. Smith v. Chapman, 10 Gratt. 445.

Original Owner's Possession from Judicial Sale Until Final Decree Not Adverse to Purchaser.—The possession of the original owner, or those claiming under him, from the time of the sale by the commissioners until the final decree, is not adverse to the purchaser or those claiming under him. Evans v. Spurgin, 6 Gratt. 107.

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146 ***Goolsby &c. v. St. John.**

June Term, 1874, Wytheville.

I. In 1866 S. sues G. & R., partners, in debt. The sheriff returns on the process, executed on G. by leaving copy at his house with sister, and on R. by leaving copy at his house with wife. On this return there is an office judgment confirmed. The stay law prevents an execution on this judgment, but there is a judgment upon notice for a year's interest upon this judgment in 1867, and also in 1868. In 1870 execution is issued on the judgment

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Irregularity in Summons—Effect of Judgment.—In Brown v. Chapman, 90 Va. 174, 17 S. E. Rep. 855, the principal case is cited to support the decision of the court that an injunction should not be awarded to a judgment by default upon summons directed to sheriff of another county than the one where the action is brought, although the summons was issued contrary to law, as the judgment, though erroneous, is not void, and the defendant has a complete remedy at law by motion under Code, § 3551.

In Staunton, etc., Loan Co. v. Haden, 92 Va. 201, 23 S. E. Rep. 285, it was held that a judgment by default against a corporation, rendered on return of a summons which shows that it was executed on an officer of the company in a county other than that wherein the suit was brought, and was not served 10 days before return day thereof is a void judgment and may be assailed collaterally by third parties. The court in this decision reviewed the principal case at length.

In Preston v. Kindrick, 94 Va. 760, 27 S. E. Rep. 588,

when G. & R. enjoin it on the ground that a credit of $100 endorsed on the note should have been $600, and that the process was not properly served, and they had no notice of the suit. S. demurs to the bill for want of equity. HELD:

1. **Equitable Relief—Remedy at Law.***—G. & R. having had notice of the judgment within the time limited for a motion to quash it, they had a remedy at law by motion to quash the sheriff's return, and therefore they are not entitled to relief in equity.
2. The judgment is a judgment by default in the sense of the statute. Code of 1873, ch. 175, §§ 5 and 6, p. 1135.

II. In this case in September 1871 the court made a decree perpetuating the injunction, setting aside the judgment, and remanding the cause to the rules. In March 1872 S. by leave of the court, filed a bill of review for errors apparent in the decree; and on the 2d of September 1872, the court made a decree in the bill of review case, reversing and annulling the decree of September 1871, and directing the cause to stand upon the docket as it did before said decree. And on the same day the original case of G. & R. against S. was reinstated on the docket, and, on the motion of S., it was decreed that the injunction be dissolved. HELD:

1. It was a proper case for a bill of review.
2. The court should not only have dissolved the injunction, but should have dismissed the original bill.

147 *3. **Bill of Review—Continuation of Original Suit.**†—The bill of review is a continuation of the original suit, and there should have been two decrees, but the whole should have been embraced in one decree; and the appellate court will so regard them.

4. **Appellate Proceedings.**—If the case had not been a proper one for a bill of review, still an appeal from that decree brings up the whole case, and the appellate court will go back to the first error and reverse the decree of September 1871.

Goolsby & Rector, partners, composed of Robert Goolsby and James M. Rector, made their promissory note for eight hundred dollars, dated January 20, 1861, payable six months after date, to John L. Saunders for value received. By an endorsement upon the said note, dated July 20th, 1861, said Saunders assigned it to G. W. St. John, for value received. There was also an endorsement upon the note of certain credits in these words: "Paid by J. M. Rector, one hundred and sixty-two dollars fifty cents, July 20th, 1861. May 16th, 1863: Received of J. M. Rector, one hundred dollars, it being the value of six hundred dollars in Confederate currency. G. W. St. John." On the 28th of February 1866 an action of debt was brought upon said note in the Circuit court of Smyth county, in the name of John L. Saunders for George W. St. John, against Goolsby & Rector. The summons issued in the case was returned by the officer to whom it was directed, with a return endorsed thereon in these words: "Executed on Robert Goolsby leaving copy at his house with sister, and on James Rector by leaving copy at his house with wife, on 3d March 1866. T. H. Spratt, deputy sheriff for P. C. Buchanan, S. S. C." At March rules 1866 the declaration was filed and the common order was entered in the case. At April rules the common order was confirmed.

And at a Circuit court held for said
148 *county on the 24th day of August 1866 the office judgment was confirmed in these words: "John L. Saunders for George W. St. John, plaintiff, against Goolsby and Rector, defendants. Debt. The defendants having been summoned and not appearing, it is considered by the court that the judgment awarded in the office against them for $800, with legal interest thereon from the 20th day of July 1861 till paid, and the costs, be affirmed. Subject to a credit for $162.50, paid 20th July 1861, and for $100 paid May 16, 1863. Costs, $7.80." No execution was issued upon the said judgment for several years in consequence of the stay law then in force, but under certain provisions of that law judgments were recovered for interest on the said debt in the years 1867, 1868 and 1869, against the said Goolsby & Rector, and were paid and satisfied by them or one of them.

The stay law having at length expired, and execution having been sued out upon the judgment for the said debt with interest thereon and costs, subject to the credits aforesaid; the said Goolsby & Rector, in March 1871, filed their bill in the said Circuit court, in which bill they claimed that instead of the credit of $100, endorsed on the said note as paid May 16th, 1863, it being the value of $600 in Confederate currency, they were entitled to a credit, as of that

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the first headnote reads as follows: "A court of equity cannot grant relief against a decree by default rendered against a defendant on the ground that no process was served on him, where the return of the officer and the recitals of the decree show that process was served on the defendant, unless the false return of service was procured or induced by the plaintiff, or he can in some way be connected with the deception.

***Equitable Jurisdiction—Remedy at Law.**—The principal case is cited frequently in subsequent decisions for the proposition that where there is an adequate remedy at law equity will refuse relief. Neff v. Baker, 82 Va. 405; Barnett v. Barnett, 83 Va. 511, 2 S. E. Rep. 733; K. & O. Ry. Co. v. Ryan, 31 W. Va. 364, 6 S. E. Rep. 924; Surber v. McClintic, 10 W. Va. 247. See also, Hudson v. Kline, 9 Gratt. 379; Hale v. Clarkson, 23 Gratt. 42; Dey v. Martin, 78 Va. 1; Thompson v. Whitaker, 41 W. Va. 574, 23 S. E. Rep. 795; Shepherd v. Groff, 34 W. Va. 123, 11 S. E. Rep. 997.

†**Bill of Review.**—The procedure and effect in case of a bill of review as laid down in the principal case is approved in West v. Shaw, 32 W. Va. 195, 9 S. E. Rep. 81. See also, Pracht v. Lange, 81 Va. 721.

Decree by Default—Remedy.—In Rowland v. Rowland, 11 W. Va. 268, it is said: "The remedy of a party, against whom decree has been rendered by default, is not by appeal, but by motion to the court that rendered the decree, to annul and set it aside." Citing the principal case and Goolsby v. Strother, 21 Gratt. 107; Baker v. Western M. & M. Co., 6 W. Va. 196; Davis v. Com., 16 Gratt. 134; Hill v. Bowyer, 18 Gratt. 364. See also, Watson v. Wigginton, 28 W. Va. 545, and cases cited.

date, for the whole amount of $600, which though paid in Confederate currency, they said was really taken as a payment of $600 upon the note, and there was no agreement that the amount should be scaled and a credit entered for a less sum than $600; and they stated that the record shows that no process was served on either of them; that if they had been served with process in the suit, and had had an opportunity of contesting the matter, or had had any
149 knowledge *that this credit was placed on the note for $100 instead of for $600, they could easily have made this state of facts appear and could thus have obtained credit for $600; that they had no knowledge that any such judgment was claimed until the year 1868; and that execution had recently been issued on the said judgment and placed in the hands of the sheriff, who had levied it on the property of the complainants. And being, as they said, without adequate remedy in the premises at law, and only relievable in a court of equity, they prayed that said Saunders, St. John and said sheriff might be made defendants to said bill and be enjoined from any further proceedings upon the judgment and execution aforesaid until the further order of the court; that upon a hearing the judgment aforesaid might be vacated and annulled, and for general relief.

There were two exhibits filed with the bill, "A" and "B." A was a copy or extract of the record in the action at law upon the note aforesaid, and B was a copy of the record of a judgment recovered upon motion in Smyth County court, on the 23d of November, 1867, by Saunders for St. John against Goolsby & Rector, for $48 (being for one year's interest on $800, the amount of a judgment rendered in the Circuit court of Smyth county, August term 1866), with interest and costs; and also a copy of the notice with the return thereon, upon which the said judgment of the 23d of November, 1867, was founded, and a statement of the execution issued on said judgment. An injunction was granted as prayed for in the bill.

In April 1871 the defendant, St. John, filed his answer to said bill, in which he demurred to the bill, as containing no equity, and because the objection made in the said bill to the said judgment of
150 the 24th *of August, 1866, was enquirable into only in a court of law. He also answered the allegations of the bill, denying most of those which were material, and making such statements as he considered pertinent to his defense; but it is not necessary to make any further statement in regard to the answer.

There was but one exhibit filed with the answer, which was a table of the value in gold of Confederate money from January 1, 1861, to May 1st, 1865. There was a replication to the answer.

On the 2d of September, 1871, the cause was heard on the bill, demurrer, answer and exhibits, and the court decreed that the injunction awarded in the cause should be perpetuated; that the said judgment of the 24th day of August, 1866, in the bill mentioned, should be set aside; that the said cause should be remanded to rules in the Circuit court of Smyth county, for the purpose of issuing new process in the said action of debt if the said St. John might so desire, and that the plaintiffs should recover of the said defendant their costs in the said chancery suit.

On the 28th of March, 1872, the said St. John, by leave of the said court, filed a bill of review for errors apparent in the said decree, and also for after discovered matter, which errors and matter are set out in the said bill.

In August 1872 Goolsby & Rector filed their several answers to the said bill.

Three depositions were taken and filed in behalf of the plaintiff.

On the 2d of September, 1872, the cause came on to be heard upon the bill of review, the demurrer and answers of the defendants Rector & Goolsby thereto, the replications to said answers, the depositions and exhibits, when the court overruled the
151 demurrer, and *decreed that the said decree rendered in the said original cause of Goolsby & Rector against Saunders and others be reversed and annulled, that the said cause stand upon the docket as it did before said decree was rendered, and that the complainant in said bill of review, recover his costs of the defendants therein.

And on the same 2d of September, 1872, the said original cause of Goolsby & Rector against Saunders and others was reinstated on the docket pursuant to the decree rendered on that day in the case of the bill of review as aforesaid; and on the motion of the defendant, St. John, it was decreed that the injunction heretofore awarded in the said original cause be, and the same was thereby dissolved.

From the said decree of the 2d of September, 1872, in the said case on the bill of review, the said Rector & Goolsby applied for and obtained an appeal to this court.

Gilmore, for the appellants.

J. W. & J. P. Sheffey, for the appellee.

MONCURE, P. delivered the opinion of the court.

Many questions arose, and were ably argued in this case, but, in our view of it, there will be no necessity for considering more than one or two of them, which depend upon the preliminary ground of jurisdiction. We think that a court of equity had no jurisdiction of the matter of controversy in the original suit, and that the demurrer to the bill ought therefore to have been sustained.

There is a no better settled proposition of law than that, as a general rule, when a party has an adequate remedy at law he is entitled to none in a court of equity. And this proposition is as broadly laid
152 down *in the authorities referred to by the learned counsel for the appel-

lants in this case as anywhere else. Thus, for example, in 3 Graham & Waterman on new trials, p. 1478: "Where the remedy is ample at law, chancery will not interfere;" and in note (2) to the same page, it is said: "It is the rule of the court of chancery not to entertain jurisdiction where there is a plain and adequate remedy at law." And in support of the rule a great number of cases are there cited. Again, Id., p. 1481: "There is a well settled general principle, which admits of but few exceptions, that where a person seeking a right has a complete remedy at law, he shall not go into a court of equity to obtain it. So, on the other hand, where a defendant in an action at law has a full and complete defence in his power, and neglects to avail himself of it, he shall not go into a court of equity for relief." Again, Id. p. 1487: "The rule is now well established, that equity can give no relief after a judgment at law if the party might have made the defense at law, unless he was prevented from making the defense by the fraud of the opposite party, or by some occurrence, without fault or negligence on his own part, or unless the opposite party should fail, in a case of concurrent jurisdiction, to set up the judgment at law as a bar to the relief sought in equity." Id., p. 1488: "It is a familiar principle, that where a party has had an opportunity to avail himself of a defense at law, and has omitted to do so, he cannot afterwards resort to a court of equity to obtain the benefit of such a defense. Before a court of equity will interfere to deprive a party of the benefit of a judgment he has recovered at law, it must not only appear that it would be against good conscience to enforce the judgment, but also that the party complaining could not have defended himself at law." And in 3 Leading *Cases in Equity, in the notes to the Earl of Oxford's case, it is said that "the doctrine that equity will not enjoin a judgment on grounds which could or might have been considered and decided by the court in which the judgment was pronounced is thoroughly well settled by the authorities;" of which a great many are there cited.

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No where has the proposition just referred to been more fully sustained than in this court, as the following cases among others will show: Faulkner's adm'x v. Harwood, 6 Rand. 125; Slack v. Wood, 9 Gratt. 40; Allen, &c. v. Hamilton, Id. 255; Hudson v. Kline, Id. 379; George v. Strange's ex'or, 10 Id. 499; Meem v. Rucker, Id. 506. In Hudson v. Kline, supra, the court unanimously say, that "it has been a favorite policy in this state, especially of late, not to afford relief in a court of equity to a party who has a plain remedy at law, except in cases of concurrent jurisdiction. In all other cases he must avail himself of his legal remedy. If without his default he be deprived of all remedy at law, equity may relieve him; but if any legal remedy remain to him (that is adequate remedy), though he may have lost by his misfortune, and without the fault of his adversary, other concurrent legal remedies, he must resort to his remaining legal remedy."

In a case of concurrent jurisdiction a party may elect between his legal and equitable remedies. But having once made his election he is bound by it. A gaming consideration, however, forms an exception to the general rule, requiring a defendant at law to avail himself there of a good legal defence to the action. He is not bound to defend himself at law on account of such consideration, but may suffer judgment to go against him at law, and then obtain relief by bill in equity; or he may apply for such relief before judgment *is obtained, or even action brought against him at law. White v. Washington's ex'or, 5 Gratt. 645.

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Now, the question is, had the appellants an adequate remedy at law in this case?

Their claim was to have credit for the nominal amount of $600, paid by them in Confederate money on the 16th of May 1863, on account of their note for $800 to Saunders, instead of for $100 only, the scaled value at that time of the said $600 Confederate money, for which sum of $100 a credit was endorsed on the note by St. John, the assignee of Saunders. An action at law was brought and a judgment recovered upon the note by the said assignee against the appellants. Whether they were entitled to credit which they claimed as aforesaid, was only a matter of defense to the said action, and the appropriate mode of making such defense was under a plea of payment to the action. Nothing is clearer than that if they failed to make such defense, without a reasonable excuse for such failure, they are forever concluded from afterwards making it in any court of law or equity.

But they insist that their failure to make their defense in said action was without any fault on their part, and was occasioned by the fact, which they allege, that they had no knowledge of the existence of the action until after the judgment was rendered therein. They say that the summons in the action was never executed on them according to law, and that the record shows the fact.

The Code, ch. 166, § 6, p. 1085, declares, that "any summons or scire facias against any person, may be served as a notice is served under the first section of chapter 163." By that section, Id. p. 1097, it is provided that "a notice, no particular mode of serving which is prescribed, may be served by delivering a *copy thereof in writing to the party in person; or, if he be not found at his usual place of abode, by delivering such copy, and giving information of its purport, to his wife, or any person found there, who is a member of his family and above the age of sixteen years; or, if neither he nor his wife nor any such person be found there, by leaving such copy posted at the front door of said place of abode. Any sheriff or sergeant thereto required, shall serve a notice within his bailiwick and make return of the man-

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ner and time of service; for a failure to do so he shall forfeit $20. Such return, or a similar return by any other person who verifies it by affidavit, shall be evidence of the manner and time of service."

The summons in this case was directed to the sheriff of Smyth county, who made a return thereon in these words: "Executed on Robert Goolsby by leaving a copy at his house with sister; and on James Rector by leaving copy at his house with wife, on 3d March 1866. T. H. Spratt, deputy sheriff, for P. C. Buchanan, S. S. C." The declaration having been filed at March rules, the common order was then entered, which was confirmed at April rules, and at the succeeding term of the Circuit court of said county, to wit, on the 24th day of August 1866, the office judgment was confirmed, by an order of the court in these words: "John L. Saunders for George W. St. John, plaintiff, against Goolsby & Rector, defendants. Debt. The defendants having been summoned and not appearing, it is considered by the court that the judgment awarded in the office against them for $800, with legal interest thereon from the 20th day of July 1861 till paid, and the costs, be affirmed. Subject to a credit for $162.50, paid 20 July 1861, and for $100, paid May 16, 1863. Costs, $7.80."

156 *If the summons had been executed in the manner prescribed by law, and the fact had so appeared from the return made thereon by the sheriff, then the judgment would have been conclusive, even though the defendants may not have had actual knowledge of the existence of the action before the judgment was rendered. An execution of the summons, in any of the modes prescribed by law, is equivalent to an execution of it, "by delivering a copy thereof in writing to the party in person."

But in this case, however the fact may be, it does not affirmatively appear from the return that the summons was served in the manner prescribed by law. It does appear therefrom that the summons was executed on the defendants, not by delivering to them in person a copy thereof, which would certainly have been good legal service, but by leaving a copy at the house of each with a sister of one and the wife of the other, without saying that the defendants were not found at their usual places of abode, that the sister in the one case, and the wife in the other, were members of the families of the defendants respectively, and above the age of sixteen years, and that he gave information of the purport of the summons to the persons to whom he delivered a copy thereof as aforesaid.

It was argued with great force by the counsel for the appellee, that the legal presumption is, that the sheriff did his duty, and that he did so is not only consistent with his return, but inferable from the terms thereof; and that having said he executed the summons by leaving a copy at their houses with a sister of one and the wife of the other respectively, it must be inferred in the absence of anything to the contrary, that everything was done which the law required to make a good execution.

157 *It is very probable that in point of fact everything was done which the law required to make a good execution; and that the only defect in the case consists in the omission of the sheriff to set out in his return all the particulars which constitute a good execution.

But without deciding whether the summons might properly be considered upon the return in the absense of anything to the contrary as having been duly executed, and conceding, for the purposes of this case, that it could not, and that the summons was not duly executed, how will the case then stand?

It will then stand as if the summons had been returned "Not found," or without any return endorsed thereon. In which case the clerk, instead of entering the common order, would have issued a new summons. He, therefore, committed a clerical misprision in entering the "common order" and "common order" confirmed at March and April rules 1866, and the office judgment confirmed on the 24th day of August, 1866.

The judgment then being erroneous by reason of this clerical misprision (which is the utmost extent of the error, if there be one), what is the remedy of the defendants for the correction thereof? Is it by proceedings in error in a court of law, or by a proceeding in injunction in a court of chancery?

Clearly they had a plain, cheap, summary, and complete remedy at law, which would formerly have been by a writ of error coram vobis (or coram nobis, for the writ has each of these names in the books) in the same court in which the error was committed, but is now by a mere motion to the court. 1 Rob. Prac., old edit., p. 644; Gordon v. Frazier, &c., 2 Wash. 130. See also 2 Saun. R., pp. 101 and 101 a; Eubank, &c.

158 v. Rall's *ex'or, 4 Leigh 308; Shelton's ex'or v. Welsh's adm'ors, 7 Leigh 175. The Code, chap. 177, §§ 5 and 6, p. 1135, provides as follows: "§ 5. The court in which there is judgment by default, or a decree on a bill taken for confessed, or the judge of the said court in the vacation thereof, may, on motion, reverse such judgment or decree for any error for which an appellate court might reverse it if the following section was not enacted, and give such judgment or decree as ought to be given." And then follows in the same section a provision for the amendment of judgments and decrees by default, in which there is any mistake, and where there is anything in the record whereby such amendment can safely be made, and a provision for the release of any excess in the amount of the recovery beyond what it ought to be. After which comes the next section: "§ 6. No appeal, writ of error or supersedeas, shall be allowed by an appellate court or judge for any matter for which a judgment or decree is liable to be reversed or amended on motion as aforesaid by the court which

rendered it, or the judge thereof, until such motion be made and overruled in whole or in part," &c.

Whether, therefore, the error, if any, in this case, was a mere clerical misprision, or an error in the judgment, or whether being a mere clerical misprision, it comes within the meaning of §§ 5 and 6 aforesaid or not, there was a plain remedy at law for its correction by a mere motion to the court in which it was committed, after reasonable notice to the opposite party.

But it is argued by the counsel of the appellants, that the provisions in the Code before recited apply only to judgments and decrees by default, and that the judgment in this case was not by default; that
159 a *judgment by default can only be when a defendant has been legally served with process and fails to make defense or to appear. And he refers to authority to sustain that position. However true this may be, technically speaking, certainly the statute in question uses the word "default" in no such restricted sense, but extends to all judgments entered against a party who does not appear, whether legally summoned or not. Where a defendant appears in the court in which the suit is brought, before the judgment is rendered, he can there make his defense, and if a judgment be rendered against him he must apply for relief from any error therein to an appellate court. He is not required, nor has he a right, to go again into the court which rendered the judgment for relief against it before he can apply to an appellate court. But where he does not appear in the inferior court, and a judgment is therefore rendered there against him, the law presumes that the court will correct its own errors so soon as they are brought to its notice by a party having a right to complain of them, and it therefore requires him to apply, in the first place, to that court or the judge thereof for relief, as being the cheapest and best remedy he could have. Whether the judgment be strictly or technically by default, or merely quasi by default, the effect and the law, and the reason of the law, are precisely the same. If authority be necessary to sustain this proposition, it is fully sustained by the case of Davis, Sheriff, v. The Commonwealth, 16 Gratt. 134, cited by the counsel for the appellee. In that case it was held by the whole court, Allen, P., delivering the opinion, that all judgments where there has been no appearance by the defendant, are judgments by default, within the meaning of the act before referred to. The
160 proceeding there was by *motion, where there are no rules, and where, it was supposed there could, therefore, be no judgment by default. But Judge Allen said: "The object of the legislature was to save the parties the delay and costs of an appeal to correct such irregularities and formal errors; errors which seldom affect the merits of the controversy, and which would have been corrected at once by the court if pointed out. The case of a motion comes within the reason of the statute, and I think the term 'judgment by default' was intended to apply to all judgments where there was default of appearance"; that is, where there was no appearance.

The appellants might have appeared in the Circuit court of Smyth county at any time before the expiration of five years after the rendition of the judgment at law against them and moved the court to set aside the judgment and all the proceedings in the suit subsequent to the return of the summons, on account of the defective return thereof. On such motion the sheriff might have amended his return, on leave obtained from the court for that purpose, and thus have cured the defect. 18 Gratt. 51; 1 Munf. 269; 5 Munf. 407; 6 Id. 181; 4 Leigh 590. But if he failed to do so the court might have sustained the appellants' motion; in which case the plaintiff at law would have had to sue out a new summons, and the appellants would then have had an opportunity to make their defense at law. If they did not know of the existence of the suit while it was pending, they certainly knew of it shortly after the judgment was rendered, and within the period of limitation allowed by law for making the motion. The judgment was rendered on the 24th of August 1866; and they admit they had knowledge of it as early as 1868. But, in fact, the record shows they had such knowledge as early as 1867, the next year after it was rendered.

161 *The appellants then had an adequate remedy at law for the wrong of which they complain, and, according to the principle and authorities on that subject before referred to, they are therefore entitled to no relief in equity.

But it is further argued by the counsel for the appellants, that while it is true, as a general rule, that a party having an adequate remedy at law, is, therefore, entitled to none in equity, yet there are exceptions to that rule, and this case is one of them. That the ground for relief in this case is, that the appellants were not served with process in the action at law, which is an established ground for relief in a court of equity; and 3 Graham & Waterman on new trials, p. 1523, and Kibbe v. Benson, 17 Wall. U. S. R. 624, are relied on to sustain this argument. It is true, that it is good ground for relief in a court of equity, that the party complaining was not served with process in an action at law, and was thus unable to make his defense at law; but that is only upon the principle that he would otherwise be without any remedy, and that he has lost his legal remedy without any fault on his part. The case of Kibbe v. Benson, supra, plainly shows that such is the case. There, as here, the ground relied on for equitable relief was, that the process in the action at law (what in that case was a declaration in ejectment) was not duly executed on the defendant. It appeared from the record in the action that the process had been duly served by leaving a copy with the father of the defendant and a

member of his family at his dwelling house. But the bill denied that the process had been served as stated in the return. And it averred, in addition, that the complainant was ignorant of the commencement or existence of such suit until more than two years had elapsed after the re-
162 covery of *the judgment therein, within which time he would have been entitled, under the statutes of Illinois (in which state the case occurred), to move to set it aside. That, then, was clearly a case for equitable relief, on the well settled principles of law; and Mr. Justice Hunt, in delivering the opinion of the court, refers to the Marine Insurance Company v. Hodgson, 7 Cranch's R. 336, in which he says the rule is well expressed by C. J. Marshall thus: "Without attempting to draw any precise line to which equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said, that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

Far different from that case is the one now before us for adjudication, in which it appears that the appellants had a plain and adequate remedy at law, of which they had full notice in time, and might easily have availed themselves; and they did not pretend to assign in their bill any reason whatever for not having so availed themselves. We are therefore of opinion that the demurrer to the original bill ought to have been sustained, and the injunction dissolved, and the bill dismissed.

But, instead of doing that, the Circuit court by its decree of September 2d, 1871, perpetuated the injunction and ordered the judgment in the action at law to be set aside and the cause remanded to rules, &c. That decree was clearly erroneous,
163 and it was competent *for the appellee, St. John, to have it reversed, either by the same court on a bill of review (the decree being final) or by this court on an appeal. We have no doubt but that according to the well settled practice, in this state at least, it was a proper case for a bill of review; and one was accordingly filed by leave of the court. It proceeded both upon the ground of error in law, apparent upon the face of the decree, and upon the ground of the discovery of new matter. Of the latter ground no further notice need be taken. The case was regularly proceeded with on the bill of review, until the 2d of September 1872, when the cause came on to be heard, and the court decreed that the said decree of the 2d of September 1871 should be reversed and annulled, that the case of Goolsby & Rector v. Saunders &c. (being the case on the original bill) should stand upon the docket as it did before the said last mentioned decree was rendered, and that said St. John should recover of said Goolsby & Rector his costs expended in the bill of review cause (as it was called). On the same day, to wit: September 2d, 1872, the original cause of Goolsby & Rector v. Saunders, &c. (as it was called), was reinstated on the docket, in pursuance of the decree rendered on the same day in the bill of review cause as aforesaid, and came on to be heard on a motion to dissolve the injunction; and, thereupon, a decree was made dissolving the said injunction. From these two decrees of September 2nd, 1872, or, at least, the former, if not from both, treating them as one decree, this appeal was taken. The two decrees in effect constituted but one decree, and ought to have been embodied in one. There was but one case, the case on the bill of review being but a continuation of the original case in the same court. When on the 2nd of
164 September, 1872, the court on *the bill of review reversed the decree of the 2nd of September, 1871, as it properly did, it ought to have proceeded in the same decree (just as an appellate court would have done) to have rendered such decree as ought to have been rendered on the 2nd of September, 1871, instead of the decree which was actually rendered on that day; that is, to have rendered a decree sustaining the demurrer to the original bill, and dissolving the injunction, and dismissing the bill with costs. Sheppard's ex'or v. Starke & wife, 3 Munf. 29; Stockton v. Cook, Id. 68; Thornton v. Stewart, 7 Leigh 128. Regarding, as we properly may, the two decrees of September 2nd, 1872, as one decree, they are right as far as they go; that is, they are right in reversing the decree of September 2nd, 1871, with costs, and in dissolving the injunction, but they did not go far enough. They ought also to have dismissed the bill. But the court can make the matter perfect by rendering such decree as ought to have been rendered by the Circuit court.

If the case had not been a proper one for a bill of review, and the court below had erred in giving leave to file it, still we would have arrived at the same result. This appeal would have brought up the whole case, and we could and would have gone back to the first error and reversed the decree of the 2nd of September, 1871, and rendered such decree as the court ought then to have rendered. Only a little more than a year had elapsed after the date of that decree before the appeal was perfected, and it was in full time for an appeal from that decree, even if that be a material matter; which is a question we need not now decide. In any view of the case, therefore, we are of opinion that the demurrer to the original bill ought to have been sustained, the injunction dissolved, and the bill dismissed with costs.

165 *The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that if the appellants were entitled to any

relief at all, on account of the matters stated in their bill, they had an adequate remedy at law, of which they neglected to avail themselves, and are entitled to no relief in a court of equity; and that the Circuit court erred in not sustaining the demurrer to the said bill and dissolving the injunction and dismissing the bill, instead of rendering the decree which was rendered in the cause on the 2d day of September 1871. But the court is further of opinion that it was competent for the appellee, St. John, to have the said error corrected, either by bill of review in the same court or on appeal to this court; and that the Circuit court did not err in giving him leave to file a bill of review in the case; and that there is no error in the two decrees of the 2d day of September 1872, as far as they go, regarding them as constituting but one decree, as, in effect, they are. But they ought to have gone further, and dismissed the original bill with costs. Therefore it is decreed and ordered that so much of the decree or decrees appealed from as are in conflict with the foregoing opinion, if any, be reversed and annulled, and the residue thereof affirmed, and that the appellants pay to the said appellee as the party substantially prevailing, his costs by him about his defense in this behalf expended. And this court proceeding to render such decree as the said Circuit court ought to have rendered, instead of the said two decrees of the 2d of September 1872, it is further decreed and ordered that the said decree of the 2d of September 1871 is erroneous, and be reversed and annulled; that the said
166 demurrer to the original bill be *sustained, the said injunction dissolved and the said original bill dismissed, and that the appellants pay to the said appellee his costs by him in the said Circuit court expended, as well in his defense to the said original bill, as in his prosecution of his bill of review.

Which is ordered to be certified to the said Circuit court of Smyth county.

Decree reversed in favor of appellee.

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167 *Umbarger & Wife & als. v. Watts & als.

June Term, 1874, Wytheville.

1. **Appeal—Jurisdiction—Amount Involved.***—A judgment creditor brings a suit in equity to subject his debtor's land to satisfy his judgment; and other judgment creditors of the same debtor come into the cause by their petitions, to subject the same land. None of these judgments amount to $500. Upon a decree against them, dismissing the bill, the Court of Appeals has no jurisdiction to allow or hear an appeal from the decree, either on the ground that the united judgments amount to more than $500, or that the suit concerns the title or bounds of land.
2. In such case the decree is to be considered as several as to each creditor.
3. **Same—Matter in Controversy.**—The matter in controversy, in reference to the appellate jurisdiction of the Court of Appeals, is that which is the essence and substance of the judgment, and by which the party may discharge himself.

This was a suit in equity, brought in February 1871, in the County court of Tazewell, against Sterling F. Watts and Jane M. his wife, and R. C. Fudge, her trustee, to subject the life estate of said Watts in certain lands mentioned in the bill, to satisfy a judgment confessed in the clerk's office of said court by Watts at the suit of the plaintiffs, for $394, with interest from the 9th of January, 1871, till paid, and costs $6.03.

The defendants answered the bill, and insisted that the life interest of Watts in the land had been conveyed to the trustee for the benefit of Mrs. Watts, in consideration of several conveyances of her own land by Watts and herself to third parties, to enable him to pay his debts; and that this
168 deed was executed, *and, as they insisted, left with the clerk, to be recorded before the plaintiffs obtained their judgment.

In the progress of the cause, several judgment creditors of Watts filed their petitions in the cause, and asked to be permitted to come in and have their judgments satisfied out of the fund. These judgments were prior to the deed, but neither of them amounted, principal and interest, to $500.

When the cause came on to be heard in the County court, that court held that the life estate of Watts in the land was liable to the satisfaction of the judgments, and made a decree appointing special commissioners to sell the said life estate in the land. From this decree Mrs. Watts applied to the judge of the Circuit court of Tazewell county for an appeal, which was allowed. The cause came on to be heard in that court on the 11th of May, 1872, when the court held that the pre-existing equities of Mrs. Watts were superior to the lien claimed by Umbarger and wife; and that the deed should be considered as a recorded deed, and dismissed the bill with costs. And further held that the petitioning creditors having tacked their fate to the fate of the bill, their petitions must be dismissed,

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***Appeal—Jurisdiction—Amount Involved.**—See Harman v. City of Lynchburg, 33 Gratt. 37, and *note*, for collection of authorities upon this subject. See also, Campbell v. Smith, 32 Gratt. 288, and *note*; W. & S. R. R. Co. v. Colfelt, 27 Gratt. 777, and *note*; Patteson v. McKinney, 88 Va. 748, 14 S. E. Rep. 379; Pitts v. Spotts, 86 Va. 71, 9 S. E. Rep. 501; Lawson v. Bransford, 87 Va. 75, 12 S. E. Rep. 108; A. & D. R. R. Co. v. Reid, 87 Va. 119, 12 S. E. Rep. 222; Rymer v. Hawkins, 18 W. Va. 309; Greathouse v. Sapp, 26 W. Va. 87; Fleshman v. Fleshman, 34 W. Va. 342, 12 S. E. Rep. 713.

In Hicks v. Roanoke Brick Co., 94 Va. 741, 27 S. E. Rep. 596, it was held that the amounts decreed against the appellant is the amount in controversy as to him, and not the several amounts decreed in favor of the appellees, and if the aggregate of the sums decreed against the appellant exceed $500 the supreme court has jurisdiction although the amount decreed to no one of the appellees amounts to $500.

but without prejudice. And, thereupon, Umbarger and wife, and two of the petitioning creditors, obtained an appeal to this court.

After the appeal had been allowed and perfected, the appellees moved the court to dismiss it, on the ground that the court did not have jurisdiction of the cause.

Richardson and J. W. & J. P. Sheffey, for the motion.

Crockett & Blair, against the motion.

CHRISTIAN, J. delivered the opinion of the court.

169 *The first question we have to decide in this case is whether this court has jurisdiction.

The bill was filed in the County court of Tazewell by Umbarger and wife, for the purpose of subjecting the life estate of Sterling F. Watts in certain real estate to the lien of a judgment which had been confessed in their favor by him for the sum of $394, with interest from the 9th day of January 1871, and upon which an execution had been issued and returned "no property." During the progress of the cause, and before any decree was rendered, other judgment creditors of Watts filed their petition, in which they exhibit copies of judgments in favor of each of them, respectively, and assert their right to subject to the lien of their judgments whatever interest in real estate the said Watts may be entitled to. Neither of these claims amount to the sum of $500, the largest being below that sum.

The bill of Umbarger and wife is answered by Watts and wife and also by Fudge, trustee of Mrs. Watts, in which several answers it is claimed that before the recovery of the judgment by Umbarger and wife the land sought to be charged with the lien of their judgment had been, for a valuable and lawful consideration, conveyed to Fudge, trustee, for the sole use and benefit of Mrs. Watts; and that the deed conveying said land had been put upon record before the judgment in favor of Umbarger and wife was confessed by Watts.

Much evidence was taken as to the fact of the recordation of the deed, which it is not necessary here to notice. The County court rendered a decree declaring that "the land in the bill and proceedings mentioned were liable to the liens of the several judgments, inasmuch as the trust deed for 170 the benefit of *the female defendant was not admitted to record until after the rendition of said judgments." It was accordingly decreed that Sterling F. Watts pay to the several judgment creditors the amounts of their several judgments, and, in default thereof, commissioners appointed by the court were directed to sell the lands for that purpose.

From this decree an appeal was taken to the Circuit court of Tazewell county; which court reversed the decree of the County court, dismissed the bill of Umbarger and wife, and also dismissed the petition of the other judgment creditors, but without prejudice to the latter to institute new proceedings. From the decree of the Circuit court an appeal was allowed to this court.

The jurisdiction of this court is invoked upon two grounds: 1st. That, although no one of the several claims of the appellants amount to the sum of $500, yet the aggregate sum of all amounts to more than that sum, and that having a joint interest in subjecting the land to the payment of their several judgments, the aggregate amount ought to be considered in this court as the amount in controversy.

2d. But if the aggregate amount is not to be considered the amount in controversy, but each claim is to be considered as several and independent, still this court may take jurisdiction, because the matters in controversy are concerning "the title or bounds of lands," which the constitution recognizes as a proper subject of jurisdiction.

As to the first proposition, it is clear that the claims of the appellant are several, and independent of each other. They are founded upon different contracts, upon judgments obtained at different times. The allowance or rejection of one in no manner 171 affects *the others. There is neither a joint interest nor a community of interest among them. All that can be said is, that they are pursuing the same debtor, and are seeking to subject the same property. Nor have they a common interest in that property. If the property they are seeking to subject to the liens of their several judgments was declared to be so liable, their interest would not be a common interest, but each independent of the other; for the proceeds would not be distributed pro rata, but according to the priorities of their several judgments. So that, in fact, their interests are diverse and antagonistic, instead of joint and common. They do not sue as co-plaintiffs, because they have a joint and common interest; but for convenience, and to save a multiplicity of suits, other creditors are permitted to come in by petition in a suit already commenced by one creditor. But though the proceeding by petition be in the same suit, these several demands are as distinct and independent of each other as if they were pursuing the same debtor in different and independent suits. The decree of the court is not joint, but several, decreeing the several amounts due to them respectively, according to their several judgments. If one of the creditors is aggrieved by the decree, it is to the extent that his claim is not paid, and not because other creditors are not paid: and if his claim be less than $500, he cannot successfully invoke the jurisdiction of the court by uniting his claim to that of another creditor, in order to swell the amount to $500. These positions are fully sustained by the authorities cited by the learned counsel for the appellees.

The case of Oliver v. Alexander, 6 Peters' R. 143, was a suit in which several 172 seamen united, as was permitted *by act of congress and practice in ad-

miralty in a libel, seeking to subject a certain fund to the payment of their several demands. The sum decreed to the libellants in no case amounted to $2,000 (that being the amount which gives jurisdiction to the Supreme court of the United States), most of the claims being less than $500. It was held that the matter in controversy was several with each libellant; and that inasmuch as no one claim amounted to $2,000, though all combined exceeded that sum, the court had no jurisdiction.

Mr. Justice Story delivering the opinion of the court says: "The decree assigns to each seaman severally the amount to which he is entitled, and dismisses the libel as to those who have maintained no right to the interposition of the court in their favor. The whole proceeding, therefore, though it assumes the form of a joint suit, is, in reality, a mere joiner of distinct causes of action by distinct parties, growing out of the same contract. * * * It is obvious that the claim of each seaman is distinct and several, and the decree upon each claim is distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another, for he has no interest in it, and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim, and the matter of dispute between him and the owner, or other respondents, is the sum or value of his own claim, without any reference to the claim of others. It is very clear, therefore, that no seaman can appeal from the District court to the Circuit court, unless his claim exceeds $50, nor from the Circuit court to the Supreme court, unless his claim exceeds $2,000." And accordingly the appeal was dismissed for want of jurisdiction. The same doctrine was re-
173 affirmed *in the cases of Stratton v. Jarvis and Brown, 8 Peters' R. 4, and in Rich v. Lambert, 12 How. U. S. R. 347. The case of Seaver v. Bigelows, 5 Wall. U. S. R. 208, is a case much in point. That was a case (as is the case before us) of a judgment creditor filing a bill setting up his judgment and seeking its enforcement against the property of the defendant; and another creditor came into the same suit to enforce a judgment against the same fund, which he had recovered against the same defendant. The case is, in this respect, strikingly analogous to the case under consideration. Mr. Justice Nelson, who delivered the opinion of the court, said: "The judgment creditors who have joined in this bill have separate and distinct interest depending upon separate and distinct judgments. In no event could the sum in dispute, of either party, exceed the amount of their judgment, which is less than $2,000." * * * "It is true the litigation involves a common fund, which exceeds the sum of $2,000; but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class of cases, where separate and distinct interests are in dispute, of an amount less than the statute requires, and where the joinder of parties is permitted by the mere indulgence of the court, for its convenience and to save expense, would be giving a privilege to the parties not common to other litigants, and which is forbidden by law. The case (that is the case of creditors asserting different and distinct claims in the same suit) is analogous to proceedings in admiralty in behalf of seamen for wages, and salvers for salvage, where the practice of the court is well settled." He then cites Rich v. Lambert, and other cases above cited, and declares that the appeal must be dismissed for want of jurisdiction.

174 *These authorities seem to establish the proposition, that where the claims of the plaintiffs are separate and independent, though joined in the same suit, and where one claimant has no interest in the claim of the other, the court will not take jurisdiction because the aggregate sums amount to over $500; but in such a case the claim of each party appealing must amount to that sum.

I am not aware that the question in the form in which it is here presented, has ever been before this court. But this court held in Claiborne v. Gross and Wimbish v. Same, 7 Leigh 331, that where two judgment creditors filed separate bills in chancery impeaching a conveyance of land made by a debtor as fraudulent, which suits were consolidated, and there was a final decree dismissing the bills respectively, and the plaintiffs respectively appealed, that the amount in controversy in one of the suits being insufficient to give this court jurisdiction, the appeal in that suit should be dismissed. In the case before us the claims of each of the judgment creditors are as separate and distinct as if each had filed his separate and independent bill. They are permitted to assert their claims in the same suit merely as a matter of convenience, and to save the costs of litigation and prevent a multiplicity of suits. The amount in controversy between the parties is the amount of the claim of each judgment creditor, and not the aggregate amount of the whole. So that it follows that no one claim amounting to $500 the court has no jurisdiction.

The case of Rodd v. Heartt, 17 Wall. U. S. R. 354, so earnestly relied upon by one of the learned counsel for the appellants, is not at all in conflict with the views above presented and the authorities cited to sustain them. The case was this: A
175 steamer having *been sold under a proceeding in rem in the admiralty, left in the registry of the court $4,337.51, claimed on the one hand by Rodd and several other persons creditors of the owners, who by one mortgage on the vessel had undertaken to secure all those creditors in a body, and, on the other hand, claimed by Heartt and others, mariners, furnishers of supplies and material men. The claim of Rodd under the mortgage was $4,825, and of his co-mortgagees was (in the aggregate) $8,000. The claim of the mariners, fur-

nishers of supplies and material men was $10,150. The District court decreed the fund to the mortgagees, which gave to Rodd $1,498.99 as his pro rata share. This decree of the District court was reversed by the Circuit court, which held "that the claims of the mariners, furnishers of supplies and material men be recognized as superior to the claim of the mortgagee creditors, and paid in preference to the latter; and that a new distribution of the proceeds be prepared by the commissioner in accordance with the principles thus laid down." It was from this decree that Rodd and his co-mortgagees appealed to the Supreme court, where a motion was made to dismiss the appeal, among other grounds, "because no one of the claims exceeded $2,000, Rodd's which was the largest, being but $1,498.99, and the judiciary acts giving an appeal only where the matter in dispute exceeds $2,000." The plain answer to this proposition is that the sum of $1,498.99 does not represent the claim of Rodd, but that amount was the pro rata share of the fund decreed to him by the District court, but that decree was reversed by the Circuit court; his claim and those of his co-mortgagees was disallowed and the whole fund decreed to the other claimants. His claim was $4,825, the whole of which was disallowed; so that it
176 was not *true as contended by the counsel in that case, that "Rodd's claim, which was the largest, was less than $2,000." And Chief Justice Chase therefore says, on the motion to dismiss the appeal: "As to the second ground on which a dismissal is asked, it is apparent that though no one of the claims allowed exceeded $2,000, yet the claim of the appellant which was disallowed exceeded that sum." The matters in dispute were the claims of the mortgagees in the fund, amounting to over $8,000, of which Rodd's was over $4,000 and the claims of the mariners and others, on the other hand, amounting to over $10,000; both sets of claimants asserting their right to the fund in the hands of the court, amounting to over $4,000. This whole fund was given to one set of claimants, and the claim of the mortgagees was wholly disallowed. It is plain that the matter in dispute in this case exceeded $2,000.

In that case, too, it may be observed, that the mortgagees had a joint and common interest arising under the same contract, and secured by the same mortgage, having an interest pro rata in a common fund.

This case is not only not in conflict with the uniform course of decisions of the Supreme court of the United States, but, when properly understood, is entirely consistent with those decisions.

I think it is plain, therefore, both upon principle and authority, that the aggregate amount of the creditors' claims cannot give the jurisdiction; and the claim of each being less than $500, the appeal must be dismissed, unless there be some other ground upon which the jurisdiction will attach.

It is claimed by the learned counsel for the appellants, that this case is brought within the jurisdiction of this court, because the matter in controversy is one "concerning the title to land."

177 *By the second section of article six of the constitution it is provided that the Supreme court of Appeals "shall not have jurisdiction in civil cases where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, the probate of a will, the appointment or qualification of a personal representative, guardian, committee or curator, or concerning a mill, roadway, ferry or landing, or the right of a corporation or of a county to levy tolls or taxes, and except in cases of habeas corpus, mandamus, and prohibition, or the constitutionality of a law," &c.

The phrase, "the matter in controversy," when used in relation to the appellate jurisdiction of this court, has already received a judicial exposition. In Lewis v. Long, 3 Munf. 136, Judge Roane says: "The matter in controversy is that which is the essence and substance of the judgment, and by which the party may discharge himself." In the cases of Hutchinson v. Kellam, and Lymbrick v. Selden, 3 Munf. 202, in both of which the action was trespass quare clausum fregit, and the damages recovered were less than $100, but it appeared from the records that the title or bounds of land were drawn in question, Judge Cabell said, and in this the majority of the court concurred: "To give this court jurisdiction, the matter in controversy must be equal in value to $100, or must be a franchise or freehold. The action of trespass is one in which damages alone can be recovered, and although title or bounds of land may be incidentally or collaterally brought in question, yet the value of the matter in controversy is, from the nature of the action, the value of the damages sustained by the trespass; and this as well where the title or bounds of land may
178 *be drawn in question, as where they may in no manner be involved in the dispute."

These cases were followed by Skipwith v. Young, 5 Munf. 276. That was an action on the case for injury to the land of the plaintiff by the erection of a mill dam. There was a verdict for the plaintiff for one penny damages, subject to the opinion of the court on a point reserved, involving the right of the defendant to build a mill under the circumstances set forth. It thus appeared that the questions between the parties were the right and title to the land overflowed, and the right to continue the mill and dam. In the course of his opinion in this case, Judge Brooke remarked "that the matter in controversy is that for which the suit is brought, and not that which may or may not come in question." * * "The injury in the case before the court is emphatically the matter in controversy, though other matters may have been put in issue, the finding of which by

a jury may, if pleaded, estop the party in another action."

Now to give this court jurisdiction in the case before us, the matter in controversy must either be $500, or the matter in controversy must be "concerning the title or boundaries of land;" or in other words, adopting the judicial interpretation of the words "matter in controversy," that for which the suit is brought must be a matter "concerning the title or bounds of land." In the case before us, the suit is not brought for the land, but to enforce a pecuniary demand against the land. The object of the suit is to recover money evidenced by judgments; and the land is only the fund out of which it is sought to enforce the payment. In such a suit by a creditor to enforce a judgment lien, the question as to the title or bounds of land may or may not arise. The 179 question *does not (in such a suit) directly arise, but may arise as incident or collateral to the matter "for which the suit is brought." To adopt the language of Judge Brooke, "the essence and substance" of the decree in such a case is for the payment of the money due upon the judgment; and by the payment of that "the party may discharge himself." In every such case the decree is always for the payment of the money due under the judgment; and in default of payment within a reasonable time, the sale of the land is decreed. Now it would be a most unreasonable construction to hold that in every creditor's bill to enforce a judgment lien, because the land may be sold by decree of the court to satisfy the judgment, that therefore it is necessarily a suit "concerning the title or bounds of land." "That for which the suit is brought" is to enforce a pecuniary demand. The essence and substance of the decree is the payment of the pecuniary demand asserted; and by that payment the defendant "may discharge himself," and "the title or bounds of the land" be in no manner brought in question.

In support of these views as to the true construction of the constitution, it may be further observed, that not only have the words "matters in controversy" received a judicial exposition, but also the word "concerning," as used in the constitution. The same section of the constitution which we have been considering confers jurisdiction upon this court in "controversies concerning a road," and the statute law authorizes appeals as of right from orders of the County courts in "controversies concerning a road." But it was held by this court in Hancock v. Richmond and Petersburg Railroad Co., 3 Gratt. 328, that appeals of right from orders of the County court in controversies 180 *concerning roads, only exist where the controversy is concerning the establishment of a road; and not where it is a collateral controversy concerning the damages occasioned by a road already established. See also opinion of Chief Justice Marshall in Spring v. Gray's ex'ors, 6 Peters' R. 151, 10 Curtis 77, where the same word "concerning" is used in a statute under consideration in that case, and is construed by him.

Upon the whole, I am of opinion that this court is without jurisdiction to determine the questions in controversy between the parties, and that the appeal must be dismissed.

Appeal dismissed.

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181 *Hendricks & als. v Gillespie.

June Term, 1874, Wytheville.

1. **Specific Performance—Defect in Title.**—In June 1860 G. sells to H. a large tract of land, supposed to contain 2,500 or 3,000 acres, and puts him in possession. In December 1860 he executes a deed, reserving a lien, conveying 2,030 acres to H., of which H. has no knowledge. H. dies in 1861, and his heirs remain in possession of the land. In July 1868 G. files a bill against the administrator and heirs of H., to subject the land for the unpaid purchase money. The heirs file a cross-bill to rescind the contract. And it appears that when the deed was made, and the suit brought, G. did not have a good title to a large part of the land. The land had depreciated in value under the effect of the public events which had occurred since the purchase—HELD: Though G. may be able to make a good title at the time of the decree, the court will not enforce specific performance of the contract, but will rescind it.

2. **Same—Same—Unsatisfied Judgment.**—In this case there were numerous judgments against a previous owner of the land, docketed before he conveyed it in 1859; and it did not appear that they had been satisfied or released. Though it may be improbable that the lien of these judgments may be enforced against the land, the purchaser will not be compelled to take the title.

In July 1868 Thomas H. Gillespie filed his bill in the Circuit court of Tazewell county, in which he set out, that in December 1860 he sold and conveyed to A. Fullen Hendricks a tract of land containing two thousand and thirty acres, lying in the county of Tazewell, for the sum of $22,600, of which $18,000 was unpaid, and a lien therefor was reserved in the deed, a copy of which he filed with the bill. That the unpaid purchase money was due in instalments, one of which, for $6,000, was due on the 15th of May 1863; and one 182 *for $, was due in , &c.: That, on the first named note, suit had been brought against Hendricks' administrator, who pleaded plene administravit; and there was a judgment when assets. That soon after the purchase aforesaid, Hendricks departed this life intestate, and J. Stras qualified as his administrator.

Specific Performance—Compensation.—For cases where a court of equity will decree compensation in a suit to enforce specific performance, see Stearns v. Beckham, 31 Gratt. 379, and *note*. See also, Kenny v. Hoffman, 31 Gratt. 442; Wood v. Walker, 92 Va. 28, 22 S. E. Rep. 523, citing Griffin v. Cunningham, 19 Gratt. 571. See Max Meadows Land Co. v. Bridges, 95 Va. 184, 27 S. E. Rep. 839, where *rescission* is refused on the ground of defect of title.

That the said two notes are unpaid; and if there are assets in the hands of the administrator they are not accessible. And making Stras the administrator, and the children of A. Fullen Hendricks, deceased, three of whom were infants, defendants, he prayed that he might have a decree for the balance of the unpaid purchase money of the land, and that the land, or so much thereof as might be necessary, might be sold to pay the same; and for general relief.

The deed referred to in, and filed with the bill, bears date the day of December 1860; and by it Gillespie and wife convey to Hendricks with general warranty, by metes and bounds, a tract purporting to contain two thousand and thirty acres, reserving a lien thereon for $18,600, the balance of unpaid purchase money. This deed was acknowledged by Gillespie in the clerk's office of Tazewell county, on the 31st of December, 1860, and by his wife before a notary on the 22d of March, 1861; but it appears that it was not presented in the office for record until the 29th of January, 1863.

In October 1869 the children of A. Fullen Hendricks answered the bill, and filed a cross-bill in the cause. They say that the foundation of the dealing between Gillespie and Hendricks was a written agreement of June 14th, 1860; which they file. That by this agreement the tract of land was estimated to contain between twenty-five hundred and three thousand acres. That the deed, filed with the bill, was never 183 *delivered to Hendricks, or accepted by him, as they believe and charge. That the deed was taken to the office, to be recorded by Gillespie, or some agent of his, without the knowledge or consent of Hendricks or his heirs; and the pretended recordation of the deed was intended as a fraud upon Hendricks and his heirs; and it was in fact so left with the clerk after the death of Hendricks, who died on the 12th of October, 1861. They charge that Hendricks never had the deed in his possession, and that it was not found among his papers after his death.

They further say, that there never has been any substantial or adequate performance by Gillespie of the said agreement on his part. That there was at the time of said pretended sale, June 14th 1860, a claim of dower of Elizabeth Harrison, in a large part, if not the whole, of the lands embraced in said agreement; and that her suit by bill in chancery for dower in the whole of said lands is now pending and undetermined in this court. That said Gillespie was not then, nor has ever been vested with the legal title to the said lands, as to be able to comply with his contract of June 14th 1860. The pretended deed is only for two thousand and thirty acres; whilst one single tract agreed to be conveyed by said agreement was therein estimated to be two thousand and five hundred or three thousand acres, and one other single tract which had been entered by Harrison contained five hundred acres.

The plaintiffs then proceed to state the locality of the land referred to in the agreement, as differing in some respects from that contained in the deed, and to point out lands embraced in the deed to which Gillespie his no title. These are sufficiently referred to in the opinion of Anderson, J. 184 *They insist that said contract is still executory, that there was and is an unconscionable disproportion between the real value of the lands in the deed or agreement and the price which Gillespie is claiming for them, independent of the charge of Mrs. Harrison's dower; and that therefore it would be inequitable in the extreme to enforce the contract, especially as Gillespie is insolvent; and that a warranty from him is worthless. They state, that beside the debt which plaintiff is seeking to enforce, there is one for $5,000 held by William A. Stewart, and one of $5,000 by David H. Perry; and on this last there is a credit of $2,800 or $2,900.

The prayer of the bill is for an injunction to restrain the said Gillespie, Stuart and Perry, &c., from proceeding to collect said debts; that the said contract and deed be declared of no force and effect, and that such portion of said lands as may be necessary be subjected to sale for the purpose of refunding to the estate of A. F. Hendricks the sums already paid by his administrator, under the contract of June 14th, 1860, and for general relief. The injunction was granted.

The agreement of the 14th of June 1860 provides that Gillespie, in consideration of the covenant and agreement of said Hendricks, as hereinafter mentioned, doth sell to the said Hendricks, and doth bind himself to procure and convey to said Hendricks, good title in fee simple, with general warranty in and to a certain tract, parcel or boundary of land, lying and being in the county of Tazewell, on the Pounding Mill branch, and on the north side of the Paint Lick mountain, which said tract, parcel or boundary of land is supposed to contain 2,500 or 3,000 acres, more or less, and is composed of the following tracts or 185 parcels, viz. *It sets out the different tracts, and then proceeds: And the said Gillespie is to have said boundary of land sold Hendricks surveyed, and to convey a good title, with general warranty, to said Hendricks, by metes and bounds as one tract; and should any of the tracts composing said boundary not join, or should there be any land between them not embraced within their lines, the said Gillespie binds himself to procure title to said adjacent or vacant lands and convey the same, with general warranty, to said Hendricks as part and parcel of the boundary sold to him. And the said Gillespie gives possession of all the land to said Hendricks, except that in cultivation, and binds himself to deliver the lands now in cultivation or grain, to said Hendricks on or before the 1st of March 1861. And whereas John C. Harrison has entered as waste and unappropriated lands five hundred acres on the

south and southwest of the boundary sold by Gillespie to Hendricks, now, the said Gillespie binds himself to have the said entry surveyed and carried into grant, and to convey or have conveyed to said Hendricks, with special warranty, the title acquired under said grant. And he further binds himself to enter, survey and obtain a grant for any other vacant land adjoining Harrison's entry, and to convey the same to Hendricks, with special warranty, Hendricks paying one-half the expense on the lands entered, beyond the five hundred acres of Harrison's.

And, in consideration of the covenants of Gillespie, Hendricks binds himself to pay to Gillespie the sum of $22,600; of which he had paid $4,600 in the bond of John C. Harrison, which Gillespie took without recourse; and to execute a negotiable note for $2,000, payable in six months. And for the remaining $16,000 Hendricks executes
186 his three bonds to Gillespie: *one for $5,000, payable May 15th, 1861, one for $5,000, payable May 15th, 1862, and a third for $6,000, payable May 15th, 1863. And the said Hendricks has the right to discharge all or any of said three bonds by assigning to Gillespie cash bonds on solvent persons, provided the same be transferred in time to enable Gillespie to collect the same by due course of law, by the day when the bonds fall due which the said assigned bonds are to discharge.

The evidence in the cause is sufficiently stated by Judge Anderson.

The cause came on to be heard on the 5th of October 1871, when the court held that Gillespie was entitled to have specific execution of the contract of June 14, 1860, and to enforce his vendor's lien for the purchase money of the land sold by him to Hendricks by the said contract, and conveyed by the deed of December 1860 for 2,030 acres, subject to an abatement of $1,780, for reasons stated. And having fixed the amount paid by the administrator of Hendricks upon the bond due May 15th, 1861, at $2,862, it was decreed that the injunction granted on the cross-bill be dissolved, except as to the sum of $1,780, and perpetuated as to that. And a special commissioner was appointed to sell the land upon the terms and in the manner stated in the decree. And thereupon the widow and children of A. F. Hendricks applied to this court for an appeal; which was allowed.

Wm. H. Burns, for the appellants.

J. W. Sheffey, for the appellees.

ANDERSON, J. The execution of the deed of December 1860, by Gillespie to Hendricks, was not a performance of his executory contract of the 14th of
187 *June. He was bound not merely to make a deed, but to procure and convey a good title with general warranty. Was he invested with a good title himself at the time he executed said deed to the lands conveyed by it, or to which he was bound by his contract to make a good title?

He was bound by his contract to make a good title to the following tracts, to wit: First, Samuel W. Cecil's tract, shown by survey to contain 317 acres, described as formerly belonging to Cecil, and sold by him to John C. Harrison. The record shows no conveyance to Harrison.

Next, a tract patented to Chapman and Perry, except a small portion sold to Cornelius McGuire. The tract contains 1,072 acres, as shown by survey. There is a deed from Chapman and Perry to Gillespie, bearing date 29th of December, 1860. But the record shows that it had been previously sold by them to John C. Harrison for $1,000, which he had paid; and there is nothing to show that this conveyance was made to Gillespie with the assent of Harrison.

Next is a tract formerly belonging to James M. Whitt, and by him sold to Gillespie. There is a deed from said Whitt to Gillespie, dated November 14th, 1853, conveying a tract containing 225 acres. But it appears on the face of the deed that it was patented to said Whitt and James Oney jointly; and there is no evidence that Whitt had ever acquired Oney's part.

The next are two tracts formerly belonging to Harvey Whitt.

There is a deed from Harvey Whitt to Gillespie, for only one tract, containing eighty-four acres. The plat of survey shows that Harvey Whitt had two tracts within the bounds of the survey, only one of which appears to have been conveyed to Gillespie.
188 *Lastly, all that portion of fifteen hundred acres of land which formerly belonged to Gillespie, lying west of the Pounding Mill, which said Gillespie formerly sold to John C. Harrison. This tract is laid down on a map accompanying the record. And that portion of it which lies west of the "Pound Mill" is described on the map, and embraces four tracts, which are excluded from the boundary which Gillespie claims to have sold and conveyed to Hendricks, to wit: Hannah Linkous 33 acres, Samuel Cecil 92 acres, Hinkles' patent, now Oney's, 110 acres, and a part of James C. Williams, west of the "Pound Mill," quantity not given, but which contains perhaps between eighty and one hundred acres. These tracts are all parts of the tract of fifteen hundred acres lying west of the "Pound Mill;" and the record does not show that they were excluded from the sale made by Gillespie to John C. Harrison. Unless they were, they would seem to be included in the sale made to Hendricks, being parts of the survey of fifteen hundred acres lying west of the "Pound Mill." Yet they are excluded by the survey which Gillespie caused to be made, and by the deed in question.

It appears that Hendricks was aware of their exclusion, for he was along when the survey was made. But there is evidence that he was disappointed and dissatisfied with the running of these lines on the north side of the survey, although he agreed to make an exchange with Oney of a small

parcel for their mutual benefit, to give better shape to their several tracts. This act, we think, could not be regarded as a waiver of the objection. It implies only, that however confident he may have been that the said lands were embraced in the sale to him, he was satisfied, as shown by the survey, and doubtless by the dis-
189 claimer *of title by Gillespie, that they did not belong to him; and upon this ground he did not contemplate a rescission of the contract. He had been put in possession under the contract, and had paid part of the purchase money; and expecting the contract to be performed in other respects by his vendor, he did not intend to surrender it for this cause.

The fact of his possession could not be used against him, because he was authorized by the contract to take possession before the title was made. 1 Sugd. Vend. top p. 518, chap. ix, § 1, art. 20. Nor can his act of exchange implying ownership. Because acts of ownership, after an authorized possession, are of no importance; for what can be the purpose or advantage of taking possession except to act as owner? Ibid, art. 23. We do not think therefore that the continued possession of Hendricks, or the exchange he made with Oney, amounted to an acknowledgment that the survey was made in conformity with the contract, or a waiver of his objection.

But if it could be a waiver of the objection, upon a further discovery of objections arising out of the misdescription he might rescind the contract. 1 Sugd. Vend. top p. 508, bottom 331, chap. 8, § 4, art. 25.

This survey also includes Miles Claypool's entry and survey of 96 acres; also James Oney's of 336 acres, and nearly the whole of Thomas Davis's of 114 acres, which are not mentioned in the contract. Whether the rights which accrued under them have been extinguished by Gillespie the record does not show.

It also includes a large portion of the Samuel W. Cecil tract of 317 acres, a considerable part of the James M. Whitt tract of 225 acres, and a small part, perhaps eight or ten acres, of the Harvey Whitt tract of 92 acres; all of which were expressly
190 sold by Gillespie *to Hendricks, as distinct and separate tracts, from that portion of the 1,500 acre tract lying west of the "Pound Mill" and of the Chapman & Perry tract of 1,072 acres; the whole supposed to be twenty-five hundred or three thousand acres, more or less. And the said Gillespie bound himself to have the boundary of said lands surveyed, and to convey a good title to them, with general warranty, to the said Hendricks, "by metes and bounds, as one tract; and should any of the tracts composing said boundary not join, or should there be any land between them, not embraced within their lines, said Gillespie binds himself to procure title to said adjacent or vacant lands, and convey the same, with general warranty, to the said Hendricks as part and parcel of the boundary sold him." The articles further stipulate that Gillespie gives possession to Hendricks of all the lands except that in cultivation, which he binds himself to give possession of on or before the 1st day of March 1861. He also binds himself to have an entry made by John C. Harrison, of 500 acres, surveyed and carried into grant, and to convey the same, or have it conveyed, with special warranty to said Hendricks. And this land is not in the said deed of 1860, and had not been surveyed when the said deed was made. He also binds himself to enter, survey and obtain a grant for any other vacant land not included in the said John C. Harrison's entry, and adjoining the same, and to convey the same, with special warranty, to Hendricks, the said Hendricks paying one-half of all the expenses incurred for entering, &c., beyond the 500 acres of John C. Harrison. In consideration whereof the said Hendricks agreed to pay $22,600, of which he has paid $4,600 due him by John C. Harrison, which said Gillespie takes without recourse; to execute
191 *a negotiable note for $2,000, payable at six months, which was given and has been paid. And for the residue he executed three bonds to Gillespie: one for $5,000 payable May 15th, 1861; another for $5,000, payable May 15th, 1862; and the third for $6,000, payable May 15th, 1863; which bonds Hendricks was to have the privilege of discharging by assignment of cash bonds on solvent persons, provided the assignment be made in time to enable the said Gillespie to collect the same by due course of law, by the day the bond falls due, which the assignment was made to discharge. Sundry payments have been made since the death of Hendricks by his administrator.

We will now return to the map, from which it appears that the Chapman & Perry tract lies on the south side of the 1,500 acre tract, and slightly interlocks with it at one place, and at another place there is a small parcel of land lying between the two surveys, to which Gillespie shows no title whatever. It also appears that a tract of 117 acres, belonging to Francis McGuire, lies between the Harvey Whitt survey and the Chapman & Perry survey, and adjacent to them, which is not included in the survey which Gillespie bound himself to have made, nor in his deed of December 1860. It also appears from the deed of Joseph Barbareux and wife to the said Gillespie for the 1,500 acre tract, bearing date September 9th, 1850, that the same is a part of a tract of 5,200 acres which was granted by the commonwealth to Henry Banks, by patent bearing date the 25th of February, 1795. And it does not appear that the said Barbareux had any title to the same. It is evident also from the survey aforesaid that a part, probably the whole, of the Chapman & Perry survey, which was not patented until the 1st day of August, 1850, is covered by the said Banks' patent.

192 *The deed of Gillespie and wife of December 1860, before referred to, was acknowledged by said Gillespie before the

clerk of Tazewell county on the 31st day of December, 1860; and by his wife before a notary on the 22d of March, 1861, and deposited in the clerk's office; and was not recorded until 29th of January, 1863. A. F. Hendricks died in October 1861, leaving a widow and infant children his heirs at law. He paid, previous to his death, $6,600, including the Harrison bond; and further payments were made by his administrator after his death. This suit in equity was brought in July 1868 by Gillespie against the administrator and the widow and heirs of said Hendricks to enforce the vendor's lien and subject the land to sale, to satisfy the balance of the purchase money. It is virtually a bill for specific performance.

The deed of December 1860 is set out as constituting the contract between the parties sought to be enforced; and no allusion is made to the executory contract of the 14th of June. The answer of the heirs denies that said deed was ever delivered to their ancestor, or accepted by him as an execution of the contract, or that he had any knowledge of its existence. We think the fact, as shown by the evidence and admissions of Gillespie, is most probable, as stated by the answer; and that said deed is not therefore any evidence of a contract between Gillespie and Hendricks binding on the latter or his heirs. Nor can it be regarded as an execution of the contract on the part of Gillespie, who was bound not merely to make a deed, but to procure and convey a good title in fee to Hendricks with general warranty. That, it is clear, was not done by the execution of this deed; for, at that time, he had not an unquestionably good title to a large portion, if any, of the 193 lands conveyed by it; *and there is strong presumptive evidence that a large and valuable portion of the lands, which were sold to Hendricks, were not conveyed by the said deed. The executory contract of the 14th of June, 1860, remained therefore unexecuted. The bill sets out the deed as the contract which it seeks to enforce, and makes no allusion to the contract of June the 14th; and as it appears that Hendricks was not a party to the deed, the bill ought strictly to have been dismissed. But the defendant having answered and admitted the contract of June, which he sets out in his answer, we will consider the case as if the bill had been amended and sought to enforce that contract. And, thus viewed, is it a case proper for specific performance?

In Garnett v. Macon & als., 2 Brock. 185, 244, which is a leading case, and has received the approval of this court, Chief Justice Marshall says: "Both on principle and authority, I think it is very clear that a specific performance will not be decreed on the application of the vendor, unless his ability to make such a title, as he agreed to make, be unquestionable. In a contract for the purchase of a fee simple estate, if no incumbrance be communicated to the purchaser, or be known to him to exist, he must suppose himself to purchase an unincumbered estate; and a court of equity will not interpose its extraordinary power of compelling a specific execution of the contract, unless the person demanding it can do himself all that it is incumbent on him to do." "This objection (the Chief Justice said) is not confined to cases of doubtful title. It applies to incumbrances of every description, which may, in any manner, embarrass the purchaser in the full and quiet enjoyment of his purchase." The doctrine on this subject is fully and 194 clearly stated in a *recent decision of this court; J. Staples delivering the opinion. Christian v. Cabell, 22 Gratt. 82.

A court of equity is anxious to protect a purchaser, and give to him reasonable security for his title; not compelling him to take a title, not knowing whether it is good or bad. 1 Sugd. Vend., top p. 577, chap. X, § 3, art. 1. To enable a court of equity to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion, for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him. It has, there, fore, become a settled and invariable rule that a purchaser shall not be compelled to accept a doubtful title. Nor will he be forced to take an equitable title. Ibid, art. 3. To apply these well established principles to the case in hand, it is evident that the vendor was not, when he executed the deed of December 1860, in a condition to demand of Hendricks a specific performance of the contract; nor was the execution of said deed a performance of the contract on his part. If it had been tendered to Hendricks, as an execution of the contract, he would have been justified in rejecting it. But it is evident that the deed was never tendered to Hendricks, and the probability is, that he died without the knowledge of its existence. Gillespie seems to have contented himself with that act as a performance of the contract on his part; and when he filed his bill in this suit, in August 1868, was in no better condition to perform the contract on his part, or to demand the specific performance on the part of the heirs, than he was in December 1860. The final decree, dissolving the injunction, which had been awarded to judgments at law for the purchase money, except as to the sum of seventeen hundred and eighty 195 *dollars, as to which it was perpetrated, and enforcing the vendor's lien for the residue, was pronounced in the cause on the 5th day of October, 1871. It is contended, on behalf of the appellee, that at the date of said decree he had perfected his title, and had given to the heirs of Hendricks all necessary and proper assurances of title.

If there has been no unnecessary delay, courts of equity will sometimes decree a specific performance in favor of the vendor, although he is unable to make a good title at the time of filing his bill, if he is in situation to make such a title at or b

the time of the decree. 2 Stor. Eq. Juris. ch. 18, § 777. But if the vendor has been long in default, and in the meantime a change of circumstances has taken place, unfavorable to the party resisting the demand, a court of equity will not compel specific performance. Garnett v. Macon & als., 2 Brock. R. 185; and Bryan v. Lofftus' adm'or, 1 Rob. R. 12. In this case, more than eleven years had elapsed from the date of the contract before the vendor had perfected his title, and was prepared to perform the contract on his part, if he has ever perfected his title, and has ever been prepared to perform the contract. The first deferred installment of the purchase money was due on the 15th of May, 1861; the payment of which the vendor had no right to enforce, until he was prepared to make the purchaser a good title. He was not in condition to perform the contract at that time, and was not until 1871, shortly before the decree was pronounced, if he was then. Admitting that he had then perfected his title, he had been in default for a period of ten years; during which period the most extraordinary change of circumstances had taken
196 place that had ever occurred *in this or perhaps any country, and which were unfavorable to the party resisting specific performance. In the above case of Garnett v. Macon, Chief Justice Marshall, after adverting to the change of circumstances which had taken place between the time when the vendor ought to have been prepared to perform his contract and the time when he had perfected his title, says: "The same property which, if sold in time, would probably have enabled him to pay for Mantapike, would not, on any reasonable estimate, now enable him to do so." If Gillespie had been in condition to perform his part of the contract, and to demand payment of the first bond when it was due in May 1861, or when the second bond became due in May 1862, property which might have been sold to satisfy them, afterwards, by the results of the war, became utterly worthless to his estate. Or it may be fairly presumed that the whole of the deferred installments might have been paid in solvent bonds, with which he was authorized by the contract to pay them, which have become utterly worthless, as alleged by the heirs in their answer: and that there has been a general decline in the value of lands is a fact of public notoriety. The other case of Bryan v. Lofftus is analogous to this.

In that case, as in this, the purchaser had been put in immediate possession, and had made large payments. In that case, as in this, the purchaser had retained possession until the date of the decree, and had given no notice of his intention to go for a rescission of the contract until the filing of his answer—in that case seven years after the date of his contract. In this case it was nine years and some months. But the purchaser died the next year after he
197 made the contract, *his heirs being infants, all of whom remained in their minority probably for several years, and some of whom were still in their minority when this suit was brought. Judge Cabell delivering the opinion of the court in that case said: "It was not for the heirs of Lofftus (the vendor) who had always been in default, and who were never in a situation to comply with the contract of their ancestor, to object to the conduct of Bryan in not demanding a rescission of the contract. Although Bryan might at an earlier period have objected to going on with the contract, it was not too late for him to do so in 1825; the default of Lofftus's heirs still continuing."

In that case, as in this, the purchaser did not surrender the land. Judge Cabell said: "He had paid nearly $4,000 of the purchase money, for the recovery of which he had no hope, Lofftus having died insolvent. I think he was right therefore in retaining possession." In this case the evidence tends strongly to show insolvency in Gillespie. In that case, as in Garnett v. Macon, the court was of opinion, admitting that the vendor was in condition to make a good title at the date of the decree, and had executed proper deeds for that purpose, his long continued default, and the change of circumstances that had occurred during its continuance, was a sufficient objection to the specific performance.

I might rest the decision of this case upon that ground. But the record presents further objections to specific performance in this case, which I can only briefly notice, as this opinion has already taken up too much time. And first, the record does not show that the vendor could convey a clear, unquestionable title to the heirs of the vendee, even at the date of the decree.
198 The burden is on the vendor to *show that the title is free from reasonable doubt, and that the vendee will not be exposed, by taking it, to litigation. Dwight Sturtevant v. Jacques, 14 Allen's R. 523, 526; Richmond v. Gray, 3 Allen's R. 25; Griffin's ex'or v. Cunningham, 19 Gratt. 571.

The appellee relies upon a deed executed by him to the widow and heirs of A. F. Hendricks on the 26th of April, 1871, whereby he conveys and releases to them the lands on the "Pounding Mill Branch," which were conveyed to him in trust by John C. Harrison, by deed bearing date January 31, 1859, to secure Napoleon B. French as his endorser on a note for $5,000. The lands conveyed by this deed of trust are claimed to be the same which were sold by Gillespie to Hendricks by the contract of 14th of June, 1860, and conveyed by the deed of December 1860. And the said deed of release, of April 1871, recites that the said Gillespie, after due notice as trustee, made sale of the said lands under the said deed of trust at public outcry, and that Joseph Harrison became the purchaser thereof at the price of $5,000 cash. And it further recites, that the said Gillespie, by and with the consent and under an agreement with the said Joseph Harrison, sold

the same to A. F. Hendricks, &c. And there is a deed from Joseph Harrison and wife in the record, bearing date December 12, 1870, granting and releasing all their right and title to the same lands to the widow and heirs of A. F. Hendricks, in which the recitals are substantially the same as in the deed aforesaid. Do those deeds invest a clear and unquestionable title in the widow and heirs of said Hendricks to the lands conveyed by them? The said Gillespie and Joseph Harrison would be estopped to deny the title of John C. Harrison. And it may be conceded
199 that they invest *in the appellants whatever right and title John C. Harrison had to them. But we have seen that, for several of the tracts embraced in the deed of December 1860, no title has ever been conveyed, as shown by this record, either to John C. Harrison or Gillespie. We have seen also, that when Gillespie executed his deed of 1860 to Hendricks, he could only trace his title back for ten years to Joseph Barbareux to the fifteen hundred acre tract; and there was not, and is not now, a particle of evidence in the record to show that said Barbareux had any manner of title to the same. The deed recited that it was part of a tract of fifty-two hundred acres, patented to Henry Banks in 1795, but does not, even by way of recital, show how Barbareux became entitled thereto. And it is very evident, from the survey in the cause, that a part, if not the whole, of the Chapman and Perry tract is covered by said Banks' older patent.

It also appears that the widow of John C. Harrison was entitled to dower in all these lands, which the said Gillespie and Joseph Harrison, by the deeds aforesaid, are estopped to deny. It is true there is a deed from the widow of John C. Harrison and her trustee, bearing date November 23, 1870, granting and releasing to Thomas H. Gillespie her right of dower, which would enure to the benefit of the purchaser from him. But previous to the execution of said deed, in January 1869, she had executed a deed of marriage settlement, whereby her intended husband, with whom she afterwards intermarried, and three of his children, became invested with important rights and interest in her dower estate, which are not divested by her said deed to Gillespie, they not being parties thereto, and which remain as an incumbrance upon said lands. The record shows further, that prior to said
200 deed of *trust from John C. Harrison to Gillespie, which was admitted to record on the 29th of August, 1859, there were numerous unsatisfied judgments against the said Harrison, amounting, principal, interest and costs, to $18,000 or $19,000. At least, there is nothing in the record to show that they have ever been satisfied, or ceased to be a lien and an incumbrance upon the whole of said lands. These matters of doubt, as to the title and evidences of incumbrance, existed at the date of the deed of December 1860, and presented serious obstacles to specific performance, down to the date of the decree. To the argument, that it is improbable that these outstanding claims will ever be enforced, I reply in the language of Lord Chancellor Sugden: "If any person has an interest in, or a claim upon the estate, which he may enforce, a purchaser cannot be compelled to take the estate, however improbable it may be that the right will be enforced." 1 Sugd. Vend., top, p. 590, chap. 10, § 3, art. 24.

There are other serious objections to the enforcement of specific performance in this case, which also operated at the date of the deed of December 1860: the uncertainty as to what lands were sold; the great deficiency in the quantity supposed as represented by the vendor; the great disproportion in the price agreed to be paid, and the value of the lands supposed to be conveyed. As was said in Blessing's adm'r v. Beatty, 1 Ror. R. 187, 303, "In the absence of all direct evidence, the safest general rule is that an estimate of the quantity by the parties, whether in a contract executed or executory, ought to be taken prima facie to have influenced the price; for quantity is usually an important element in the agreement, and can hardly be supposed to have been disregarded by the parties or to
201 have been unmeaningly stated by *them in a solemn contract." And the question of compensation usually arises, not in sales by the acre, but for a gross sum. And in the latter cases the first inquiry is whether the parties made a mistaken estimate of the quantity, which influenced the price; second, whether they waived the right to compensation by an agreement of hazard. And the courts have a strong leaning against the inference of a contract of hazard; a construction which has in several cases been expressly declared one that ought not to be favored. Hundley v. Lyons, 5 Munf. 342; Keyton's ex'ors v. Brawford's ex'ors, 5 Leigh 391. Hendricks is represented to have been a man of good judgment; and it is not an unreasonable inference from the facts in the record, that the impression was made on his mind that he was getting nearly a third more land than was afterwards conveyed to him. The price he agreed to pay for it tends strongly to confirm this inference. According to Gillespie's account, it had sold in open market, at public auction. for $5,000 in cash to Joseph Harrison, but a few months before Gillespie's sale to him at the price of $22,600. And in the deed of trust from John C. Harrison to Gillespie, under which said sale to Joseph Harrison was made, the quantity was represented to be two thousand acres. In the sale a few months after by the same Gillespie to Hendricks it was estimated to be from twenty-five hundred to three thousand acres, besides the five hundred acre entry, which it was intimated did not embrace all the vacant land, and that was to be secured for said Hendricks also.

I am of opinion therefore, upon the whole case, to reverse the decree of the Circuit court with costs, and to remand the cause

with instructions that the appellants, if they are still in possession, should be
202 required, *as was held in the case of Bryan v. Lofftus, to deliver up the land to Gillespie, and to account for the rents and profits during the time they and their ancestor held it, and to release all their rights under the contract between Thomas H. Gillespie and A. F. Hendricks, and the deeds in the record exhibited. But the administrator of A. F. Hendricks is entitled to a return of all the purchase money paid by his intestate in his lifetime (estimating the payment made in the bond of John C. Harrison for $4,600 at its value) and by himself, as his administrator, since his death, with interest from the time the same was paid; and also to have the value of any permanent improvements his intestate or heirs may have made, set off against the rents and profits so as not to exceed the amount; which matters should be referred to a commissioner for an account. And if upon the return of the commissioner's report it should appear that there was a balance of rents and profits due from the intestate, his administrator should be decreed to pay it, or if from the heirs, they should be decreed to pay it; and any balance in favor of the administrator should be decreed to him. And if there should be no sufficient personal estate of Gillespie out of which it could be made, the land in question should be subject to its payment.

The other judges concurred in the opinion of Anderson, J.

Decree reversed.

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203 *Ewart v. Saunders.

June Term, 1874, Wytheville.

I. **Confederate Currency—Authority to Agent.**—An authority by the plaintiff in a judgment to an agent in December 1861, to receive from the debtor the principal and interest of the judgment, and remit the costs, did not authorize the agent to receive the payment in Confederate money on the 10th of February 1863.

II. In a suit in equity to subject land to satisfy a judgment, the bill states a valuation of the land, and that the judgment could not be satisfied from the rents and profits in five years. The answer says nothing on the subject, and no application is made for an enquiry: but the court in its decree expressing the opinion that the judgment could not be satisfied out of the rents and profits in five years, appointed a commissoner to sell the land —HELD:

1. **Judicial Sales—Enquiring into Rents and Profits.***—As the statute prescribes no particular mode by which it shall be made to appear that the rents and profits will not pay the judgment in five years, if none of the parties ask for such an enquiry, there may, in a proper case, be a decree for the sale of the land without it.

2. **Same—Same—Effect Where Not Made.**—Where no application for such an enquiry is made, and the decree appealed from is interlocutory, the appellate court will not reverse the decree for the failure to direct the enquiry; but will amend it, allowing the defendant to have the enquiry if he chooses, and so amended will affirm it.

This was a suit in equity in the County court of Pulaski county, brought in June 1871 by S. D. Saunders, to subject certain real estate in said county, to satisfy a judgment which he had recovered in that court against John S. Ewart. The bill, after setting out the judgment, which was $450, with interest from April 1st, 1856, and costs, subject to two credits, amounting to $151.06, stated that the defendant was a non-resident of the state, and had no personal
204 property *here out of which the plaintiff could make his judgment; but he owned two tracts of land in the county, one of them containing eleven hundred and seventy-five acres, and valued at two dollars per acre, and the other containing fifty acres, and valued at four dollars per acre. That the rents and profits of the land would not in five years pay off the judgment, and that a sale of the two tracts was necessary. And making Ewart a defendant, he prayed that the land might be sold, and his judgment paid, and for general relief.

Ewart answered the bill, and admitted the judgment, his non-residence in the state and ownership of the land mentioned in the bill; but he insisted that he had paid off the judgment, except the costs, to Lynch A. Currin, the agent of the plaintiff, and that the plaintiff had agreed to remit the costs.

The only question in the County court was as to the payment by Ewart of the judgment. Upon that question the facts are stated by Judge Bouldin in his opinion.

The cause came on to be heard on the 9th of March, 1872, when the court held that the judgment had not been paid, and that it could not be satisfied out of the rents and profits of the land in five years, and made a decree, that unless the defendant, or some one for him, should, within twenty days from the date of the decree, pay said judgment, a commissioner named, should sell the land in the manner and upon the terms stated in the decree, and make report to the court.

From this decree, Ewart obtained an appeal to the Circuit court of Pulaski; and the case was afterwards removed to the Circuit court of Montgomery county; and coming on to be heard on the 19th of
205 October, *1872, the decree of the County court of Pulaski was affirmed. Ewart then applied to a judge of this court for an appeal; which was allowed.

J. A. Walker, for the appellant.

Terry & Pierce, for the appellee.

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*Judicial Sales—Inquiring into Rents and Profits.—See Horton v. Bond, 28 Gratt. 815, and *note*; Brengle v. Richardson, 78 Va. 411, citing the principal case; McClung v. Beirne, 10 Leigh 394; Manns v. Flinn, 10 Leigh 97. 'See also, Etter v. Scott, 90 Va. 762, 19 S. E. Rep. 776; Price v. Thrash, 30 Gratt. 515, and *note*; Barr v. White, 30 Gratt. 581, and *note*.

BOULDIN, J. delivered the opinion of the court.

The first error assigned in this case is, that the court below erred in overruling the defense of payment by the appellant to Currin, as agent of the appellee.

There is no doubt that Currin was duly authorized in writing by the appellee, in the month of December 1861, to receive of the appellant the amount of the judgment in the proceedings mentioned, abating costs. The judgment, however, was for an ante-war or specie debt; and at the time the authority was given to Cursin to receive it, we are at liberty to notice judicially, as an historical fact, that the common currency of the country was at scarcely an appreciable discount, so inconsiderable in fact that the date of the transaction was not embraced within the period included by the act for the adjustment of Confederate liabilities, which did not commence until the 1st of January, 1862. We are bound then to construe the authority given to Currin, as authorizing him to receive money only, or, at the most, the then existing currency. We think, furthermore, that prompt payment is necessarily to be implied from the nature of the authority given to Currin, from the circumstances under which it was given, and from the terms of the authority itself, by which the agent was authorized to abate the costs of the suit on payment to him of the debt and interest. It will be observed that the offer to pay the amount of 206 the *judgment, on abatement of the costs, came from the appellant himself through Mr. Currin, the clerk of the court; and is as follows:

"Newbern, December 10th, 1861.

Dear Sir:—I am instructed by Mr. John S. Ewart to say to you, that if you will pay the costs of the judgment obtained by yourself against him in this county, he will pay the amount into this office," &c., &c.

This proposition is in the nature of an offer to compromise, and evidently imports an offer of present payment, in consideration of the abatement of costs. It was accepted by Saunders, by immediately sending to Currin authority in writing to receive from Ewart the amount of principal and interest, abating costs. The authority was given, as we have seen, in December 1861, immediately after the receipt by Saunders of Currin's letter of December the 10th, to which it was a response. Such authority, thus given, was not, we think, a general authority to Currin to collect a debt due by Ewart to Saunders, to be exercised at any time, however remote, and to receive any currency, however depreciated and worthless it might be; but it was a specific agency or an authority, pro hac vice, to receive an offered payment of an ante-war debt, in money or a sound currency; the payment to be made at once, in consideration of an abatement of costs. Prompt payment was, we think, of the very essence of the arrangement; and it would be alike unreasonable and unjust to construe such special and evidently limited authority as empowering the agent (as was done by him in this case) to let the matter slumber for two years, and then to receive an ante-war debt, 207 *due in gold or legal tender, in the greatly depreciated currency of that day. His authority so to do was promptly repudiated by the appellee as soon as he heard of the transaction; and in this he was sustained by the Circuit court.

We think there was no error in this ruling of that court.

It will be seen, from what is said above, that we have rested the decision of this branch of the case on the special and limited authority of the agent; such being the case before us. But it may not be improper for us to say that had the power to collect been much more general and unlimited it would not, except under special and peculiar circumstances, have authorized the agent to collect such a debt in the greatly depreciated currency received in this case. Ward v. Smith, 7 Wall. U. S. R. 447; Alley v. Rogers, 19 Gratt. 366.

The next and only other error assigned is that a sale of appellant's land to satisfy the appellee's judgment against him was decreed by the court without first ascertaining by an enquiry through a commissioner of the court, or otherwise, that the rents and profits of the land would not satisfy the judgment in five years.

The statute gives to a court of equity the power to enforce the lien of a judgment, and provides that "if it appear to such court, that the rents and profits of the real estate subject to the lien will not satisfy the judgment in five years, the court may decree the said estate or any part thereof to be sold," &c., &c.

It will be observed that the statute prescribes no particular mode by which it shall be made to appear that the rents and profits will not pay the judgment in five years. When there is doubt about the fact, or an inquiry is demanded by either of the 208 parties, the *court will generally direct one of its commissioners to ascertain and report the annual rents and profits of the land. But this is not a necessity in every case. If none of the parties ask such an inquiry there may, in a proper case, be a decree for the sale of the property without it. McClung v. Beirne, 10 Leigh 305; Manns v. Flinn's adm'r, 10 Id. 93.

In the latter case, which occurred prior to the existing statute, and when the debtor had a right to throw the creditor on the rents and profits of the real estate chargeable with the debt, if the same could thereby be discharged within a reasonable time, it does not seem that the fact that it could not be so discharged was either alleged in the bill or in any manner proved in the cause. That matter was not litigated nor brought in question except in this court, where the objection was taken for the first time to a decree for the sale of the land without ascertaining that the debt could not be discharged within a reasonable time out of the rents and profits thereof. The objection

was overruled and the decree affirmed. On this question Judge Stanard said, p. 100: "It seems from the record in this case, that the whole controversy in the court below related to the existence of the claim and the liability of the lands devised to be charged with it; there was no controversy about the manner of raising the money out of the lands." And on p. 109 he said: "It is plain that there was no controversy between the parties as to the manner of raising the money; that the decree being interlocutory, the appellants had full opportunity to apply for a modification of it before the sale could take place under it if they preferred a decree so modified to the one which was rendered; that it is nowise apparent that they would have preferred, or will now prefer, such a modification *of the decree; and that if they have such preference this court may give them the benefit of it without reversing the decree." The other judges concurred, and the decree was affirmed with costs, but so modified as to allow the appellants the privilege of an account of rents and profits if they should so elect.

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The principle thus settled was carried even further in the case of McClung v. Beirne, ubi supra. Judge Tucker, with whom on this point all the judges concurred, said, p. 405, "The next error assigned is the failure to ascertain whether the rents and profits would not pay the debt in a reasonable time. To this it may be answered—First, That the defendant not having asked the inquiry may be presumed to have waived it. Manns v. Flinn's adm'or, reported ante, p. 93," &c., &c.

These principles apply a fortiori to the case before us, in which the quantity, situation and value per acre of the land sought to be charged is distinctly alleged, and it is directly charged that the rents and profits thereof will not discharge the judgment in five years. The defendant in the court below admits in his answer, that he owns the real estate mentioned in the bill; does not controvert the allegation that the rents and profits of the land would not satisfy the judgment in five years, and asks no inquiry into that matter. The only matter of controversy was whether the debt had been paid or not; and the court being of opinion that it was unpaid—was a lien on the lands in the bill mentioned," and "also that the rents and profits of said real estate will not pay said judgment within five years"—decreed a sale of the land. We think there is no error in this decree; and we reach this conclusion the more readily, because here, as in the case of Manns v. Flinn's adm'or, the decree is interlocutory merely; and *if there be doubt about the rental value of the lands, there will be opportunity, on a proper showing in the court below, to make the necessary enquiry now; and the execution of the decree may be suspended for that purpose. And if desired by the appellant's counsel here, the decree, as in the case of Manns v. Flinn's adm'or, will be so modified as to require the Circuit court to make the proper enquiries before the execution of the order of sale; and, thus modified, it must be affirmed with costs.*

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We are of opinion, on the whole case, that there is no error in the decree of the Circuit court, and that the same be affirmed with costs, &c.

Decree affirmed.

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211 ***Shannon v. McMullin.**

June Term, 1874, Wytheville.

1. **Liability of Surety—Effect of New Contract by Principal.†**—It is settled law that a surety is entitled to be relieved from his liability to pay the debt of his principal, either *in toto* or *pro tanto*, as the case may be, if the creditor, without the consent of the surety, make a new contract with the principal, founded on valuable consideration, to postpone the day of payment of the debt for a certain period, however short, beyond the day on which it was to be paid by the terms of the contract on which the surety was liable; or if the creditor, without the consent of the surety, release any lien which he may have on any property of the principal for the security of the debt. In the first case, the relief of the surety is *in toto*, without regard to the extent of the damage actually sustained by the surety by reason of such new contract, or whether any such damage was sustained or not; and in the latter case, being *in toto* or *pro tanto*, according as the value of the property released was as much as, or less than, the amount of the debt.
2. For the liabilities and duties of a surety, and the right of the creditor to enforce his debt against both principal and surety, or either, see opinion of MONCURE, P.
3. **Return of Sheriff—Effect as Evidence.‡**—A sheriff endorses a return on an execution in his hands:

**Note by the Judge.*—The appellant's counsel being present in court when this opinion was read, waived any further inquiry as to the rental value of the land.

†Liability of Surety—Effect of New Contract by Principal.—In Knight v. Charter, 22 W. Va. 429, the court says: "It is well settled that mere indulgence granted to the principal debtor will not release the surety. Shannon v. McMullin, 25 Gratt. 211; Humphrey v. Hitt, 6 Gratt. 509; Walker v. Com., 18 Gratt. 13; Sneed v. White, 3 J. J. Mar. 525; Alcock v. Hill, 4 Leigh 622; McKenny v. Waller, 1 Leigh 434. But the authorities are equally clear that if the creditor, upon sufficient consideration, enter into a valid and binding contract or agreement with the principal debtor whereby without the consent of the surety he 'ties his hands' so that he has suspended his right or disabled himself, for any definite period of time, however short, from proceeding to enforce the performance of the original contract, the surety will, in a court of equity, be thereby discharged. Norris v. Crummey, 2 Rand. 323; Hunter v. Jett, 4 Rand. 104; Sayre v. King, 17 W. Va. 562; Renick v. Ludington, 14 W. Va. 367." See also, McKenzie v. Wiley, 27 W. Va. 661, citing the principal case, and Bullitt v. Winstons, 1 Munf. 269; Knight v. Charter, 22 W. Va. 422; Glenn v. Morgan, 23 W. Va. 467; Baird v. Rice, 1 Call 18; Ward v. Johnson, 6 Munf. 6. See further, First Nat. Bank v. Parsons, 45 W. Va. 688, 32 S. E. Rep. 271.

‡Return of Sheriff—Effect as Evidence.—The rule laid down in the third and fourth headnotes of the

Levied on the following property, together with other executions, to wit: one negro man, George, &c., naming a number of negroes, horses, &c. V S M. He afterwards endorses on the execution: This execution held up, and property not sold, by direction of F M. V S M, S. S. C. F M was the creditor entitled to the money. This additional return is not even *prima facie* evidence against F M of the fact it states.

4. **Same—Same—Where Extra Official.**—Where process is returnable process, if the officer make return of the performance of acts beyond his duty under such process, such return will be invalid as to such parts, and will not be evidence; though the addition of such parts will not render the whole return void, but it will be good to the extent he was authorized to make return.

212 *5. **Testimony of Sheriff.**—Upon a bill by surety against the creditor, to be relieved, on the ground that the creditor had authorized the sheriff to release the property levied on under the execution, the creditor answers and denies explicitly the allegations of the bill in this respect. The sheriff is a doubtful witness to sustain the bill, and though he testifies that the creditor directed him not to sell, he not being sustained by strong corroborating circumstances, relief should be denied.

The case is sufficiently stated by Judge Moncure in his opinion.

J. W. Sheffey, for the appellant.

There was no counsel for the appellee.

MONCURE, P. It is well settled that a surety is entitled to be relieved from his liability to pay the debt of his principal, either in toto or pro tanto as the case may be, if the creditor, without the consent of the surety, make a new contract with the principal, founded on valuable consideration, to postpone the day for the payment of the debt for a certain period (however short) beyond the day on which it was to be paid by the terms of the contract on which the surety was liable; or if the creditor, without the consent of the surety, release any lien which he may have on any property of the principal for the security of the debt. The extent of the relief to which the surety is entitled in the former case being in toto, without regard to the extent of damage actually sustained by the surety by reason of such new contract, or whether any such damage was sustained at all or not; and in the latter case being in toto or pro tanto, according as the value of the property released was as much as or less than the amount of the debt.

The principle on which rests the right of the surety to relief as aforesaid is, that his rights cannot without his consent be impaired by the act of the creditor; 213 *that he has a right, at any time while he is surety, to pay the debt, or by a bill quia timet to compel the principal to pay it; and to be subrogated to the place of the creditor in regard to any liens the latter may have on any property of the principal for the security of the debt.

The appellant, Shannon, who was the surety of Thomas and Williams in a forthcoming bond on which judgment was recovered in the County court of Smyth, and on which judgment an execution was issued and levied on the property of the principal debtor Thomas, and was more than nine years thereafter renewed, obtained an injunction to the said renewed execution, so far as he was concerned, on a bill filed by him in the Circuit court of said county, in which he complained that the appellee, McMullin, who was the only defendant to the bill, for whose benefit the said execution was endorsed, and who was entitled to the use of the same, had directed the sheriff, who had levied the said execution, to hold it up, and not to sell the property levied on; that the said execution was accordingly held up, and the said property not sold, by direction of said McMullin without the authority or consent of the complainant. In the language of the bill: "Nine years have elapsed; the affairs of said Thomas have become extremely embarrassed, and nothing can be made upon execution against him. His property levied upon is all gone, or put beyond the reach of execution by emancipation, sale, wear and tear, and deeds of trust, &c. He has held and disposed of since said levy large amounts of property; has handled and paid large sums of money, and has carried on a very large business." And the complainant claimed to be discharged from liability as surety on said judgment and execution by the interference of 214 *said McMullin. He further charged, that by the direction of said McMullin, a new execution had, on the 18th day of August, 1869, been issued on the said judgment, was then in the hands of the sheriff of said county, and that complainant had reason to know that the sheriff would proceed to levy the same upon the property of complainant unless restrained by injunction. He also claimed that other credits, which are enumerated in the bill, in addition to a credit of $500, endorsed on said

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principal case, in regard to the effect as evidence of the sheriff's return in respect to facts upon which it was not his duty to make return, is affirmed in Alexander v. Byrd, 85 Va. 699, 8 S. E. Rep. 577.

Stay Law.—In Saunders v. Prunty, 89 Va. 924, 17 S. E. Rep. 231, the court says: "In the case of Shannon v. McMullin, 25 Gratt. 211, the return on the execution was almost identical with the return in this case; and it was said by the court in that case that the passage of the stay laws sufficiently accounted for the delay in that case." See page 228 of the principal case.

Rights of the Surety—Subrogation.—In Coffman v. Moore, 29 Gratt. 244, the court says: "It is also held that the surety, as against his principal, is entitled to all the securities which the latter has given the creditor for the purpose of reimbursing him, if he has paid the creditor, and if he has not, for the purpose of having it paid for his own protection." Citing the principal case, and Ward v. Johnson, 6 Munf. 6; McKenny v. Waller, 1 Leigh 434; Alcock v. Hill, 4 Leigh 622; Humphrey v. Hitt, 6 Gratt. 523; Harnsbarger v. Kinney, 13 Gratt. 511; Harrison v. Price, 25 Gratt. 553.

execution, were properly applicable thereto. And he prayed that McMullin might be made defendant to the bill, and be enjoined from all further proceedings on said execution against the complainant or his property; that the complainant might be discharged from all liability as surety in said forthcoming bond and upon the judgment and execution thereon, and for general relief.

Among the exhibits filed with the bill was a copy of the original execution on the forthcoming bond and of the endorsements thereon. The execution bore date on the 23d day of June, 1860, and was returnable to the next August court of said county, being the Tuesday after the third Monday in that month. Among the endorsements on the execution the following appear, and in the following order:

"Levied on the following property, together with other executions, to wit: one negro man George, Fred, Campbell, Stephen and David; one woman Ellen and Polly; one boy James, Hiram and King; one girl Mary, Deemy and Ann; 10 horses, 6 wagons, one carriage, one buggy, 30 head of cattle, one steam saw mill and fixtures, one reaper and thresher, August 20th, 1860.

V. S. Morgan."

215 *"Received of V. S. Morgan on the within execution five hundred dollars.

F. McMullin.

Jan'y 22nd, 1862."

"The above payment of $500, Jan'y 22nd, 1862, was paid by J. H. Gilmore for A. Thomas, being all that Thomas has paid on this execution.

V. S. M."

"This execution held up and property not sold, by direction of F. McMullin.

V. S. Morgan, S. S. C."

It thus appears that the appellant claims no relief upon the ground of any new contract made by the creditor with the principal debtors whereby the creditor's right to enforce the payment of the debt by the principal was suspended for a single instant; but he claims relief only upon the ground that by the levy of the execution, the creditor acquired a specific lien on property of the principals sufficient in value for the payment of the debt, and that this lien was, in effect, released by the creditor without the consent of the surety.

The ground relied on by the surety for his discharge from liability for the debt is amply sufficient for the purpose if it be sustained by the facts, and the only question is: Do the facts of the case sustain it?

Without stopping to inquire whether the facts as set out in the bill are sufficient to sustain the ground relied on for the discharge of the surety, I will proceed to inquire whether, upon the whole case, he is entitled to such discharge. We have seen what is stated in the bill; let us now take a brief view of the answer and the proofs.

The creditor, the appellee McMullin,
216 in his answer, *admits that the execution was endorsed for his benefit on the 3d of July 1860, by James H. Gilmore, for whose use the judgment had been obtained and the execution issued; but, he says, he had no knowledge of the existence of such an execution until the 25th of August thereafter, when, calling on said Gilmore for the payment of money due from him to respondent, said Gilmore, to meet the just demands of respondent, gave him an order on V. S. Morgan, the sheriff of Smyth county, for the amount of said execution; which order is filed with the answer as part thereof. This order, respondent asserts, gave him the first information of said execution, and he says he knew nothing of the endorsement thereon for his benefit until since the filing of the bill. The return day of the execution, as well as the levy of the same, were both prior to the 25th day of August 1860, the date of the order from Gilmore to respondent. The return of "levied," &c., dated 20th day of August 1860, and signed by the sheriff, was a complete return, and by it the said sheriff became bound as sheriff to account to respondent for the full amount of said execution. The pretended supplemental or additional return ("This execution held up and property not sold, by direction of F. McMullin,"), being unauthorized by law, is therefore not binding on respondent in any sense. He then proceeds in his answer, emphatically and repeatedly to deny that he gave any such direction to the sheriff, to hold up the execution and not to sell the property, as stated in said pretended supplemental or additional return. He says, in different parts of his answer: "This respondent here now denies that he ever, at any time, gave directions to the sheriff, V. S. Morgan, to hold up the execution and not to sell the property levied on."

217 "So far from *ever having directed the sheriff to hold up said execution, he, some two or three times after the 25th day of August 1860, urged said Major, as sheriff of Smyth county, to pay him the amount of said execution, and informed him repeatedly that he held him responsible as sheriff for the amount of the same," and threatened to move against him and his sureties for the same." Again, "Your respondent positively denies giving any such instructions as are mentioned in what is styled in complainant's bill, 'the addition to said return of levied.'" And again, "Respondent denies any interference with the execution on which the sheriff made the levy as aforesaid, except to urge the sheriff to make the same after your respondent became entitled thereto." He also makes the following averments in his answer: "It is also true that a stay law has prevented the renewal of execution until the date of the execution now enjoined, which issued by reason of non-payment of interest provided by said stay law. This respondent, however, since the 25th day of August 1860, has several times admonished the complainant, Charles J. Shannon, that the complainant, being bound with Abijah Thomas for the amount of said execution, ought, for his protection, to secure from said

Thomas an indemnity against it; and your respondent positively avers that at these instances with complainant he never disputed his liability to your respondent, nor was your respondent ever informed of any claim of discharge from such liability until the filing of complainant's bill." He then admits that besides the credit of five hundred dollars endorsed on the execution, the defendants therein are entitled to another credit of five hundred dollars and the two years' interest mentioned in the bill, but denies that he has received anything
218 else on *account of said execution (or the debt for which it was issued).

Now taking the case upon the bill and answer, together, with the general replication which was filed to the answer, it is very clear that the complainant is not entitled to the relief that he claims. The only allegations of the bill on which the prayer for relief is founded, are expressly, positively and repeatedly denied by the answer. The pretended additional return is not conclusive, nor even prima facie evidence against the respondent. The cases referred to in Crocker on Sheriffs, § 47, fully sustain this proposition. "Where the process is returnable process," says that writer, "if the officer make return of the performance of acts beyond his duty under such process, such return will be invalid as to such parts, and will not be evidence, though the addition of such parts will not render the whole return void, but it will be good to the extent he was authorized to make return. Though such return will be invalid as to others, it may be used as an admission against the sheriff in a proper case. Thus the sheriff cannot make his return evidence that he has paid money levied under an execution to the plaintiff, yet such return may be used against him in an action for not paying over the money. (Cowen and Hill's notes, 1083.) Nor can the officer's return be evidence of any fact which would go to excuse him for not having performed his duty, except as has been seen, such facts be official acts done in the ordinary and usual course of proceedings under such process. Thus a return to an action that goods levied on had been casually destroyed by fire after the levy, will not be competent evidence for the sheriff in an action against him for not collecting the moneys on such execution. (5 Denio R. 586, Browning v. Harford.) When
219 such *fact is a good defense, as it will be where the sheriff has taken the property into his possession, and it is destroyed by fire, or is otherwise lost, without fault on his part, it must be proved in the usual mode." In the case under consideration the sheriff seems to have endorsed his return of "levied," &c., on the execution, while it was in force. It bears date August 20, 1860, and is responsive to the mandate of the writ. When he made what is called his additional return does not appear. It bears no date, and may have been made long after the return day of the writ, and while the execution creditor was pressing him for the money, and threatening to make him liable for it. It does not appear when he returned the execution to the office from whence it issued. He may have retained it in his hands until the bill in this case was filed. It would be strange if the sheriff could fabricate in his favor such evidence as he pleased, by a mere endorsement on an execution or other paper which might happen to be in his possession at the time. Certainly he cannot do so.

Then let us look at the evidence in the cause and see whether that varies the case, and if so, which way, and to what extent.

Two witnesses were examined in behalf of the complainant Shannon, viz: V. S. Morgan and J. H. Gilmore. The substance of their testimony, so far as material to be stated, is as follows:

V. S. Morgan, in answer to a question of complainant in regard to the original execution, said: "The execution came into my hands as sheriff of Smyth county in July 1860. I levied on some property, together with other executions subject to older levies, and Mr. Thomas was hard run and trying to get indulgence upon his debts, and
220 told me if Governor McMullin *could get a part of the money upon this debt he wouldn't press for the balance. I then saw Governor McMullin myself on the subject, and he told me that if he could get a thousand dollars I could hold up the execution, as he did not wish to press Thomas; and I paid him five hundred of the thousand dollars of my own money, for which I took his assignment or receipt on a separate piece of paper, I don't know which, and Mr. James H. Gilmore paid five hundred dollars more for Captain Thomas to me, and I paid it to McMullin; and it was the understanding then between me and McMullin that I was not to press Thomas any further for the money until I was further notified by McMullin. He never gave me any further notice, but spoke frequently in my presence of his indulgence to Thomas on the execution."

J. H. Gilmore in answer to a question of complainant said: "On the 3d day of March, 1859, I purchased of E. A. Scott a note executed by Abijah Thomas and A. C. Williams to him for twenty-four hundred dollars. It was assigned to me, and suit was brought upon it, and judgment obtained at March court 1860. I see that I endorsed on the fi. fa., on the forthcoming bond in the case, that the execution was for the benefit of Fayette McMullin. The money with which I purchased the note was the money of Fayette McMullin, and this note was purchased by me according to an agreement between him and myself with regard to the purchase of paper, though I cannot say certainly that he knew of the purchase of this note until I gave him an order on the sheriff for the money of date August 25, 1860. I suppose I made the endorsement on the fi. fa. because I knew that the money would be really coming to Governor McMullin. I never gave the sheriff any instructions about the execution. I do not know

221 anything *about what directions were given him by Governor McMullin."

After making a statement in regard to the two payments of $500 each on account of the execution, not material to be here repeated, he further said: "I have an impression that Governor McMullin and some one else, perhaps Mr. Morgan, or perhaps Captain Thomas (I have a very indistinct recollection of the person who came with Governor McMullin), came to me on one court day, and one of them said that Governor McMullin was willing to give time on this debt against Captain Thomas, or was willing to hold it up, or words to that effect, if I was willing. I replied, that as the debt did not belong to me, I could not take any control of it. Nothing further was said between us that I recollect, and the parties walked away. This conversation must have taken place before the war, as I had no conversation with any one about fi. fa. that has been issued in this case.

Three witnesses were examined in behalf of the defendant McMullin, viz: A. Thomas, one of the principals in the execution, the defendant McMullin himself and J. H. Gilmore, who had been examined in behalf of the plaintiff. The substance of their testimony, so far as material, is as follows:

A. Thomas, in his examination-in-chief, after making a long statement, in answer to a question propounded to him by the defendant, in regard to $1,000, which he said he had sent to the sheriff Morgan to be applied to the payment of the debt due the defendant, but which the said Morgan applied to other claims which he said were in his hands against said Thomas, gave the following answers to the following questions:

Question by defendant. Did I not say if you would pay me $1,000, I would indulge you a reasonable length of time, if J. H. Gilmore was willing?

222 *Answer. I do not recollect the precise language used by you in regard to the indulgence.

Question by same. Did I, at any time, in your presence, direct Mr. Morgan to hold up the execution?

Answer. I have no recollection of ever hearing you give him any such instructions.

And then, in his cross-examination, besides other testimony not material to be stated, gave the following answers to the following questions:

First question by complainant's counsel. Why was not your property on which was levied said execution, sold to pay it?

Answer. I have no recollection why Morgan did not sell my property to pay said debt.

Question by same. Did you not have plenty of personal property at all times before the beginning of the war in 1861, out of which said debt could have been made?

Answer. I have no doubt but what I had property sufficient to pay off all the executions against me at the commencement of the war, and more than sufficient.

Question by same. Did you or not after the levy of said execution, pay to V. S. Morgan, or his deputies, large sums of money which were applied to the satisfaction of younger executions?

Answer. I cannot state as to the date of executions on which money was credited I paid to V. S. Morgan, or deputy. I did pay Morgan and his deputies considerable amounts of money after the levying of said execution. I paid a considerable amount that I cannot find where either of them has credited me, which I expected would be applied to debts in their hands.

Question by same. How much have you actually paid on the debt in controversy?

223 *Answer. I know I directed as much as $1,500 to be paid on said debt, and furnished funds to J. H. Gilmore and E. A. Scott to pay the amount.

F. McMullin, the defendant, made the following statement in his deposition: "In my answer to complainant's bill I omitted to state that I did say to W. A. Thomas that if he would send and pay to me $1,000, I would indulge him a reasonable length of time. I went to Mr. J. H. Gilmore, I think with Mr. V. S. Morgan, and stated to him that if he, Thomas, would pay me $1,000 I would indulge him a reasonable length of time, if he, Mr. Gilmore, was willing; to which Mr. Gilmore replied that he would not interfere in the matter. I understood that Mr. Thomas had sent to E. A. Scott $1,000. I then called on Mr. Morgan for the money. He, Morgan, stated to me that he had other executions against said Thomas that must be paid, and he only gave me $500, which he, Morgan, stated, I think, afterwards, was his own money. I had received, prior to this time, $500, and if Mr. Thomas had paid me the $1,000, I would have given him indulgence, provided Mr. Gilmore would have consented; but Gilmore declined to extend the indulgence, and Capt. Thomas and Morgan failing to pay the $1,000, I let the matter rest; and the stay law was enacted so that I could not enforce the collection. I will repeat what I stated in my answer, that I deny, distinctly and emphatically, that I gave any orders to Mr. V. S. Morgan to hold up the execution and not sell the property. I could not have given the direction, for the reason that I did not get the order from Mr. Gilmore to Mr. Morgan for the money until the 25th August 1860, which was five days after the return of the property as stated in the so-called return of Morgan."

224 *J. H. Gilmore's second deposition seems not to be material.

On the 19th day of March, 1873, the cause came on to be heard upon the bill, answer and replication thereto, depositions, &c., when the court being of opinion that the complainant was entitled to the following credits on the debt in controversy, to wit: $500 of date the 22d December, 1860; $500 of date 22d January, 1862; and $194.80, amount of interest paid the day of , 1867; decreed that the injunction awarded in the case should be dissolved, and that the de-

fendant be no longer restrained from collecting by execution his debt aforesaid, after endorsing thereon the credits aforesaid, and recover his costs of the complainant. From that decree the complainant obtained this appeal.

The question upon the whole case which is now before us is, whether the appellant has made out his defense, that the execution was held up, and the property levied on was not sold by the sheriff by direction of the appellee, McMullin, the execution creditor, without the authority or consent of the appellant, Shannon, the surety.

The appellant, who has no personal knowledge whatever on the subject, so alleges in his bill. The appellee, who has full personal knowledge on the subject, directly and emphatically denies in his answer the truth of the allegation. That denial is conclusive in favor of the appellee, unless it be overthrown by the evidence of at least two witnesses, or one with pregnant circumstances. Has it been thus overthrown? Is it disproved by the required amount of countervailing evidence?

The only evidence in the case which tends to sustain the allegation of the bill, 225 is the testimony of a man *who was deeply interested in sustaining it, to wit: the sheriff, Morgan, who professes to have made the levy, and who has certainly been guilty of great default, if he held up the execution and failed to sell the property without the direction of the execution creditor. The testimony of such a witness, testifying under such circumstances, can have but little weight. He was testifying not only as to facts in which he had the deepest interest, but from vague recollection of what must have transpired, if at all, ten years before he gave his testimony, and without the aid of a scratch of a pen to refresh his memory, unless it be the additional return, so-called, as to the time of endorsing which there is no evidence. We can readily see how easy it would be for such a witness, giving testimony under such circumstances, to imagine that he had been directed by the execution creditor to hold up the execution, and not to sell the property, when the creditor, at most, only refrained from active proceedings to coerce the payment of the debt, either by the debtors or by the sheriff himself on account of his default. It would require strong corroborating circumstances in support of the testimony of such a witness to overthrow the denial of an answer. The positive testimony of a most disinterested and truthful witness, would be insufficient, of itself, to have that effect. There are, in this case, no corroborating circumstances, tending to support the testimony of the sheriff, but the circumstances of the case rather tend to disprove it. If the fact were as he testifies it to have been, why did he not, in so important a matter, procure the written authority of McMullin to hold up the execution and not to sell the property until further orders. One line, signed by McMullin, would have answered the purpose, and 226 *left no room for dispute or controversy. That line might, most appropriately, have been endorsed on the execution. But written anywhere, it would have answered the purpose. It was written nowhere. That it was written nowhere, and that the sheriff preferred to rely for his defense upon his loose recollection of what transpired ten years before his testimony might have to be given, or upon his own unauthorized endorsements, made, nobody knows when, upon the execution, increases the innate weakness of such testimony.

Due diligence was used in the prosecution of the debt to judgment, execution, forthcoming bond, and judgment and execution thereon. And after the latter execution had, it seems, been levied, we find McMullin still pressing for the payment of the debt, and threatening to prosecute the sheriff for his default. His interest was to get his money as soon as he could; and it does not appear that he had any motive to interfere with the execution, at least unless he could secure a greater benefit to himself by such interference. He professed a willingness to indulge the debtors, without saying how long, if they would pay him one thousand dollars in cash, provided, however, that Mr. Gilmore, whom he considered ultimately liable for the debt, would consent to such indulgence. But Mr. Gilmore refused to consent, and the thousand dollars were not paid. That amount, it seems, was sent by one of the principal debtors, Thomas, to the sheriff to be paid to McMullin, but it was wholly applied to the payment of other claims which the sheriff professed to have against the said Thomas; the largest one of which was an execution which the said Thomas had before discharged; and to that extent at least, therefore, the money sent by him to the sheriff was, by the latter, misapplied.

227 *We can readily account for the long delay which has occurred in the prosecution of this claim by the creditor. The execution was levied, if at all, "together with other executions"; and the sheriff says in his deposition, that the property thus levied on was "subject to older levies, and Mr. Thomas was hard run, and trying to get indulgence upon his debts." There was, then, great complication and difficulty about this matter. Thomas may have been solvent, and he says he was; but evidently, his property was much encumbered. McMullin might, perhaps, have made his money at once, by having his execution levied, as he well might have done, on the property of the surety, Shannon, instead of the principal, Thomas. But he no doubt desired, if he could, to make the money of the principal; and probably thought that it would facilitate that object to get a thousand dollars of the money in cash, even if he had to give a little indulgence for the balance. But he was unwilling to make such an arrangement without the consent of Gilmore, who refused to consent. He would, no doubt, also have required the consent of the surety if Gilmore

had consented. But supposing such arrangement would have been for the benefit of the creditor, it would have been for the benefit of the surety also, who would, therefore, readily have agreed to it. The fact is, there is no reason to believe that the surety was not in favor of any indulgence which the creditor might choose to give for the payment of the debt. McMullin, in his answer, as we have already seen, says, that since the 25th day of August 1860, he "has several times admonished complainant Shannon that the complainant being bound with Abijah Thomas for the amount of said execution, ought, for his protection, to secure from said Thomas an indem-
228 nity against *it; and your respondent positively avers, that at these int stances with complainant he never disputed his liability to respondent, nor was respondent ever informed of any claim of discharge from such liability, until the filing of complainant's bill." If this allegation had not been true it would surely have been denied by the complainant. But he did not deny it, and gave no deposition in the case.

The war commenced shortly after the first payment of five hundred dollars was made on account of the execution, which was on the 22d of December, 1860, and nearly a year before the second payment of five hundred dollars was made on the same account, which was on the 22d of January, 1862. In the meantime, to wit, on the 30th of April, 1861, a stay law was passed by the convention, entitled "An ordinance to provide against the sacrifice of property, and to suspend proceedings in certain cases." After which time, and until recently before the execution was issued, which was injoined in this case, there was a continual succession of stay laws, which prevented the collection of debts by execution, and sufficiently accounts for the delay which has occurred in this case since the commencement of the war. Interest on this debt for two years of that period, has, it seems, been collected by the creditor.

It is not pretended that the sheriff yet has the property said to have been levied on in his possession, or any part of it, or that any of it has been wasted by him. It is not pretended, and it is not probable, that any of it was ever taken by the sheriff out of the hands of the principal debtor to whom it seems to have belonged. The principal debtor does not say in his deposition that he was ever deprived of an atom of the property for a single moment.
229 No doubt the *levy was made, if levy it could be called, by merely seeing the property; or, what is more likely, by its being merely named by the owner to the sheriff, to enable the latter to endorse a levy on the execution. Most of the property said to have been levied on consisted of slaves, which were emancipated by the effect of the war; and thus no doubt were released from the execution if they ever were subject to it; and the rest of the property included in the levy has no doubt long since been applied to prior executions, or otherwise disposed of by the owner. The appellant in his bill says, as we have seen, that the "property levied on is all gone, or put beyond the reach of execution by emancipation, sale, wear and tear, and deeds of trust," &c.

But whether the sheriff has incurred any liability or not in regard to the said execution, and if so, to whom and to what extent, are questions not involved in this case; but which will arise in any proceeding that may hereafter be had against him to fix and enforce such liability.

I have thus far referred to no authorities on the subject of the rights and liabilities of sureties in such cases, and will now refer only to two cases recently decided by this court, in which the whole subject is reviewed, and all the authorities which can have any bearing on this case are referred to. These two cases are, Humphrey v. Hitt, 6 Gratt. 509; and Walker, &c. v. The Commonwealth, 18 Gratt. 13, in both of which the court was unanimous. In the former Judge Baldwin delivered the opinion; and he lays down the law so clearly and so appropriately to this case, in regard to the rights, liabilities and duties of a surety, that I cannot do better than to borrow some of his language, and hope I may be excused for so doing. "It is per-
230 fectly *well settled, and has been very properly conceded in the argument," he said, "that a surety is not absolved by the want of diligence on the part of the creditor in regard to his demand against the principal debtor. A defense on the ground of mere laches would, indeed, be inconsistent with the relation of the parties. The obligation of a surety is not conditional, but absolute. His undertaking to pay is not in the event of the inability or unwillingness of the principal, but at all events, and under all circumstances, as much so as if he were himself the sole debtor. Such is the form of his obligation (unless specially qualified), whether separate or joint, and such its true intent and meaning; and it is founded upon a lawful and sufficient consideration, the credit given to the principal by his procurement. It is the duty of the surety, as well as the principal, to see to the payment of the money; and the forbearance of the creditor is a tacit indulgence given to both, in which the acquiescence of the one is equally significant with that of the other. Hence it is, that if the obligation be several, the creditor may pursue the surety only; that if it be merely joint, he may bring his action against the survivor, or the representative of the deceased, at his option, as if both were principals; that after a several judgment against the principal, he need not sue out execution thereupon, but may sue and coerce payment from the surety; that upon a joint judgment against both, he may cause execution to be levied at his pleasure, upon the person or property of either; that he may pursue the surety personally, notwithstanding a collateral surety given by him or his principal." But without quoting more from this

opinion, I will refer to it, and the
231 opinion in the other of the *two cases just cited, as setting forth all the law which can have any material bearing on this case.

Upon the whole, I am of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

The other judges concurred in the opinion of Moncure, P.

Decree affirmed.

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232 ***Merewether v. Dowdy.**

June Term, 1874, Wytheville.

I. In December 1862 M sells to D a house and lot for $1,000. Nothing was said as to the kind of currency to be paid, but D paid in cash at the time $600, and gave his bond for the balance payable in twelve months. The property had been offered in 1860 for $800, and at the time of the sale Confederate treasury notes was the only currency. When the bond became due, or two or three days thereafter, D tendered the amount in that currency—HELD:

1. That the contract was made with reference to Confederate currency as the standard of value.
2. Though D tendered the money he is not thereby released from the payment of the debt.
3. **Confederate Contracts—Gold Value.***—No inflexible rule can be laid down as to whether the value of the property at the time of the contract, or the gold value of the purchase money at that date, should be adopted. Under the circumstances of this case the gold value of the debt at the date of the contract was properly applied.

This was a suit in equity in the Circuit court of Smyth county, brought by C. J. Merewether against H. Dowdy, to enforce a lien reserved for $400, part of the purchase money of a house and lot in the town of Marion, sold and conveyed by Merewether to Dowdy on the 3d of December, 1862. The bill states the sale of the house and lot at $1,000, and that $400 of the purchase money was to be paid twelve months after the 3d of December, 1862, for which Dowdy executed his bond.

Dowdy answered the bill. He says the contract was made by him with J. H.
233 Gilmore, the agent of the *plaintiff, and was made with reference to Confederate States treasury notes at the standard of value. That $600 was paid at the time in said currency. That Dowdy being in the army, Mrs. Dowdy went on the day the bond fell due to pay Mr. Gilmore the money, but he was not at home; and in two or three days thereafter she did tender it to Mr. Gilmore, and he refused to receive it. He therefore insists he is released from the payment of the debt.

The facts are referred to in the opinion of Judge Christian.

The cause came on to be heard on the 19th of September, 1873, when the court held that it was a contract in reference to Confederate States treasury notes as the standard of value, and that the debt was to be scaled. And holding that, under the circumstances of this case, the gold value of the purchase money at the time of the contract, rather than that of the value of the property sold, was the proper measure of recovery, stated the debt as of that time, and rendered a decree for the sum of $149.-33, with interest from the 3d of December, 1862; and unless payment was made within sixty days, then a special commissioner was appointed to sell the property, &c. From this decree Merewether applied to this court for an appeal; which was allowed.

Gilmore, for the appellant.

J. W. & J. P. Sheffey, for the appellee.

CHRISTIAN, J. delivered the opinion of the court.

There is no error in the decree of the Circuit court. In his petition the learned counsel for the appellant assigns for cause of error the following: "Whatever construction may be put upon the contract
234 of sale between *petitioner and said Dowdy, it was error in the Circuit court to scale the debt to its value in gold on the day when it fell due. If it was not a contract which according to the true understanding and agreement of the parties was to be fulfilled and performed in Confederate States treasury notes, then the court erred in applying the scale at all. If it was such contract then the court erred in scaling it to its gold value at the time it fell due, because it has been decided again and again by this court, that when the contract was the purchase price of property, then the measure of value is not gold, but the fair price of the property; and in this case it is proved that the property was worth on the day it was sold in good or par money from $900 to $1,000."

The learned counsel is mistaken in point of fact, in stating that the scale was applied on the day when the debt fell due. In looking to the decree it will be found that the scale was applied at the date of the contract. So that the only questions to be considered are, first, was the contract one which was to be fulfilled and performed in Confederate States treasury notes, or one which was entered into with reference to that currency as a standard of value? And if so, second, whether it was error in the court to adopt the gold value of the currency as the standard, instead of adopting the value of the property as the "most just measure of recovery."

The court is of opinion, that while the contract between the parties in this case, was not one which in terms "was to be fulfilled or performed in Confederate States treasury notes," yet it was a contract which was made and entered into with reference to that currency as a standard of value. At the time the contract was entered into

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***Confederate Contracts—Gold Value.**—See Compton v. Major, 30 Gratt. 180, citing the principal case; Myers v. Whitfield, 22 Gratt. 780; Stearns v. Mason, 24 Gratt. 484. See also, Jarrett v. Nickell, 9 W. Va. 358, and cases cited.

(December 1862), Confederate States
235 treasury *notes constituted almost, if not altogether, the sole circulating medium of the country. It is not pretended by the agent who sold the house and lot, the subject of the contract, that the payment was to be made in gold. He says nothing was said about the kind of currency in which the contract was solvable, that he regarded the sale as one for good or par money, and that it was worth the price stipulated to be paid, in a sound currency. The purchaser received as the cash payment nearly two-thirds of the purchase money in Confederate currency, and no doubt would have received the whole if it had been tendered at that time. It is also proved that the property was offered for $800 in cash in 1860, and that no purchaser could be found at that price. These facts are pregnant to show that the contract was one which was entered into with reference to Confederate treasury notes as a standard of value, and that neither party contemplated a sale for gold or United States currency.

The remaining question, therefore, (the character of the contract being determined,) is whether it was error in the court below to scale the debt to its value in gold, or whether in this case it was the "most just measure of recovery" to take the value of the property as the standard of value. There is no fixed rule on this subject, nor can one be laid down by which every case is to be measured. Each case must rest on its own peculiar facts.

In Pharis v. Dice, 21 Gratt. 403, which was the first case decided construing the adjustment acts, this court held that "where the consideration of the contract is the borrowing and lending of Confederate currency, then the only mode of ascertaining its value is the reduction according to the
236 scale of depreciation of the *nominal value to its real value in gold. But generally where the consideration of the contract is property sold and delivered, rented or hired, then the best mode of adjustment, and the best mode of ascertaining the value of the Confederate currency agreed to be paid, is the fair value of the property which that amount of Confederate currency bought, rented or hired at the time the contract was entered into." This is, indeed, the general rule, and has been acted upon by this court in a number of cases. But, like every general rule, it has its exceptions, which have also been recognized by the court more than once. It may be observed that in all the cases in which the "property standard," instead of the gold value has been adopted, the debtor has either proved to be in default in not tendering the Confederate currency on the day when, by the terms of the contract, his debt was payable, or there were other circumstances which would make it inequitable to compel the creditor to receive the scaled value according to the gold standard of the Confederate currency, with reference to which the contract was made and entered into. Myers v. Whitfield, 22 Gratt. 780, and Stearns v. Mason, 24 Gratt. 484, were cases in which it was held as exceptions to the general rule laid down in Pharis v. Dice (supra), that it was, under the circumstances, the "most just measure of recovery" to apply the "gold standard" instead of the value of the property. In both of these cases, as in the case before us, a tender of Confederate money was made on the day or a few days after the contract was payable. And while the court held (as on the authority of those cases it must hold in this case), that the tender did not discharge the contract, because there had been such a depreciation as was not in contemplation of the parties at the
237 time of the contract, and *because there had been no agreement in terms to receive Confederate currency, regardless of the extent of its depreciation, it also held that in such a case the best mode of adjustment was to scale the debt by reducing its nominal value to its value in gold at the date of the contract. We think the principles decided in the cases above referred to must govern this case, and are therefore of opinion that there is no error in the decree of the Circuit court, and that the same be affirmed.

Decree affirmed.

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238 *Persinger & als. v. Simmons & als.

June Term, 1874, Wytheville.

1. **Advancements—Refusal to Come into Hotchpot—Second Division.***—The dower of a widow in the land of her husband is assigned to her; and upon bill filed the other two-thirds of the land is divided among ten of the twelve heirs; the other two refusing to bring their advancement into hotchpot. Upon the death of the widow, the heirs who refused to come into the first division may come into the division of the dower property.
2. **Same—Same—Division of Dower Interest.**—Though there may be cases in which a court of equity would, in her lifetime, decree a division of the property assigned to the widow for dower; in a suit for partition brought during her life, in which some of the children refused to bring their advancements into hotchpot, the decree, though broad enough in its terms to exclude them from any share of the dower lands, will be restricted to their interest in the two-thirds then divided, unless the pleadings make a case for the division of the dower land.
3. **Same—Proper Parties.**—One of the children who had refused to come into the first division died after the death of the widow, leaving children. Her husband is a proper party plaintiff for a division of the dower land.

Lewis Harvey, of the county of Roanoke, died in 1842, intestate, leaving a widow and twelve children. In August 1842 the dower of the widow in the lands of he late husband was laid off and assigned to her by commissioners appointed by the County court of

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***Advancements—Refusal to Come into Hotchpot.**—See monographic *note* on "Advancements" appended to Watkins v. Young, 31 Gratt. 84.

Roanoke, and she held the land until her death in 1864.

In 1845, Charles S. Kirkwood and his wife, who was a daughter of Lewis Harvey, instituted the suit in the Circuit court of Roanoke against the other children of said Harvey, to have a division of the estate among the heirs. Of these children, 239 one was Magdalen, *who had married David Persinger, and they living in Ohio, were proceeded against by order of publication. Robert Harvey was another of the heirs.

The only parts of the record in that case which are filed in this are the decrees and the reports of the commissioners appointed to divide the property.

By a decree made in the cause in August 1845, it was ordered that the lands of the said Lewis Harvey, deceased, not assigned in dower, and the slaves, after assigning to the widow her third thereof, be divided among the heirs and distributees of the said Lewis Harvey, or such of them as may elect to bring their advancements into hotchpot, according to their respective rights, charging each of the distributees who may come into the said distribution, with the value of the advancements made to them respectively, and taking the same into estimation in the division.

The reports show the division of the land and slaves was only of the two-thirds not assigned to the widow. And Robert Harvey and David Persinger having declined to participate in the division, the property was divided among the other ten children.

At the August term 1846 the cause came on to be finally heard, when the court confirmed the reports, and decreed that the parties should hold the lands allotted to them respectively in severalty, according to the report, and that they should convey the same to each other in severalty, by proper deed of partition. The decree as to the slaves was to the same effect, decreeing from one to another, the sums of money which the commissioners reported as necessary to equalize the shares. The decree then proceeds: And the defendants Robert Harvey and David Persinger and Magdalen his wife, having refused to bring their advancements into hotchpot, and to come 240 into a division *with the other distributees of said intestate, it is adjudged, ordered and decreed that they be barred and precluded from participating in the division and distribution of any part of the estate of the said intestate, &c.

At the December term 1864 of the County court of Roanoke, commissioners were appointed to make partition of the lands lately held as dower by the widow of Lewis Harvey, amongst those entitled thereto. And in June 1866 these commissioners returned their report, by which it appeared that they divided the land into ten shares; of which they report that four shares belong to Sparrel F. Simmons, four shares to Robert Harvey, one share to Nat. Harvey, and one to the heirs of Lewis Harvey; and they are accordingly allotted to these parties. And at the July term of the court this report was confirmed.

Magdalen, the wife of David Persinger, having died after the death of the widow of Lewis Harvey, in April 1871, David Persinger, and the children and heirs of said Magdalen, filed their bill in the County court of Roanoke against Simmons, Robert Harvey and the other heirs, in which, after referring to the facts hereinbefore stated, they insisted that the proceedings in the suit of Kirkwood & als. v. Lewis Harvey's heirs & als., did not apply to the lands assigned to the widow, nor deprive Magdalen Persinger and her heirs of their right to share in the division of said land, and that the report of the commissioners dividing said dower lands into ten instead of twelve shares, was erroneous; and they pray that said partition may be set aside, and a new partition directed to be made, by which the share thereof, which would belong to the said Magdalen, as a daughter and heir-at-law of of Lewis Harvey, deceased, 241 were she alive, *should be allotted to the plaintiff, David Persinger, as tenant by the curtesy during his life, and at his decease to the children and heirs of the said Magdalen; and for general relief.

Robert Harvey and Simmons, and the other parties, answered, and insisted that the decree in the case of Kirkwood & als. v. Harvey's heirs & als., in which Persinger and his wife were parties, and had knowledge of the proceedings therein, applied to the whole estate of Lewis Harvey, deceased, including the dower lands; and was therefore conclusive upon the plaintiffs. They also relied upon the act to preserve and extend the time for the exercise of certain civil rights passed the 2d of March, 1866.

The cause having been removed to the Circuit court of Roanoke, came on to be heard on the 30th of September 1872, when the court dismissed the bill with costs. And thereupon the plaintiffs applied to a judge of this court for an appeal; which was allowed.

Hansbrough, for the appellants.

F. Johnston and Edmundson & Blair, for the appellees.

ANDERSON, J. delivered the opinion of the court.

The court is of opinion, upon the authority of Knight & wife v. Oliver, 12 Gratt. 33, that an heir-at-law, who has been advanced in the lifetime of his ancestor, is entitled to participate in the division after the death of the widow in the real estate which had been assigned to her in dower, although he had refused to bring his advancements into hotchpot, in order to participate in the previous division of the estate, which was not embraced in the assignment to the widow. It is true, that the question decided in that case was as to the right of the advanced child to partici- 242 pate in the *distribution of slaves which had been allotted to the widow

for her life. The court is of opinion that the principle is the same when applied to real estate.

In this case there were twelve children. And by the decree of the court in Ch. S. Kirkwood & als. v. Lewis Harvey's heirs & als., one-third of the slaves and one-third of the real estate were allotted to the widow for life, and the other two-thirds were divided between ten of the children; the remaining two being unwilling to bring in their advancements, did not participate in that division. And the court can perceive no reason if, after the death of the widow, they would be permitted to participate in the distribution of the dower slaves, why they should not be allowed to participate also in the division of the dower lands.

But it is contended for the appellees, that the first division was made by a decree of a court of competent jurisdiction, inter partes, the appellants being parties, who having refused to bring their advancements into hotchpot, and come into the division and distribution of the property then divided and distributed, with the other heirs, it was adjudged, ordered and decreed, that they should be debarred and precluded from participation in the future division and distribution of the slaves and real estate which had been assigned to the widow for life. Is this a proper interpretation of the decree in that case? Did the court mean to exclude the appellants from all participation in the division of the estate, slaves and land, which had been assigned to the widow for life, and which was not intended to be divided until after her death, if they failed or refused to bring their advancements into the first distribution and division, or only from a participation in any part of the estate then divided? As was said in Oliver & Knight, supra, in relation to the al-
243 legations of *the bill and the admissions of the answer in that case, so it may be said in this case, that the terms of the decree are sufficiently broad to embrace the property reserved for future division and distribution, as well as that which was then divided and distributed. The language of the decree in this case is not broader than that employed in the bill and answer in that case; yet the court held in that case, that looking to the rights of the several parties and to the objects most probably contemplated by them, the allegations and admissions in respect to Knight's advancements, and his choosing not to bring the same into distribution, ought to be construed as referring to the two-thirds of the surplus then to be distributed, and not as extending also to the slaves in the widow's share. And upon the same principles of construction ought not the terms of the decree to be so construed in this case? The rights of the several parties were the same as in that case; and it might be inferred from so much of the record as is before us, that the objects contemplated by them were the same. The decree in this case settles and adjusts the rights of the parties severally in the two-thirds of the estate then divided, and in that only. It first ascertains and decrees against each one of ten of the heirs and distributees, the amount he shall pay for owelty of partition of two-thirds of the estate, and to whom it shall be paid, and directs mutual conveyances to be made from one to another of the ten heirs, in accordance with their several rights, as ascertained by the decree. And as to the remaining two heirs, who refused to bring their advancements into the distribution and division, it next decides upon their rights, and declares that they shall have no part in the estate thus divided: the language is broader, "that they be barred and pre-
cluded from participating in the divi-
244 sion *and distribution of any part of the estate (it may be construed of that estate) of said intestate." Ought not this language, as was done in the case above cited, be construed as limited to the subject of the suit, as adjudicating and determining the rights of all the heirs, as to the estate then divided?

Such, we think, is the proper construction of the decree, unless the record shows it was not only the object of the suit to divide two-thirds of the estate, but also to ascertain and determine what were the several rights of the parties in the reversion. There might be a case where the wants and interests of the unadvanced children might require, that they should make sale of their interests in the reversion, and which might be done without prejudice to the rights and interests of the advanced children, but which could not be well done until the number of shares into which the reversion was to be divided was ascertained and determined. And in Knight & wife v. Oliver, Judge Daniel intimates an opinion, that in such a state of things, "upon a bill filed containing the proper allegations, and setting forth distinctly the objects of the suit," a court of equity might compel "an advanced child to elect whether he would hold on to his advancements, or bring them in and claim his interest in the reversion." Such may have been the case in Kirkwood & als. v. Lewis Harvey's heirs; and if it was, we could hardly give the foregoing construction to the decree. In such a case, it would seem to have been the purpose of the decree to ascertain and determine that two of the heirs named in the decree were not entitled to participate in the distribution and division of the reversion; and so to determine the number of shares into which it was to be divided. And the decree, whether right
or wrong, would be binding on the
245 *heirs until reversed; and could not be avoided in a collateral way.

But only a small part of the record of that suit is before us. The whole record ought to have been made a part of this. And, in the absence of the bill and answer especially, we could not say what was the object of the suit, if any, other than the division of that part of the estate which was ready for division. We cannot say that the case presented by the bill was such as to require a decree to settle and adjust the rights of

the several parties in the reversion, and that such object was distinctly set forth.

The question, whether the appellant, David Persinger, has a right to join in this suit, depend upon the decision of the cause upon the merits. His wife, having survived her mother, the doweress, if she was entitled to a share of the reversion, which she would be, unless her right was divested by the decree aforesaid, would be immediately invested with the right of possession; and the possession of any one of the coparceners was her possession, and her husband was immediately invested with a life estate by the curtesy. Poindexter & wife v. Jeffries, 15 Gratt. 363.

The court is also of opinion that the right of the plaintiffs to sue is not barred by the statute of limitations.

For the foregoing reasons, the court is of opinion to reverse the decree of the Circuit court, with costs, and to remand the cause for further proceedings to be had therein in conformity with this opinion; and that either party be allowed to offer in evidence the full record in the case of Charles S. Kirkwood & als. v. Lewis Harvey's heirs & als.

Decree reversed.

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246 *Cocke & al. v. Minor & als.

June Term, 1874, Wytheville.

1. **Equity Practice—Hearing on Bill and Answer.**—When a case in equity comes on to be heard upon the bill, the answers and exhibits, without replication to the answers, the allegations of fact, and denials of the answers, must be admitted to be true. If the answer clearly and unequivocally deny those allegations in the bill, upon which alone it can be sustained, or if the answer set up sufficient new matter in avoidance of those allegations, in either case the bill should be dismissed. But the facts constituting the equity should be plainly denied or clearly avoided. There should be no fact admitted by the answer inconsistent with defendant's denial, no equivocal denial, no doubtful avoidance.
2. **Same—Case at Bar.**—A case in which the denials and allegations of the answers, though there was no replication to them, were held not sufficient to defeat the plaintiff's claim.
3. **Fiduciaries—Liability of Purchaser from.***—The conversion into money by a trustee, of well secured bonds belonging to a trust fund, by a sale thereof, at a large sacrifice, to a purchaser with full notice of the trust, constitutes such an improper dealing with and *devastavit* of the trust subject as will render both trustee and purchaser *prima facie* responsible therefor. And it will be for them to show that the necessities of the trust required the sacrifice.
4. **Equity Practice—Sufficiency of Allegation in Answer.**—In such a case it is not sufficient, though the answer is not replied to, for the purchaser to say that the trustee informed him that he needed the money to meet debts contracted for his *cestuis que trust*, and from all the information he had he was led to the belief that the trustee wanted the funds for proper purposes.
5. **Same—Same—Settlement of Trustee's Accounts.**—And in such a case, though there is no replication to the answer, it is not sufficient for the trustee to say that the necessities of the *cestuis que trust* required a sale of the trust fund, and that he had properly applied the proceeds thereof to their uses, without showing how they were applied, and without showing or alleging that he had ever kept or settled an account of his transactions as trustee.

247 *6. **Same—Appeal.**—Bill by a plaintiff claiming to be a creditor of a trust fund against the trustee, *cestuis que trust* and purchaser from the trustee of a part of the trust fund consisting of bonds well secured. Upon the hearing in the court below upon the bill, answers and exhibits, without replications to the answers, the bill is dismissed; but on appeal, the appellate court holds that the answers do not make out a good defense. The court will send the case back, to allow the trustee and purchaser to show, if they can, that the sale was a proper one to be made, and with instructions for an account of the trust fund, and to ascertain clearly the condition and value of the fund and the necessities of the *cestuis que trust*.

7. **Same—Same—Jurisdictional Amount.***—In a suit by C against the trustee, *cestuis que trust* and a purchaser, to subject a trust fund to the payment of his debt, M files an answer claiming to be a creditor of the trust for a debt of $262.80. The bill is dismissed in the court below, and C and M obtain an appeal. Though the decree is reversed as to C, the appeal of M will be dismissed as improvidently awarded; and also because no such case is made in the pleadings as to entitle him to a decree against his co-defendants, or any of them.

In March 1869 Charles L. Cocke instituted his suit in equity in the Circuit court of Washington county, against William S. Minor, trustee of his wife Lucy M. Minor and their children, C. Derrick and E. R. Lancaster; and in his bill he set out that William A. Minor had, on the 12th of February 1851, conveyed to William S. Minor certain bonds, choses in action, a negro woman, a horse, and $1,100 in money, for the support of said Lucy M. Minor during her life, and for the support and maintenance of their children; and authorized him to collect the said debts, and to invest the proceeds, as well as the money, in land or

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***Fiduciaries—Liability of Purchaser from.**—See Jones v. Clark, 25 Gratt. 642, for an exhaustive discussion of the liability of a purchaser of the trust fund from a fiduciary in all its different aspects. See also, Utterback v. Cooper, 28 Gratt. 233, 287; Brockenbrough v. Turner, 78 Va. 448. The principal case is distinguished in Mills v. Mills, 28 Gratt. 442. In regard to payments to a fiduciary in confederate money, see Patteson v. Bondurant, 30 Gratt. 94.

Equity Practice—Hearing on Bill and Answer.—See monographic *note* on "Answers" appended to Tate v. Vance, 27 Gratt. 571. See also, Simmons v. Simmons, 33 Gratt. 451, and *note*; Simpson v. Edmiston, 23 W. Va. 681; Atkinson v. Beckett, 34 W. Va. 564, 12 S. E. Rep. 717.

***Appellate Jurisdiction—Amount Involved.**—As to the jurisdictional amount required in appellate proceedings, see Umbarger v. Watts, 25 Gratt. 167, and *note*.

other property. That, pursuant to the provisions of the trust, said William S. Minor, as trustee, purchased certain lots in the town of Goodson. That he afterwards on the 15th of November 1867, conveyed said lots to Edwin R. Lancaster, reserving the vendor's lien thereon, for the sum of
248 $3,900, part of which was *paid in cash, and for the balance Lancaster executed his notes to said Minor as trustee. That Minor had sold a part of these notes to C. Derrick at a great discount, the said Derrick well knowing that the said Minor was not at the time, and never was, before or since, the owner of the said notes individually, but only as trustee as aforesaid. That Minor was guilty of a breach of trust in so disposing of the said notes, in which breach of trust Derrick was particeps criminis. That at the November term of the County court of Washington, plaintiff recovered a judgment against said Minor, as trustee, for $423.92, with interest from the 6th of June 1867, and his costs, in an action of debt upon a note, the consideration of which was the board and tuition of three of the said children; upon which judgment an execution had been issued and returned "no property found." He claims that he is entitled to subject the trust property; and, making the persons before mentioned parties, three of whom were minors, he prays that the property aforesaid might be sold, and the surplus, if any, after discharging the lien thereon, applied to the payment of his debt; and if there be no surplus, that the notes sold to the said Derrick be so applied; and that he be compelled to produce the said notes and disclose at what discount he bought them; and for general relief.

Minor and Derrick answered the bill. Minor admits the deed of trust. He claims that under the deed he was fully authorized to sell the trust property and reinvest the proceeds of such sale, and to apply the property or the proceeds of the sale of it, or any part of it, to the purpose of the trust mentioned in the deed, in such manner and at such times as he might deem most prudent. And he claims that he did not exceed the power conferred upon him when he
249 made *the sale and transfer to C. Derrick of the notes of Edwin C. Lancaster; and he denies that he committed any breach of trust in making the sale and transfer. He says he did not sell the lots in Goodson until he was forced to do so by the urgent wants of his family (the cestuis que trust in the trust deed) for the common comforts; nay, many even of the necessaries of life. That ten days after Lancaster executed his notes, the one due January 1st, 1869, was assigned to W. D. Minor, as shown by the assignment on the note; and the assignment was made for the proper purposes of the trust, and the proceeds were properly applied by respondent as trustee. Before the 2d of April, 1868, respondent proposed to the plaintiff to pay to him the note due January the 1st, 1871, in liquidation of his debt, for the recovery of which this suit was brought; but plaintiff declined to take it; and soon thereafter it was applied to the payment or securing another debt due from respondent as trustee. By these and other transactions, it happened that not more than one of the notes of Lancaster, which respondent sold to Derrick, was under control of respondent at the date of the sale. Derrick insisted he should have all the bonds; and respondent procured from him sufficient funds to recover all the bonds due from Lancaster, and then sold them all to Derrick. Lancaster had at the time of the sale to Derrick failed to pay one of the bonds then matured, his credit was gone, or at least much impaired, money was very hard to procure on any reasonable terms, and respondent's family were so situated as to require money for their support and maintenance. Under these circumstances respondent availed himself of the best means at hand, and disposed of Lancaster's bonds at a discount not greater, as respondent believes, than was often and will-
250 ingly allowed *by business men in their transactions. Respondent fully intended to pay the debt which he owed complainant with the funds derived from the sale to Derrick; but he found that the funds were so far beyond his control that he could not carry out his intention. Before the plaintiff had obtained a judgment against him, respondent had paid out for the purposes of the trust deed, largely more than the whole property conveyed by the trust deed. He had, besides, lost over $3,000 of the trust fund by the emancipation of slaves, and several thousand dollars in personal property in which the trust funds had been invested; this last loss having been caused by a raid of the Federal troops during the war. The whole of the trust property had passed from his hands before plaintiff's judgment was obtained; and therefore it was no lien upon any of the property granted in the trust deed.

Derrick, in his answer, admits that Minor did sell to him three notes of Lancaster, one for $400, due January 16th, 1869, one for $1,000 due January 15th, 1870, and one for $1,000, due January 15th, 1871, all dated the 15th of November, 1867, and bearing interest from the date. That these notes were executed to W. S. Minor, trustee for Lucy M. Minor and others, and were sold by said Minor to respondent on the 15th of July, 1868, for $1,941.61. That when Minor proposed to respondent to sell him these notes, he stated that he wished to procure the money for the purpose of discharging some debts due from him as trustee, for the education and support and maintenance of his children, provided for in the trust deed mentioned in the bill. He particularly mentioned a debt due R. H. Rawlings, the principal of an academy in Abingdon. This debt was $369.75, and was paid
251 by respondent to *Rawlings out of the sum of $1,941.61, above mentioned. All the information respondent had led to the belief that Minor wanted the funds for proper purposes, and seeing that by the

terms of the trust deed, he had full power to make any disposition by sale or otherwise of these notes, so that he applied the money properly, respondent did not hesitate to make the trade with him. He insists that if there was any breach of trust on the part of Minor, it was committed after the money came to his hands, and not before; and respondent was not bound to see to the application of the purchase money. He does not know how Minor applied the money after he obtained it, except the said sum of $369.75 paid to Rawlings. He knows that amount was properly applied, and has no reason to believe that the remaining portion was not so applied by Minor.

It does not appear that there was any replication to the answers.

The infants answered by their guardian ad litem.

The only evidence in the cause is the deed of trust from William A. Minor to William S. Minor; the deed from the latter to Lancaster for the Goodson lots, and copies of the judgment of the plaintiff, and the bonds. The bond on which the plaintiff's judgment was obtained is the bond of William S. Minor, by which he on demand promises to pay to Charles L. Cocke $423.92 for the board and tuition of my daughters Louisa, Henrietta and Matilda Minor, at Hollins Institute, for the session ending this day, and it is dated Botetourt Springs, June 6th, 1867.

Whilst the cause was pending, J. D. Mador, without, so far as the record shows, having been made a party, filed his answer, claiming to be a creditor by judgment against William S. Minor, as trustee,
252 for *$262.80, and claiming a lien upon the trust property.

It appears also, that in a suit in the same court of Robertson for, &c., against Lancaster, the lots conveyed by Minor to Lancaster had been sold. And the two causes were brought on to be heard together on the 15th of April, 1871, when the court held that Robertson for, &c., and Derrick, were entitled ratably to payment of said notes out of the proceeds of the sale of lots sold under a decree in the first case, free from the claim asserted by the plaintiff, Charles L. Cocke, and of J. D. Mador in the last case. And it appearing that there would be no surplus arising from the said sale, after payment of the notes due to said Robertson and Derrick, the bill of Cocke was dismissed with costs. And, thereupon, Cocke and Mador applied to this court for an appeal from the decree; which was allowed.

Daniel, Trigg and F. Johnston, for the appellants.

Gilmore, for the appellees.

BOULDIN, J. This is a case in which there was an effort in the court below, by a party claiming to be a judgment creditor of a trustee or trust fund, to charge his debt on the trust fund in the hands of the trustee, and of an assignee of the fund with notice of the trust. The case was heard on the bill, answers and exhibits, without replication to the answers, and without examination of witnesses; and the main question before us is, "What was the effect of the answers?"

There can, I think, be no doubt about the general rule under such circumstances. The allegations of fact, and denials of the answer distinctly made, must be admitted to be true. "If the answer clearly and unequivocally deny those allegations in
253 the bill upon *which alone it can be sustained, or if the answer set up sufficient new matter in avoidance of those allegations, in either case the bill should be dismissed." But to invoke the rule successfully, the facts constituting the equity should be plainly denied or clearly avoided. There should be no fact admitted by the answer inconsistent with defendant's denial; no equivocal denial, no doubtful avoidance.

My opinion is, that the answers in this case do not come up to this standard. The bill, as we have said, seeks to set up a claim by judgment against a trust fund, and charges an improper dealing with that fund by the trustee, Minor, and his co-defendant, Derrick, by which the latter, with full notice of the trust, was allowed to purchase the entire trust fund remaining in the hands of the trustee, consisting of interest bearing bonds, well secured on real estate; and the defendants are called on to disclose the discount at which the bonds were sold.

The answer of the trustee, Minor, admits in substance, if not in express terms, the character of the plaintiff's claim; that it was a claim upon the trust fund, and that he had expected to pay it out of that fund. Derrick, the assignee, does not deny, but impliedly admits, that it was such claim; both admit the sale of the bonds by the trustee to Derrick, and Derrick admits, as the bonds themselves would show, without such admission, full notice of the trust; and that on the 15th July, 1868, he purchased of the trustee bonds belonging to the trust fund, amounting to $2,400 of principal, bearing interest from the 15th of November, 1867, for the sum of $1,941, being at a discount of $555 on principal and interest to the date of assignment, or, rather, more than twenty per cent.

To avoid the effect of these admis-
254 sions, the trustee *in his answer merely says, in substance, that the necessities of the family required a sale of the trust fund, and that he had properly applied the proceeds thereof to the uses of the family, without showing how they were applied, and without showing or even alleging that he had ever kept or settled an account of his transactions as trustee; and Derrick in his answer merely says, in a very general way, that Minor, the trustee, had told him that he needed the money to meet debts contracted for his cestuis que trust; and from "all the information re-

spondent had, he was led to the belief" that Minor wanted the funds for proper purposes.

I am of opinion that such vague and general allegations, especially when the rights and interest of minors, who have claimed the protection of the court, are concerned, do not constitute a sufficient avoidance of the distinct and damaging admissions of the answers. The answers admit facts which constitute a prima facie devastavit by Minor, with the aid and concurrence of Derrick; and they are not avoided.

That the conversion into money by a trustee of well secured bonds belonging to a trust fund, by a sale thereof at a large sacrifice to a purchaser, with full notice of the trust, does constitute such an improper dealing with, and devastavit of, the trust subject as will render both trustee and purchaser prima facie responsible therefor, is a proposition about which, at this day, there can be no doubt. It was so held in Fisher v. Bassett &c., 9 Leigh 119, by all the judges sitting (absent Brooke and Brockenbrough). The reporter's syllabus correctly states the decision on this point as follows: "An administrator takes a bond to himself individually for a debt due to his testator's estate, payable at a distant day, and then sells this bond at a discount 255 *of twenty-five per cent. to an assignee, who knows that the consideration of the bond was a debt due to the intestate's estate; but is informed, and so informed as to justify him in believing, that the administrator has acquired the full property in the bond in his own right—Held: This is such dealing with the assets of the intestate's estate; such a concurrence of the assignee with the administrator in his appropriation of the assets to his own use, as to throw the burden of proof of the fairness of the administrator's conduct on the assignee; and if the administrator had not purchased the claim from the next of kin, or had not made such advances as to justify him in appropriating it to himself, the assignee cannot in equity avail himself of the transfer." Judge Tucker, at p. 137, says, "I am clearly of opinion that unless Fisher could show that Scott had fairly become the purchaser of the debt due to Robinson's estate, or was in advance to that estate to the amount of the debt, the transfer was such a dealing with the assets as to render the transfer void. The sale of the bond at so large a discount was itself a prima facie devastavit, and the burden of proof is upon Scott or Fisher that the necessities of the estate, and not those of the administrator, required the sacrifice."

Parker, J., at p. 139 Ibid, says: "If the necessities of the estate did not require a sale of the bonds at so large a discount, it was a devastavit in Scott to sell to Fisher. When Fisher bought the bonds for so much less than their real value, under the circumstances existing in this case, he took upon himself the risk of showing either that Scott was the real owner of them, or that the necessities of the estate justified the sacrifice." The learned judge was of opinion, however, "that Fisher should be allowed to show that Scott had 256 *a right to transfer the bonds by a settlement of the accounts of the latter;" and Judge Cabell concurred with Judge Parker on this point. The decree, which was against Fisher in the court below, was reversed, and the cause sent back for a settlement of Scott's account.

It will be observed that it was held in the case of Fisher v. Bassett &c. not to be enough to discharge Fisher that he should have been informed, and so informed as to justify him in believing that Scott had the right to transfer the bonds. Whilst such belief, honestly entertained on sufficient grounds, would acquit him of intentional wrong in acquiring the bonds, it constituted no defense to the claims of those entitled to receive or charge the fund. At his own peril he was bound to know that the fact existed which he believed to exist, and to show it. The onus was on him. These principles are clearly announced in Fisher v. Bassett &c., and have been distinctly approved and reaffirmed in the subsequent case of Pinckard v. Woods &c., 8 Gratt 140, and in other cases cited by appellant's counsel.

Pinckard v. Wood &c. was a case in which the appellant purchased bonds from an administrator at a discount of eighteen to twenty per cent. which were payable to the administrator in his character as administrator; and will be found to be directly in point.

Judge Baldwin delivering the opinion of the court, at pp. 144–'5, says of the administrator: "If he sells such debts at a price below their value, he thereby commits a devastavit, unless he makes it appear that such sale was manifestly required by the interests of the estate: And this he can never do without showing, in the first place, that the proceeds thereof have been applied 257 to the purposes of the *estate." And on p. 145, speaking of the purchase by the appellant, of the bonds at the discount mentioned, he says: "From the profit he was thus allowed to make, he had a good reason to believe that the administrator was selling them for his own individual uses; a fact which the result and the condition of the estate have abundantly shown. Under such circumstances, it was incumbent on the appellant to stay his hand until he should ascertain, by the requisite inquiries, that the sale was to be made for the purposes of the estate, and the sacrifice to be incurred was indispensably necessary to prevent some greater sacrifice."

Nothing of this is made to appear either by the answer of Minor the trustee or of Derrick the purchaser. The trustee does not allege that he had ever settled, or even kept an account of his transactions as trustee, so as to enable him to state, with any approximation to accuracy, the condition of the trust fund; but he contents himself with alleging, in the most general and unsatisfactory terms, that the necessities of his family required the sale of the bonds,

and that the discount allowed was not greater, "as respondent believes, than was often and willingly allowed by business men in their transactions." He does not aver, as a fact within his knowledge, that such discount was often allowed in business transactions, nor does he even say that he had been so informed. He states his belief only; and does not pretend that he had examined into the matter at all; or that he had endeavored and failed to do better, and was therefore compelled to make the sacrifice. Nor does his co-defendant Derrick in his answer make any distinct allegation of fact upon which it was necessary to take issue. He does not aver that he had made inquiry, diligent or otherwise, as to the condition of the trust fund, or the state 258 of Minor's account as trustee. *Had he done so, he would, in all probability, have found that Minor had settled no account, and was therefore in no condition to make the sale. He is content to say, in substance, that Minor told him that he needed the money to discharge obligations incurred for the family, and that "all the information that respondent had led him to the belief, that Minor wanted the fund for proper purposes; and seeing that by the terms of the trust deed aforementioned, the said Minor was vested with full power to make any disposition by sale or otherwise of these notes, so that he applied the money properly, your respondent did not hesitate to make the trade with him."

Here there is no averment of matter of fact on which issue should be taken, but merely an allegation on the part of Derrick, that from such information as he had, he believed Minor wanted the money for proper purposes, without stating what that information was, or, indeed, that he had any, except from Minor himself. Admit it all to be true, and admitting further, what is neither shown nor even alleged, that his information was of such character as to justify the belief arrived at, still, under the principles established in the cases referred to, that belief, however it might acquit him morally, would not be enough to discharge him from legal responsibility. He was acting at his own risk, and would be bound to show that what he thus believed was in fact true. Vague impressions of that character cannot be received as a ground on which the rights of others are to be bartered away.

As to the general power of the trustee, claimed for him under the deed, to dispose of the trust subject at his discretion, it is enough to say, that whether such power exist or not, is not matter of fact but of law, to be determined by the court on 259 the face of the deed; *and a denial of the power, by replication to the answer, was wholly unnecessary.

I am clearly of opinion, therefore, that the failure of the appellant, Cocke, to reply generally or otherwise to the answers, does not, under the circumstances of this case, relieve the trustee and the assignee, Derrick, from the burden of showing the bona fides of the transaction, and the right of Minor to transfer the bonds at the ruinous sacrifice disclosed by Derrick.

This has not been shown; but as the right to make the transfer might possibly be established by a full disclosure of all the circumstances, and a proper settlement of the trustee's account, as was ordered in Fisher v. Bassett, &c., my opinion is, that it was error in the court below to dispose finally of the case without ordering such account, and ascertaining clearly the condition and value of the trust fund, and the necessities of the cestuis que trust.

If the claim of the appellant, Cocke, should, on such inquiry, be found to be properly chargeable on the trust fund, and on a proper settlement of the trustee's account there should be found in his hands, or in the hands of the defendant, Derrick, a balance, properly applicable on the principles above declared, to appellant's claim, the same should be so applied.

But as a question has arisen whether the claim of said appellant is not in law and fact a claim against Minor, the trustee, individually, and not against the trust fund, I am further of opinion, without deciding at this time, whether it does or does not sufficiently appear on the pleadings and the face of the judgment that the claim is against the trust fund, that a further inquiry should be directed to ascertain upon what contract and on whose credit the debt to the appellant, Cocke, was contracted; and whether in taking the 260 *bond on which the appellant's judgment was obtained, Minor, individually, or the trust fund, was looked to for payment. Should the appellant's claim be found on such inquiry to be due from Minor, individually, and not from the trust fund, then his bill must be dismissed with costs, but without prejudice to the right of cestuis que trust to impeach the transactions between Minor and Derrick by cross-bill in the suit or otherwise.

If, on the other hand, the debt should appear to be a proper charge on the trust fund, then the same should be dealt with as above declared. Without deciding at this time whether under the deed of trust, in the proceedings mentioned, the trustee had power, without authority from a court of equity, to dispose of any portion of the principal or corpus of the trust subject, I am of opinion that the decree complained of should be reversed with costs to the appellant, Cocke, against the appellees, Minor and Derrick; and that the cause be remanded to the circuit court, to be further proceeded in according to the principles above declared.

I am further of opinion that the appeal of Mador should be dismissed as improvidently awarded, the amount of his claim being below the jurisdiction of this court; and, furthermore, because being a defendant in the court below, there was no such case made in the pleadings as to entitle

him to a decree against his co-defendants, or any of them.

ANDERSON and STAPLES, Js. concurred in the opinion of Bouldin, J.

MONCURE, P. and CHRISTIAN, J. dissented.

Decree reversed.

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261. *Hale v. Penn's Heirs.

June Term, 1874, Wytheville.

I. P's heirs, living in Louisiana, owned two tracts of land in the county of Carroll, adjoining each other, one of one hundred and thirty and the other of one hundred and thirty-eight acres, on which they had tenants, who paid the taxes up to 1858. In 1860 the 130 acre tract was sold for the delinquent taxes of 1858 and 1859, and was purchased by H; for which he paid the said taxes, $3.93, and all other charges, amounting in all to $4.37. Within three years, and before a deed was made to H, P's heirs paid to the clerk of the County court the said sum with ten *per cent. per annum* interest thereon and the charges, all amounting to $7.72; H not then being in the county, and they not knowing that H had paid taxes on the land. H refused to receive the money on the ground that he had paid taxes on the land since his purchase; and he had the tract of 138 acres surveyed and obtained a deed for it from the clerk of the County court. Upon a bill filed by P's heirs against H and the clerk, to set aside the deed—HELD:

1. **Tax Bills—Right of Redemption.**—P's heirs had the right to redeem their land at the time they paid the money to the clerk, by paying the amount for which the same was sold, and such additional taxes thereon as may have been paid thereon by H, with ten *per cent.* interest thereon from the time the same was paid by H.

2. **Same—Same—Payment to Clerk.**—H having been out of the county at the time, they properly paid the money to the clerk of the County court.

3. **Same—Deed from Clerk—Validity.**—The tract of 138 acres not having been sold for taxes, H did not buy it, and the deed from the clerk to him is null and of no effect.

4. **Same—When Taxes with Interest Not Required.**—The taxes which H paid upon the tract of 138 acres was not upon the 130 acre tract, and P's heirs were not required to pay them with ten *per cent.* interest in order to redeem the tract sold. Therefore, what they paid to the clerk was a redemption of their land.

262 *5. **Same—Directing a Re-Conveyance.**—The court should not only have decreed the deed to H to be null and void, but should have directed him or a commissioner to re-convey the title to the 138 acre tract to P's heirs; and should have directed the clerk to pay to H the money received from P's heirs.

6. **Same—Liability for Expenses of Survey.**—P's heirs are not liable for the payments made by H for the survey and report or for the making, stamping and recording the deed made to him by the clerk. But they should pay the taxes on the 138 acre tract since 1860, paid by H, with six *per cent.* interest.

In February 1869, Abram Penn and others, heirs-at-law of George Penn, deceased, filed their bill in the Circuit court of Carroll county against Fielden L. Hale, to set aside a deed made by the clerk of the County court of Carroll to the said Hale for a tract of land in said county, as land sold in 1860 for the delinquent taxes of 1858 and 1859.

Hale answered the bill; and the cause coming on to be heard on the 3d of April 1872, the court decreed that the deed be set aside as null and void; and that a commissioner should take an account of the taxes paid by said Hale on said tract of land from October 1860, with ten per cent. interest thereon, which, when ascertained, the plaintiffs should pay to Hale. From this decree Hale applied to this court for an appeal; which was allowed. The facts are stated by Judge Anderson in his opinion.

Tipton, for the appellant.

Lybrook and J. E. Penn, for the appellees.

ANDERSON, J., delivered the opinion of the court.

The appellees, who are heirs of George Penn, and residents of Louisiana, inherited from their said ancestor two tracts of land, one of one hundred and thirty acres, and the other of one hundred and thirty-
263 eight *acres, situate in the county of Carrol, in this state, adjoining each other, upon which they had tenants, who regularly paid the taxes on them up to the year 1858. In the year 1860, the tract of one hundred and thirty acres, which had been returned delinquent, was sold for the taxes of 1858 and 1859, amounting to $3.93, and F. L. Hale became the purchaser for the said arrearage of tax and all other charges upon it, amounting in all to $4.37.

The plaintiffs, soon after they were informed that the said tract of one hundred and thirty acres had been sold for taxes, which they supposed had been paid by their tenants as theretofore, in order to redeem their land, paid to the clerk of the county of Carrol, through their attorney, $7.72, being the amount paid by the said Hale, with ten per cent. interest thereon. The court is of opinion that they had the right to redeem their land at that time by paying the amount for which the same was sold, and such additional taxes thereon as may have been paid by the purchaser, with ten per cent. interest thereon from the time the same was paid by the purchaser, the sale having been made more than three years prior thereto, and no deed having been made

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Removing Clouds on Title—Equitable Jurisdiction.—In Va. Coal & Iron Co. v. Kelly, 93 Va. 339, 24 S. E. Rep. 1020, the court, citing the principal case, says: "The jurisdiction of courts of equity to remove clouds from title, where the party complaining has no adequate remedy at law, is well settled. This is particularly the case where he is the owner of the legal title, and is in possession of the land upon the title to which the cloud rests." See also, Carroll v. Brown, 28 Gratt. 791, and *note*.

to the purchaser, and no costs of survey and report having then been incurred by him. Code of 1873, chap. 38, §§ 16 and 25. And the purchaser not being found in the county, the proof being that he was out of the county at the time, payment was properly made to the clerk. They, nor their attorney, were aware at the time that the purchaser had paid any taxes upon the land since his purchase, or that he had any such claim. If they had been informed of it, there can be no doubt that any just and legal claim he had on that score would have also been paid. Mr. Lybrook who, as attorney for the appellees, made the 264 *payment for them to the clerk, proves that he got the statement from the clerk of the amount due, which he paid; and that he afterwards informed the appellant that he had paid to the clerk for the appellees the amount of purchase money he had paid for the land, and the damages, &c. He says that appellant made no claim for taxes, which he had paid on the land since the purchase, and that he was under the impression that he had paid none, as he had not gotten a deed. But, on the contrary, that he spoke to him in a way, though he could not recollect his language, which he distinctly recollected induced him to believe that the controversy in relation to the land was finally settled, that Mr. Hale was satisfied, and that the appellees were to have no more trouble, as far as he was concerned, and that appellant requested him to say nothing about it, as he had purchased other lands at the same sale, or words to that effect.

The appellant afterwards refused to receive the money from the clerk, assigning as his reason that no payment had been made of taxes which he claimed to have paid on the land since his purchase, and afterwards caused a survey of the one hundred and thirty-eight acre tract to be made, describing it as the tract of land sold on the 1st day of October, 1860, for the non-payment of taxes due thereon for the years 1858 and 1859, containing one hundred and thirty acres, to the said Hale, and a deed to be made to him for it by the clerk, which tract, it appears, is much more valuable than the one hundred and thirty acre tract which was sold. He assigns as a reason therefor, that the commissioner had committed an error in describing it as the one hundred and thirty acre tract on the commissioner's books. If that were so, if the commissioner had put the one hundred 265 and thirty acre tract *on his book by mistake, instead of the one hundred and thirty-eight acre tract, the one hundred and thirty acre tract was sold, and the appellant became the purchaser of that tract. He could not claim to be the purchaser of the one hundred and thirty-eight acre tract if it were true that the commissioner had made a mistake in putting upon his book the one hundred and thirty acre tract, when it ought to have been the one hundred and thirty-eight acre tract. But he furnishes no proof of such mistake. The report of sale, and the receipt given by the sheriff to the appellant for the purchase money, describes the tract sold as one hundred and thirty acres; and there is nothing else in the description that is not equally as applicable to that tract as to the one hundred and thirty-eight acre tract.

The appellant files in the cause a memorandum, setting out a claim for purchase money, taxes paid, and other costs incurred by him, with ten per cent. interest, amounting to $48.64. This memorandum includes charges for taxes paid on the one hundred and thirty-eight acre tract subsequent to the sale of the one hundred and thirty acre tract, which is not, however, supported by any evidence. But there is no claim even of his having paid any taxes subsequent to the sale on the one hundred and thirty acre tract, which was the tract sold; and there was nothing then on that score to be paid by the heirs to entitle them to redeem. If he chose to pay the taxes upon another tract of the heirs, which was not sold, they were not bound to refund to him those taxes in order to redeem their tract of land which had been sold. The payment then which they made to the clerk of $7.72 being the amount of the purchase money which the appellant paid for the one hundred and thirty acre tract, with ten per cent. interest thereon, as shown by the clerk's 266 *receipt, was a redemption of their land which had been sold as aforesaid; and it would have been a flagrant wrong against them for the appellant afterwards to have had that tract surveyed, and a deed for it made to him by the clerk. But it seems to the court the survey and report of the one hundred and thirty-eight acre tract, and the deed which he caused to be executed to him for the same, was without even a pretext of right; and that there is no error in the decree of the court below, adjudging said deed to be null and void. But we think the court should have gone further, in order to preserve to the appellees their unbroken record of title, and required the appellant to have reconveyed the title of the said tract of land to them, or to have appointed a commissioner to do it for him. The clerk's receipt, as we have seen, was a full satisfaction by the appellees of their obligation to the appellant, and entitled them to the redemption of their tract of one hundred and thirty acres of land which had been sold as delinquent, and purchased by the appellant; and the clerk, who was before the court, should have been ordered to pay over the same to the appellant. The appellees are not liable for payments made by the appellant for the survey and report, or for the making, stamping and recording of the deed; and the account was properly ordered of the taxes paid by the appellant on the said tract of land from October 1860, but they not being upon the tract of land which was sold and purchased by the appellant, he was not entitled to ten per cent., but only to six per cent. interest thereon. And the decree may be amended in those particulars.

The court is therefore of opinion, to affirm the decree thus amended with costs, the appellees being the party substantially prevailing, and to remand the cause 267 *for the taking of the account in execution of the order as modified. And upon the return of the report, and the payment of the amount appearing to be due the appellant; which may be paid by the appellees crediting their decree in this court, or the court below for costs, with the amount, the appellant should be required to reconvey the tract of land aforesaid to them, or upon his default by a commissioner appointed for the purpose.

Decree amended and affirmed.

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268 *Continental Ins. Co. v. Kasey.

June Term, 1874, Wytheville.

[18 Am. Rep. 681.]

1. **Fire Insurance—Material Misrepresentations.**—In a case of insurance upon property, when the insurer is induced to enter into the contract through a misapprehension as to a material matter occasioned by the conduct or declarations of the assured, he is entitled to be released, whether the misrepresentation be produced by fraud or innocent mistake.

2. **Same—Same—Investigation by Agent.**—When an insurance company not relying upon the statements of the insured, sends its own agent to examine the property, and thereupon issues the policy upon the faith of his representations, the insured is not responsible for a misdescription of the property, however material, though inserted in the policy and constituting a warranty; unless there was a withholding of information by the insured incompatible with good faith and fair dealing.

3. **Same—Same—Same—Bona Fides.**—When the agent of an insurance company makes an examination of property to be insured on behalf of the company, and inserts in the policy a misdescription, based as well upon that examination as upon the representations of the assured, then if the misdescription by the insured was not *bona fide*, or if its effect is to induce the company to issue a policy which it would otherwise have rejected, the company will not be responsible for the loss. But if the misdescription was *bona fide* and immaterial, the insured may recover; though, according to the policy, the description constitutes a warranty.

4. **Same—Authority of Agents.**—An insurance company establishing a local agency, must be responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal.

The case is sufficiently stated by Judge Staples in his opinion.

Griffin, for the appellant.

Edmonson & Blair and J. F. Johnson, for the appellee.

See monographic *note* on "Fire Insurance" appended to Mutual, etc., Soc. v. Holt, 29 Gratt. 612.

269 *STAPLES, J., delivered the opinion of the court.

This is an action of assumpsit upon a policy of insurance executed by "The Continental Insurance Company," of the city of New York. The action was brought in the Circuit court of Roanoke county, where, as is averred, the insurance was effected and the property was located. A verdict and judgment were rendered in favor of the plaintiff. Upon the trial various exceptions were taken by the defendants to the rulings of the court. It is, however, only necessary at present to notice the defendant's fourth bill of exceptions, which brings before us the instructions offered during the trial.

Both parties asked for instructions. Some of those asked for by defendants were given, others were refused. In relation to those that were refused it is impossible for this court to say that any error was committed in so doing, for the plain reason that the bill of exceptions contains no part of the evidence. A party complaining of the action of the court in refusing his instructions, is required always to incorporate in his bill of exceptions so much of the evidence at least as tends to show that the instructions have some application to the subject matter of controversy. Unless this is done the court may be continually required to consider mere abstract questions of law having no bearing upon the case. This is the well settled doctrine of the appellate courts everywhere.

This brings us to the consideration of the three instructions given at the instance of the plaintiff. The first and third are substantially the same, and may be examined together. They declare, in effect, that the plaintiff has a right of recovery upon the policy although misrepresentations 270 may have been made by *him to the defendant before and in regard to the property insured, unless such misrepresentations were material or prejudicial, and were wilfully made with intent to defraud the defendants. The proposition here announced is an entire misconception of the law governing contracts of insurance. The error is in assuming that a misrepresentation, to defeat the policy, must be made with intent to defraud.

The rule upon this subject is thus laid down in Flanders on Insurance, page 327. Any material misrepresentation therefore, or any failure to comply with the conditions of the insurance on the part of the assured, will avoid the policy, such as misrepresentation of the construction, nature, character, value and situation of the premises or goods to be insured, or any other misrepresentation that induces the insurer to take the risk which he otherwise might have rejected, or to take it at a less premium.

In Carpenter v. American Insurance Company, 1 Story's R. 57, the applicant had represented that certain additions had been made to the property, and upon the faith of these representations the policy was issued. Mr. Justice Story in commenting upon this point said: "1. It turns out

that this representation is utterly untrue, whether by design or mistake is not material. No one can doubt the materiality of this representation, for it was the very point upon which the policy was undertaken. This makes an end of the case; for a false representation of a material fact is, according to well settled principles, sufficient to avoid a policy of insurance undertaken on the faith thereof, whether the false representation was by mistake or design. See 1 Phillips on Insurance, sec. 337. Authorities to the same effect might be multiplied almost without number. They all affirm 271 the proposition, *that when the insurer is induced to enter into the contract through a misapprehension as to a material matter occasioned by the conduct or declarations of the opposite party, he is entitled to be relieved, whether the misapprehension be produced by fraud or innocent mistake: the result is the same in either case.

On the other hand, if the misrepresentation was in no wise material to the risk, and could have had no effect to induce the insurer more readily to assume the risk, or to diminish the premium, then it is clear the policy will not be avoided upon the ground of such misrepresentation. Whether, indeed, the misrepresentation has affected the premium, or induced a policy, which otherwise would have been declined, are questions to be determined by the jury. Columbia Ins. Comp. v. Lawrence, 2 Peters R. 25.

As has been seen, the instructions of the Circuit court ignore these principles. They assert that no misrepresentation, however material, affects the policy, unless made with a fraudulent intent. This was clearly erroneous, and renders it necessary that the verdict and judgment should be set aside and a new trial awarded.

The second instruction presents a question of greater difficulty. It declares that although the plaintiff may have represented the premises to be frame and shingle houses, yet if the agent of the company was present and inspected the buildings at the time of the agreement to insure, and before the policy was issued, and inserted the description in the policy, based upon his own inspection as well as the plaintiff's representations, and such a description was a mistaken one, the plaintiff is entitled to recover, notwithstanding the misdescription contained in the policy.

The chief difficulty in the way of 272 maintaining this *instruction is that by the express terms of the policy, the description of the property therein contained is made an express warranty. And the doctrine is well understood, that a warranty is in the nature of a condition precedent. It is a matter of no sort of importance whether in such case the condition be material or immaterial, it must be literally performed. This is the general rule. Circumstances, however, sometimes occur to prevent its application. For example, if the company, not relying upon the statements of the insured, sends its own agent to examine the property, and thereupon issues the policy upon the faith of his representations, it would seem to be clear that the insured would not be responsible for a misdescription of the property, however material, though inserted in the policy and constituting a warranty, unless, indeed, there was a withholding of information by the insured incompatible with the obligations of good faith and fair dealing.

But suppose, as assumed in the instruction, the agent makes an examination of the property in behalf of the company, and inserts in the policy a misdescription, based as well upon that examination as upon the representations of the insured, what is the effect of a misdescription thus attributable to the mistake of both parties? This will depend very much upon the circumstances. If the representation of the owner was not bona fide, or if its effect is to induce the company to issue a policy which it otherwise would have rejected, it may be that the insured ought to bear the loss, notwithstanding the company, through its agent, may have contributed to the mistake.

On the other hand, if the mistake was an innocent one, and the representation was in no wise material to the risk, justice and sound policy would seem to re- 273 quire *that the company shall be held to the observance of its contract. The rule of law which invalidates an insurance unless the warranty is strictly performed however immaterial it may be, is an extremely technical one. Its operation is often to defeat the right of recovery contrary to the plain justice of the case and the real intent of the parties. A rule thus stringent ought not to be applied to an innocent mistake, not affecting the risk, to which both parties have contributed. The company cannot justly complain that it is liable in such case; first, because its own agent has aided in the misrepresentation; and secondly, because its conduct would not have been different had the fact been truly stated.

In the case of Insurance Company v. Wilkinson, 13 Wall. U. S. R. 222, Mr. Justice Miller delivered a very interesting opinion, greatly to be commended for the sound and thoughtful views therein presented. Much of it has a strong application to the present case. In the course of the opinion he said: "It is not to be denied that the application, logically considered, is the work of the assured, and left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. It was well known, however, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one state, and having in that state their principal business office, send their agents all over the land, with directions to solicit and procure applications

for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. The agents are stimulated by letters and instructions to activity in procuring contracts, and the 274 *party who is in this manner induced to take out a policy rarely sees or knows anything about the company or officers by whom it is issued; but looks to and relies upon the agent who has persuaded him to effect insurance, as the full and complete representative of the company, in all that is said or done in making the contract."

The learned justice concedes, that according to some of the earlier decisions, the responsibility of the companies for the acts of their agents was limited to the simple receipt of the premium and delivery of the policy—a doctrine which had a reasonable foundation to rest upon at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion. But to apply such a doctrine in its full force to the present system of selling policies through agents, would be a snare and a delusion, leading as it as done, in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal." See also Masters v. Madison County Mutual Insurance Company, 11 Barb. R. 624; Sarsfield v. Metropolitan Ins. Co., 61 Barb. R. 479; 2 American Leading Cases, 5th edition, page 917. The tendency of the modern decisions is in accordance with the liberal views announced by the Supreme court of the United States. It is a source of congratulation that the courts in construing these contracts are abandoning mere technicalities, and rendering decisions more in harmony with the general sense 275 *of mankind and the dictates of an enlightened judicial policy.

The case before us presents a striking illustration of the views here suggested. The record does not contain all the evidence adduced on the trial. It is very evident, however, that the east end of the main building insured was made of logs, weatherboarded and plastered. No one could see these logs, and it is very probable their existence was unknown both to the plaintiff and the agent of the company. Both concurred in representing the buildings as frame. and this description was inserted in the policy. Now, conceding that this was a misdescription, which is very questionable, to say the least, no one can suppose it was material to the policy, or that it had the slightest effect upon the premium. In other words, the misrepresentation, if such it was, was wholly immaterial. And we are told that this constitutes a breach of warranty, and a consequent forfeiture of the policy. We cannot subscribe to this view. If any breach has occurred, we think the company is estopped, under all the circumstances, to insist upon it. This of course is said upon the assumption that the facts are as stated in the instruction. We are therefore of opinion that the second instruction correctly expounded the law, except that it does not sufficiently distinguish between material and immaterial representations. As already stated, if the description of the property contained in the policy was material to the risk, the plaintiff cannot recover, notwithstanding the agent of the company may have concurred in the misrepresentation. Upon any future trial the instructions may be so modified as to conform to this view.

Before concluding this opinion, it 276 is proper to add *that all of us concur in the opinion that the Circuit court did not err in sustaining plaintiff's demurrer to the three pleas in abatement. All the judges agree that the pleas are defective; but they are not agreed as to the grounds upon which they are to be so adjudged. It is deemed therefore most advisable upon this branch of the case to pronounce a simple judgment of affirmance, without attempting to give reasons which would not be authoritative, and may tend to mislead.

In regard to the motion to quash the writ, made by defendants, it is sufficient to say that the defendants did not claim oyer of the writ and thus make it a part of the record, nor have they brought it before us by bill of exceptions. The rule is well settled that though the writ is, even without oyer, considered as part of the record for purposes of amendment and for the support of the proceedings, yet it is not so for the purpose of reversing them, unless indeed made so by oyer, except in cases of judgment by default. 2 Tucker's Com. 250, and cases there cited.

The assignment of error under the third bill of exceptions was very properly waived by the defendant's counsel in the argument here. The bill of exceptions does not state that the witness answered the question. It is, therefore, impossible for this court to say that an answer was given to the question; or, if given, that it had any influence upon the verdict. Johnson's ex'or v. Jennings' adm'or, 10 Gratt. 1. To prevent misapprehension on any future trial, it is proper to say we are all of opinion that the evidence was clearly admissible. This necessarily results from what has been already said upon the question arising under the fourth bill of exceptions.

277 *The judgment of the Circuit court must be reversed; and the cause remanded to be proceeded with in accordance with the principles herein announced.

Judgment reversed.

278 *Stimson v. Thorn.

June Term, 1874, Wytheville.

I. Upon a bill filed by T against H, to rescind a contract for the exchange of lands, it appears that H had been in possession of his land for twelve years, and had paid all the purchase money; but D, from whom he purchased, had died, and he had brought a suit against D's widow and heirs to have the title made to T—HELD:

1. **Exchange of Land—Defect in Title—Rescission.**—Under the circumstances of this case H should be allowed a further reasonable time to get in the title; and it was error to decree a rescission of the contract.

2. **Same—Same—Same—Parties.**—It was error to rescind the contract without having the widow and heirs of D before the court.

3. **Same—Same—Dower—Exoneration.**—If D died seized of other real estate on which he in his life time and his widow since his death lived, her dower should be assigned her out of that land in exoneration of the land sold by D to H.

4. **Same—Specific Performance—Compensation.***—If the land contracted to be exchanged by H with T be in fact encumbered by the right, title or estate of dower of the widow of D, and that be the only defect in the title of H to said land, such defect is not sufficient to prevent the specific execution of said contract; but the same may be executed, with an allowance of compensation for such defect, on the terms prescribed in the Code, ch. 106, § 12, p. 855.

This was a suit in equity commenced in the Circuit court of Bland county, and afterwards removed to the Circuit court of Wythe county, brought in April 1869 by Gordon C. Thorn against Robert W. Harman and N. B. Stimson, to rescind a contract for the sale and exchange of land made in March 1858, between said 279 *Thorn and Harman. The bill stated that, on the 26th of March 1858, he entered into a contract with Harman for the sale or exchange of a tract of land which he owned lying in Bland county, for one which Harman owned also lying in said county. Each executed to the other a title bond containing the terms, and each gave possession of his tract to the other. That by the bond of Harman, which he filed with his bill, Harman sold to the plaintiff the tract of land on which he lived, and which he had bought of L. D. Dunbar, at the price of $12 per acre, and covenanted to have the land surveyed and make to the plaintiff a good title to the same with general warranty. That the plaintiff also covenanted in the title bond he executed to Harman to have his tract surveyed; and supposing Harman's tract was larger than his, and that there would be a deficiency of $2,000 due from him, estimating his land at the same price per acre, being the price fixed, upon which the estimate was to be calculated, he had paid the $2,000 to Harman. That shortly after said payment the parties had their land surveyed according to the agreement, each being present when said surveys were made, and it was then ascertained that Harman's tract only measured four hundred and sixty-six and a half acres, and plaintiff's measured three hundred and forty-five acres, leaving a deficiency in the number of acres between said two tracts in favor of said Harman of one hundred and twenty-one and a half acres, which, at $12 per acre, left due from plaintiff to Harman $1,458, instead of $2,000, as they had supposed; and Harman had thus received from the plaintiff $542 in excess of the amount to be paid by the plaintiff in the exchange of lands. That he had frequently attempted to have with said Harman a final settlement 280 of this sale and exchange *of their lands, and had on more than one occasion tendered him a deed in compliance with his title bond; but said Harman had refused, and delayed, on various pretexts, the execution of said contract, and is now unwilling to execute the same. Said Harman has no deed from Dunbar for the tract of land sold by him; that Dunbar is dead, leaving a widow and infant children; and plaintiff is informed that a large portion of the purchase money for said tract of land is yet due from Harman to Dunbar. That since the death of Dunbar his widow has had dower assigned her in the tract of land sold by Harman to the plaintiff, and is in the possession and enjoyment of the same; and that Harman has sold the land obtained from plaintiff to a certain N. B. Stimson, who is in possession of it. And making Harman and Stimson defendants, he prays that the said contract may be rescinded; that Harman may be required to deliver up plaintiff's title bond, and to repay to the plaintiff the $2,000 received from him; and upon his failure to pay, that so much of the land sold by him to the plaintiff may be sold to satisfy the same with interest; and for general relief.

Stimson demurred to the bill, and both he and Harman answered; Harman, after stating the contract between himself and Thorn, says that Thorn assured him that his land did not run more than a quarter of a mile along Clear Fork creek, and three quarters of a mile back; and that upon this statement a calculation was made of the amount that Thorn would have to pay him, which exceeded $2,000. That when they came to survey the land, Thorn changed the course to be run, so as to widen the tract, and extended the line up on the mountain to more than a mile, so as to include a much larger quantity than was anticipated, and land that was not worth twenty-five cents per acre. 281 *That he objected to this at the time, and for this reason refused to accept the deed that Thorn tendered to him. That before the survey was made possession was delivered by each to the other; that he had possession of the land in the valley; that

*Specific Performance—Compensation.—See Stimpson v. Bishop, 82 Va. 190, for further litigation concerning the property involved in this suit. Upon the question of specific performance and compensation, see Hendricks v. Gillespie, 25 Gratt. 181, and *note*.

on the mountain being entirely in woods and not susceptible of cultivation.

He further says that the plaintiff knew what was the title respondent had to his land at the time of the contract. Respondent had purchased it of L. D. Dunbar, and had been in possession for over twelve years, undisturbed, and had paid all the purchase money. He has sold the land he bought from the plaintiff to N. B. Stimson, and put him in possession of it, and he had paid the purchase money.

As to the dower of the widow of Dunbar, respondent believes it was done by collusion with the plaintiff, who was still in possession of the land; and he might have prevented it, as he knew or might have known, that as against one claiming under an alienation from the husband, the widow could only claim interest on one-third of the value. As to the title, he can and will procure it, and there is sufficient balance in complainant's hand to indemnify him for any amount arising from the question of dower.

Stimson, in his answer, says that he lived at a distance from Bland county, and knew nothing of the terms of the contract between Thorn and Harman. He purchased the land with the knowledge of Thorn, and he had paid the whole purchase money, amounting to $3,134.59; and took an assignment to Thorn's title bond. He did not know until the 8th of December 1866, the date of the assignment of the title bond, that there was any question or difficulty between Harman and Thorn in regard to the quantity 282 of land, *and supposed then that the difference could be amicably and easily adjusted, as Thorn did not oppose a sale to the respondent; and he was put in possession of the land by Harman and had been continually in possession of it ever since.

The respondent further says that before his purchase Harman had executed a deed of trust upon the land to secure the payment of $1,100 to William M. Bishop, who had paid, as his surety, this sum, on account of the purchase money due from Harman to Dunbar; and that this debt had been paid off out of the money paid by respondent to Harman for the land. And he claimed that if the contract was rescinded he was entitled to be substituted to the rights of the creditor upon the land purchased by Harman from Dunbar for the amount of this debt.

Upon the question in dispute between Harman and Thorn, as to the boundary of the tract sold by Thorn, the evidence is not very clear, and is not important, as this court does not decide that question. It is probable, if not certain, from the evidence, that Harman had paid all the purchase money for the land he bought from Dunbar and sold or exchanged with Thorn. It appears, too, that the dower of Mrs. Dunbar in the land had been laid off, and Thorn had rented it from her for thirty-seven or eight dollars a year, until 1868, when she sold it for $450 to J. H. Hoge, when the rent was put at $50 a year.

In 1866 Harman instituted a suit in equity in the Circuit court of Bland, which was afterwards transferred to the Circuit court of Wythe, against Mrs. Dunbar, the widow, and the children of L. D. Dunbar and G. C. Thorn, to have the legal title to the land he had sold to Thorn conveyed to him. And in his bill he states that at the time of 283 his death, Dunbar owned *a tract of land in Wise county containing some eight or nine hundred acres, on which his widow resides; and he prays that the land may be conveyed to Thorn free of the incumbrance of the widow's dower, and that her dower be assigned to her in the land on which she lived in Wise county. Though this suit was still on the docket nothing has been done in it.

In the progress of the cause Harman filed a plea in bankruptcy; and his assignees were brought before the court. And then the cause came on to be heard on the 4th day of November 1872, when the court held that Thorn was entitled to a rescission of the contract between himself and Harman, and consequently to a restitution of the tract in possession of Stimson, and reimbursement of the $2,000 he had paid to Harman, with interest, and to have the same a charge upon the lands of Harman in possession of the plaintiff, &c. The decree was that the said contract should be rescinded, and that Stimson should deliver possession of the land sold to Harman within thirty days. And the cause was remanded to the rules with leave to the plaintiff to amend his bill and make the heirs of Dunbar parties, &c. And thereupon Stimson applied to a judge of this court for an appeal; which was allowed.

Crockett & Blair and J. J. Wade, for the appellant.

R. C. Kent, for the appellee.

MONCURE, P., delivered the opinion of the court.

The court is of opinion that the contract between Gordon C. Thorn and Robert W. Harman for an exchange of lands, as 284 mentioned in the proceedings in *this cause, ought to be specifically executed, if a good title can be made by them to the said lands, according to the conditions of their title bonds respectively.

The court is further of opinion that the evidence in the cause strongly tends to prove, if it does not fully prove, that the said Harman has a good equitable title to the land mentioned in his title bond, being the land bought by him of L. D. Dunbar; that he has fully paid the purchase money due by him to said Dunbar, and that the only defect in the title of said Harman is, that the naked legal title to said land is yet outstanding in the heirs-at-law of said Dunbar, who is dead, which legal title can therefore be readily obtained by the aid of a court of equity.

The court is further of opinion that under all the circumstances of this case, as disclosed by the record, a reasonable further

time ought to be afforded to the said Harman and the appellant N. B. Stimson, to perfect the title of the said Harman to the said land mentioned in his title bond, either by prosecuting to a final decree the suit already brought for that purpose by said Harman against the widow, children and heirs of said Dunbar, and the said Gordon C. Thorn, and now pending in the Circuit court of Wythe county, or otherwise as they may be advised.

The court is further of opinion that the widow of said Dunbar, if entitled to dower in his estate, ought to have such dower assigned to her out of any other real estate of inheritance of which he may have died seized, rather than out of the land sold by him to said Harman as aforesaid, of which he seems to have fully received the purchase money. And it appears from the bill filed by said Harman, in the suit brought by him as aforesaid, that the said Dunbar
285 died seized of *a large tract of land, containing some eight or nine hundred acres, in the county of Wise, on which his said widow resided at the time of the filing of said bill.

The court is further of opinion that if the land contracted to be exchanged by said Harman with said Thorn as aforesaid be in fact encumbered by the right, title or estate of dower of the said widow of Dunbar, and if that be the only defect in the title of said Harman to said land, such defect is not sufficient to prevent the specific execution of said contract, but the same may still be executed with an allowance of compensation for such defect on the terms prescribed by the Code, ch. 106, § 12, p. 855.

The court is therefore of opinion that the Circuit court erred in decreeing a rescission of the said contract, at least in the state in which the pleadings and the proofs were at the time when the said decree was rendered, and would have erred in making such decree, even if it would have been otherwise proper, without first making the widow and heirs of said Dunbar parties defendants to the suit.

Therefore it is decreed and ordered, that the said decree be reversed and annulled, and that the appellee, Thorn, pay to the appellant, Stimson, his costs by him expended in the prosecution of his appeal aforesaid here. And the cause is remanded to the said Circuit court, with instructions to permit the said Thorn to amend his bill, for the purpose of making the said widow and heirs of Dunbar defendants thereto; and such other purposes as may be consistent with this decree, and for further proceedings to be had therein; and in the said suit of said Harman against said Dunbar's widow and heirs, which may be heard together with this cause in conformity with the foregoing opinion and decree.

286 *But the foregoing decree is to be without prejudice to any controversy which has arisen or may arise between the said Thorn and Harman, or their assigns, in regard to the land mentioned in the title bond of said Thorn to said Harman, and the proper quantity of said land, which is ordered to be certified to the said Circuit court of Wythe county.

Decree reversed.

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287 *Clark v. Nunn & Wife.

Absent, STAPLES, J.*

June Term, 1874, Wytheville.

The broad language of a contract in relation to the division of land between the joint owners, restricted in its construction, in view of the surrounding circumstances and the previous action of the parties.

Fugate Clark died in 1826, having made his will, by which he gave to his widow one-third of all his real and personal estate after the payment of his debts; and after some small legacies, he directs the balance of his personal property to be equally divided among his eight children, and the lands equally divided also: "The residue of my property, which I give to my wife, at her death I wish equally divided."

Charity, one of the daughters of Fugate Clark, married William Nunn; and he purchased one-half the interest in the estate of Rachel, another daughter; and Randolph Clark purchased the other half of Rachel's interest.

Fugate Clark owned two or three large tracts of land; and in a suit instituted for the purpose in 1841, commissioners were appointed to divide a part of the lands among the devisees, Nunn and wife and Randolph Clark, and to lay off the one-third for the widow. The commissioners met on the land for the purpose, when Nunn
288 and Randolph Clark agreed *upon a division between themselves, which was reduced to writing and signed by them. This agreement recites that Nunn claims an interest of one eighth and one sixteenth in the tract of land on which Fugate Clark, deceased, formerly resided, and Randolph Clark claims the residue of said lands, except the widow's dower; and it is agreed that William Nunn shall have two pieces of land on the northwest side of the survey, one of which contains one hundred and sixty-seven acres, and the other five and a half acres; and they are described by metes and bounds. The said Randolph Clark binds himself, his heirs, &c., to relinquish to Nunn, his heirs, &c., all his claim, right or title to the above described lands. The said Nunn, on his part, agrees for himself, his heirs, &c., to relinquish to the said Randolph Clark all the claim, right or title he may have in and to the said tract of land on which said Fugate Clark, deceased, resided, as well as to all the lands belonging to the estate of the said Fugate Clark adjacent thereto.

A few days after this agreement, the widow's third of the land was laid off to her, embracing three hundred and ninety acres of the above mentioned tract; and she

*He had been counsel in the cause.

occupied it until her death in 1857. During her life Joseph Clark, another son of Fugate Clark, deceased, purchased the interests of all the heirs, except that of Nunn and wife in the third of the land held by the widow; and upon her death he and Nunn and wife agreed upon a division of it upon the basis that they had three sixteenths and he owned the remainder of it; and though there was no deed of partition between them, each party took possession and held the part assigned to him until Joseph Clark's death. In 1866 Joseph Clark died unmarried and intestate. And in April 1869, Nunn
289 and wife instituted *a suit in equity to have the division aforesaid confirmed, and to have partition of the land of which Joseph Clark died possessed. Randolph Clark answered, and insisted that by the agreement between Nunn and himself, Nunn had released to him all the land on which Fugate Clark had resided, including the land afterwards assigned to the widow. The construction of this agreement is the only question in the cause, and the surrounding circumstances bearing upon that question are stated by Judge Anderson in his opinion.

The cause came on to be heard upon the 21st of April 1869, when the court held that the plaintiffs were entitled to the three sixteenths of the land as claimed by them, and confirmed the division made by them and Joseph Clark. And commissioners were appointed to make partition of the land of which Joseph Clark died possessed. And thereupon Randolph Clark applied to this court for an appeal; which was allowed.

J. J. Wade, for the appellant.

J. A. Walker, for the appellees.

ANDERSON, J. delivered the opinion of the court.

This is a bill brought by William Nunn and wife for the partition of the lands of which Joseph Clark dies seized amongst his heirs-at-law, of which they are entitled to one-sixth, and which are part of a tract of three hundred and ninety acres, which had been assigned to the widow of Fugate Clark for and during her life, and which were at her death to be divided amongst his eight children, of whom the female plaintiff was one. The bill alleges that the
290 plaintiff, William *Nunn, had purchased the half of one other share in reversion, which entitled the plaintiffs to three sixteenths in the reversion, and that the residue of the shares had been purchased by Joseph Clark, the brother of the female plaintiff, and of the defendants, who died intestate and without issue; and that they and the said Joseph had made a parol partition after the death of the widow, and their three-sixteenths were laid off to them by metes and bounds, of which they had held the exclusive possession ever since; and they ask that the same may be confirmed.

The appellant, Randolph Clark, who is also a brother of Joseph Clark, deceased, objects to the confirmation of said partition, denies the right of the plaintiffs to said three-sixteenths, and claims the right to the same himself under a contract made with the plaintiff, William Nunn, on the 16th of June, 1841, which he exhibits with his answer. On the 21st of April, 1869, the Circuit court of Pulaski county pronounced a decree, adjudging the plaintiffs to be entitled to the said three-sixteenths, and confirming the partition which had been made between them and Joseph Clark, deceased, from which decree the defendant, Randolph Clark, appealed to this court.

The case turns upon the construction of the said contract of June 16th, 1841, and the question is, was it the intention and design of the parties to make partition of their interests in the reversion, expectant upon the termination of the widow's life estate therein, or only of their interests in possession in the real estate of Fugate Clark, deceased. The contract is very inartificially and awkwardly drawn, and is by no means clear and explicit, and should be construed in the light of the surrounding circumstances.

It seems that at the time it was en-
291 tered into, there *was depending in court a proceeding instituted by William Nunn, or the plaintiffs, to have laid off and assigned to them their shares in the real estate of the said Fugate Clark, deceased, and that three commissioners had been appointed by the court to lay it off. The record of that proceeding is not exhibited with this record. But it is evident that it could not have been designed to lay off their interest in that part of the estate which was to be assigned to the widow, and which was assigned to her a few days after the date of this contract; because by the terms of the will, it was not to be divided until after the death of the widow.

The commissioners, it seems, had met upon the ground to lay off to the plaintiffs their interests in the real estate, not including their interest in the reversion, when the contract in question was entered into, by which the parties themselves agreed how it should be laid off; and two parcels were laid off to them by metes and bounds, amounting together to one hundred and seventy-two-and-a-half acres. Afterwards, three hundred and ninety acres were laid off and assigned to the widow, not including any portion of the one hundred and seventy-two-and-a-half acres which had been laid off to the plaintiffs. The inference would be, that the allotment made to them was exclusive of their interest in the dower, which was not subject to partition, by the purport of the will of Fugate Clark, until after the death of the widow.

And this construction is confirmed by the conduct of the parties, by their acts and declarations. On the 22d of April 1843, about two years after this contract was made, Randolph Clark united with his brothers Reuben and John in a conveyance of their interests in the reversion to Joseph Clark, which they describe as being three-eighths and one half-eighth. Reuben

292 had *previously purchased the one-half of his sister, Rachel, which gave him three-sixteenths, he being entitled, under the will of his father, to one-eighth, which left to each of the other grantors, Randolph and John Clark, in the interests conveyed one-eighth; which cannot be otherwise construed than as a solemn acknowledgment by Randolph Clark, inferentially, that he at that time, did not claim the appellees' interest in the reversion. If he had then claimed their shares, under the contract in question, his interest would have been two-eighths and a half, instead of only one-eighth. We regard this act of the appellant, two years after he entered into the contract in question, as a construction upon it which repels that which he now gives to it. It is the evidence of cotemporaneous construction by the party, who, long years afterwards, seeks to avoid it. On the other hand, the plaintiffs, the appellees here, have ever maintained that they did not intend to part with their interest in the dower land. And the possession has ever been consistent with their construction of the contract, from the time it was entered into, down to the filing of appellant's answer in this cause; a period of exactly twenty-six years to the day. And the rights of the appellees were recognized and acknowleged by the owner of all the other interests in the reversion, from the termination of the life estate to the day of his death. Upon the whole, the court is of opinion that there is no error in the decree of the Circuit court, and that the same be affirmed with costs and damages to the appellees.

Decree affirmed.

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293 *Kenny's Adm'ors v. Kenny & als.

June Term, 1874, Wytheville.

K died in 1851, leaving a widow and six children. By his will he gives his slaves to his widow for her life; and at her death he gives them to his sons, W and R, and directs they shall be valued in the mode prescribed in the will, and W and R shall pay to each of the other children one-sixth of their value; and he appoints W and R executors; who qualify. The widow died in 1860, when W and R took possession of the slaves, and divided them between them, and held them until two died in 1862, and the others were freed by the results of the war. In 1861 H, another son of K, brought suit to have the slaves valued. In 1868 the administrators of W and R file an answer insisting that they held the slaves as executors, and were not bound to elect to take them on the condition until they were valued; which was never done—HELD:

1. **Life Interest in Personal Property—Rights of Remaindermen.**—On the death of the widow it was the right of W and R to take possession of the slaves as their own, on the terms of the will, without the assent of the executors, whose office, in this respect, was fully discharged when the slaves were delivered to the life tenant.

In Mason v. Jones, 26 Gratt. 271, the principal case is sustained upon the rule laid down in the first headnote.

2. **Same—Title on Death of Life Tenant.**—The title to the slaves passed to W and R by operation of law immediately on the death of the life tenant, unless rejected by them. And it was competent to them to signify their acceptance of the legacies by receiving and holding the slaves as their own property under the will, while awaiting a valuation thereof.
3. **Same—Same—Legatees and Executors.**—Whether they did so take and hold is a question of fact; and on the evidence this court held they did; and that it was too late in 1868 for them or their personal representatives to pretend for the first time that they held as executors and not as legatees.
4. Having in fact accepted the legacies, they must pay the other children each one-sixth of the value at the time of the death of the life tenant.

294 *William Kenny, of the county of Carroll, died in 1851, leaving a widow and six children, and leaving a will which was duly admitted to probate; and his sons, Robert and William Kenny, who were named executors, qualified as such in the County court.

By his will, after giving to his three sons each a tract of land, and to his daughters some land in Kentucky and personal property, he provides that his wife shall have his slaves for her life; "and at my death are to be valued, and Robert Kenny and William Kenny to hold them, and pay their brother, Hance H. Kenny, and their three sisters, an equal part with themselves, to be paid in trade at trade prices. And they are to have five years to pay for them. My object for doing this is to keep them all together, where they will be well treated."

The slaves were four, and the widow went into possession of them, and held them until her death in September 1860, when they went into the possession of Robert and William Kenny, who divided them between them, and they remained in their possession until two of them died, and the other two were freed by the results of the war.

In February 1861, Hance H. Kenny instituted a suit in equity against Robert and William Kenny and the other parties interested, in which after setting out the foregoing facts, he said that a difficulty had occurred as to how the valuation of the slaves should be made; that the County court, on the application of the plaintiff, had appointed three men to make the valuation; but the said Robert and William Kenny refused to let them be valued, and still hold them and refuse to let them be valued. They ask for a construction of the will, and that the provision as to the slaves may be carried out.

295 *The defendants appeared but did not answer, as all the facts were set out in the bill and exhibits; and it was agreed that the court might decide all questions as upon a bill taken for confessed.

The court made a decree appointing commissioners to value the slaves, in a mode stated in the decree; and upon the return of their report, made a decree in favor of

the different parties, according to the report. From this decree Robert and William Kenny took an appeal, and in May 1867 the decree was reversed.

When the cause went back, Robert Kenny and the administrators of William Kenny filed their answer. They say that the slaves went into the possession of the widow of the testator, and were held by her until her death in September 1860; and that after her death they came into the possession of Robert and William Kenny, Jr., the executors of William Kenny, Sr., as a portion of the unadministered assets of their testator; and so remained in their possession until they ceased to be property, by the death of two of them in 1862, and as to the other two, by the results of the war. They deny that they ever took or held possession of the said slaves in their own right, as their own property, or that they ever considered or treated them as their own property; and, indeed, they had no right to do so until said slaves were valued and appraised to them in the mode directed by the will of William Kenny. They deny that they have refused to have the slaves valued at the proper time and by the proper persons, according to the plainly expressed will of the testator, but they were always willing to have them so valued. And they insist that the legacy was coupled with a condition that the slaves should be valued; and until this was done, they were not bound to make their election whether they would take them and pay
296 to the *other children their shares of the value; and that the said slaves having ceased to be property, they have no choice left and cannot be compelled to pay their brother and sisters for property which never came into their possession as a legacy.

There was evidence taken as to the value of the slaves; but it was finally agreed by the parties, that the four should be valued each at $1,250. This court held the evidence showed clearly that Robert and William Kenny took the slaves into their possession on the death of their mother, and held them as their own, until they died or were freed as aforesaid.

Robert and William Kenny having died, the suit was revived against their administrators; and the cause came on to be heard on the 9th of September 1870, when the court held that Robert and William Kenny, in their lifetime, made their election to take and hold the said slaves, and that they were concluded by such election. And decreed against their administrators in favor of the other parties, each for one-sixth of the agreed value of the slaves. And the administrators thereupon applied to this court for an appeal; which was allowed.

J. N. Walker and John W. Johnston, for the appellants.

Terry & Pierce and Caldwell, for the appellees.

BOULDIN, J., delivered the opinion of the court.

The court deems it unnecessary in this case to consider and decide the question so earnestly and ably discussed at the bar, whether the devises of land in the will of William Kenny, Sr., to his sons, Robert and William Kenny, respectively, are so
297 connected *with the bequests of slaves in remainder to the same legatees as to prevent them from rejecting the bequests of the slaves without at the same time surrendering their claim to the lands, on the principle invoked by the appellees, that a party cannot at the same time claim under and against a will; that he cannot accept in part and reject in part the same instrument, but must conform to its provisions throughout, or reject it altogether. There is no doubt about the general rule; but the question of its application to this case does not arise, as there has been here no rejection in fact of any of the provisions of the testator's will.

It is very clear, on a just construction of the will, that the testator, after having bequeathed the slaves in question to his wife for life, bequeathed the same "after the death of his widow to the appellants, Robert Kenny and William Kenny, who were to pay each of the other children of the testator an equal proportionate part with the said appellants respectively of the value of said slaves, viz: one-sixth part to each child," such value to be ascertained as provided in the will. About this there can be no doubt, as the proposition announced is in the very words of this court when construing the will on a former appeal in the cause.

On the death then of the testator's widow, the legatees, Robert and William Kenny, were entitled to the slaves on the terms of the will; and if they were willing to accept the legacies, it was their absolute and unqualified right to take immediate possession of the slaves and to hold the same as their own property without the intervention or assent of the executors, whose office in this respect was fully discharged when the slaves were delivered to the life tenant. The valuation of the slaves, and the payment
298 by Robert and *William Kenny to their brother and sisters respectively, of their due proportions of such value in the mode and within the period prescribed by the testator were matters outside, and wholly independent of the title to the slaves. The title to the slaves passed to the legatees in remainder, by operation of law, immediately on the death of the life tenant, unless rejected by them; and it was competent to them to signify their acceptance of the legacies by receiving and holding the slaves as their own property under the will while awaiting a valuation thereof. Such a course was convenient in itself, and could not result in any practical mischief. Whether they did so take and hold or not is purely a question of fact; and we think the affirmative is abundantly established by the evidence in the case. They took possession of the slaves, as they had a right to do, immediately on the death of the life tenant, not as executors, but in their own right as

legatees. They denied that they belonged to the estate—refused to allow them to be hired out pending the controversy as to the mode of valuation—claimed them as their own property under the will—actually divided them between themselves as such very soon after the life tenant's death—and so held them respectively, until they perished on their respective hands by death and the results of the war. In the face of these facts it was too late, in March 1868, for them or their personal representatives to pretend for the first time, that they held as executors, and had not accepted the legacies, when more than eight years had elapsed since they had actually divided the slaves between themselves as legatees, when nearly three years had elapsed since the close of the war, and when the slaves themselves had long since perished in their individual service—two of them by death,
299 and the others by the *results of the war. Under such circumstances we think their acceptance of the legacies was final and complete.

We are of opinion, therefore, that there is no error in the decree complained of, and that the same be affirmed with costs and damages to the appellee.

Decree affirmed.

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300 *Stuart, Buchanan & Co. v. White & als.

Mitchell & als. v. McCall & als.

June Term, 1874, Wytheville.

I. **Bill for an Injunction—Issue Presented.***—In a pure bill by the assignees of the lessees of salt works, to enjoin part owners of it from disturbing their possession, the only issue is the right to an injunction, and an account of profits cannot be decreed in that case.

II. **Same—Account of Profits.**—But there being another case in the same court between the owners of the property, in which the court has taken possession of the property and rented it out by its commissioner, and the Special court of appeals having directed that the cases shall be heard together, the order of account may be made in both causes.

III. The assignees of the lessees of the salt works hold under the lease by the court to P at $22,000 *per annum*, which terminated January 1st, 1861; and in 1859 P leases to the assignees for ten years, commencing in 1859 at $20,000. The assignees hold over after January 1861, until 1869. In the suit by the assignees to enjoin the part owner from interfering with their possession, on appeal to the Special court of appeals at Abingdon, that court after reinstating the injunction, and directing the cause to be heard with the case between the joint owners, says that the Circuit court may determine whether the assignees shall be charged according to the lease to P or P's lease to them, or hold them responsible for such other reasonable rent for the property as the court may determine to be right—HELD:

1. **Special Court of Appeals.**—The decree of the Special court of appeals not having been appealed from, the parties are bound thereby; and the Circuit court may direct a commissioner to ascertain and report what would be a reasonable rent of the property from January 1st, 1861, to January 1st, 1869.

2. **Same—Production of Books and Accounts.**—The court may require said assignees to produce before the commissioner, on oath, all con-
301 tracts in their possession or power *to produce, by which leases of said salt property were made by them, or privileges granted to others to manufacture salt during said period, and all books and accounts and papers in their possession or power, showing the quantity of salt manufactured during said period, and delivered to them by their sub-lessees, or those to whom such privileges were granted under such contract.

King's salt works, situated in the county of Washington, being owned by a great many persons having different interests, a bill was filed in the Circuit court of that county by John D. Mitchell and others, part owners of the property, asking the court to appoint a receiver for its management. And by a decree made in the cause on the 16th of October 1850, the court appointed a commissioner and directed him to rent out the property upon the terms and in the manner stated in the decree.

Under this decree the property was rented for five years, commencing the first day of June 1851, at $16,000 a year. In November 1855, another commissioner was appointed and directed to rent out the property at public auction, for five years, from the 1st of January 1856, at not less than the sum of $20,000. At this renting Thomas L. Preston, who was the owner of Preston's salt works, which lay within a few hundred yards of King's, in which he also had an interest, rented the property at $22,000 a year. This lease extended to January 1st, 1861. Pending this lease, Preston, in October 1858, leased both Preston's and King's salt works to Spenser, Akerman & Co., for ten years, commencing the 1st of January 1859, at the price of $50,000 a year, of which $30,000 was the price of Preston's, and $20,000 the price of King's property. This lease was subsequently transferred to Stuart, Buchanan & Co. It seems
302 that all the owners *of King's salt works, except those claiming under James White, deceased, approved the lease made by Preston to Spenser, Akerman & Co., at the time, or they were subsequently satisfied.

The court did not afterwards direct another lease of the King's salt works; but Stuart, Buchanan & Co., continued in possession of it after the lease to Preston had expired. In this state of things Newton K. White, owning an interest in the property, as one of the sons and devisees of James White, deceased, entered upon the property, and in connection with Jonas S. Kelly and William Roberts, commenced to manufacture salt. Stuart, Buchanan & Co. there-

*Bill for an Injunction.—See Barton's Ch. Pr. (2d Ed.) 451, 683.

upon applied by bill to the judge of the Circuit court of Washington county for an injunction to restrain them. The injunction was granted; but upon the hearing it was dissolved. And thereupon Stuart, Buchanan & Co. obtained an appeal to the District court of appeals at Abingdon; and on the 23d of July, 1867, that court reversed the decree of the Circuit court.

The decree of the Special court of appeals and the subsequent proceedings in the two cases are set out in the opinion of this court.

The appeal in this case is from an order entered on the 17th of April 1872, and was obtained by Stuart, Buchanan & Co.

John W. Johnston, Terry & Pierce, for the appellants.

J. W. & J. P. Sheffey, J. A. Campbell and J. T. Campbell, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

The decree of the District court at Abingdon, entered in the first named cause
303 on the 23d day of July, *1867, not having been appealed from, must be taken as a final and conclusive adjudication of all the questions settled by that decree.

The following extract is taken from that decree: "The court is further of opinion that as the possession of this property (the King's salt works) was obtained by the appellants, or those under whom they claim in the beginning of the year 1859, under a lease of previous date from Thomas L. Preston, to whom, with the approval of said court, the same had been rented by its commissioner for a term of years, which did not expire until the 1st day of January, 1861, the appellants, or those under whom they claim, did acquire a lawful possession of said property under the authority of said court; and although without any express authority from it, they have held over, still that it would defeat the purpose of said court, as indicated in its said decree, to tolerate any entry upon the said possession by any one of the part owners to the exclusion of the others, and that the interests of all make it necessary that the management assumed by the said court shall not be interfered with, but kept under its complete supervision and control." * * * * * "That the said Circuit court of Washington county having by its decree assumed the management of said property, alone can determine whether to confine the lease for ten years made by Preston to Spencer, Akerman & Co., of whom the appellants claim to be legal successors; or to treat them as being in possession of the property under the terms of the lease to said Preston; or to hold them responsible for such other reasonable rent as said court may determine to be right; or it may determine that the interests of the several owners may be promoted by a new letting of the property on such terms as it may seem proper;
304 *but these questions can only be properly determined by that court in some proceedings to which all the part owners are parties. It is therefore the opinion of this court that the injunction awarded in this cause, instead of being dissolved, should have been continued; that the appellants should have been required to amend their bill, by making all the owners of the King's salt works parties thereto; and that the cause when heard should be heard with the before-mentioned suit of Mitchell & others v. McCall and others."

Under this decree of the District court, and in accordance with its directions, the Circuit court of Wythe on the 3d day of May, 1870, entered a decree declaring that "the complainants be required to amend their bill by making all the owners of the King's salt works parties thereto, and with a view of conforming to the requirements of said decree, that the cause when heard should be heard with the case of John D. Mitchell and others against A. McCall and others, depending in the Washington Circuit court, this cause is by consent of parties removed to the Circuit court of Washington county for the purpose aforesaid, without being remanded to rules."

Afterwards, it appearing to the court that the plaintiffs in the injunction suit had in some mode adjusted the matter of rents of said salt works with the other owners, except the heirs of James White, an amended bill was filed making said heirs parties defendants; and this was accepted as a compliance with the order of the District court respecting new parties.

At the April term 1871 of the Circuit court of Washington, a decree was entered directing its commissioner "to take, settle and adjust an account, showing what would be a reasonable rent of King's salt works, in the hands of the plaintiffs, due to de-
305 fendants *or any of them, from the 1st day of January, 1861, to the 1st day of January, 1869, with interest thereon, and any payments, if any, made by Stuart, Buchanan & Co. to the defendants, or either of them, during said period, on account of rents of said salt works;" and the decree required the complainants "to produce before said commissioner any books, accounts and papers in their possession he may require, to enable him to ascertain a reasonable rent of the property during the said period."

Under this decree the commissioner proceeded to take evidence, and gave notice to the plaintiffs to produce before him at his office at Abingdon, "all their books, papers and accounts, relating in any manner to the business of manufacturing salt at Saltville, during the period embraced in the order settling said account, and the proceeds of sales of the same during the same time, in order that a full and accurate account of the entire operations may be ascertained and fully set out." After this notice had been served on the plaintiffs they filed their petition to the Circuit court of Washington county, setting out the above requirement of the commissioner, and complaining that the order of the court, with the action of

the commissioner under it, was calculated "to be productive of great wrong and injustice, and if proceeded in will occasion great expense and delay"; that according to the requisition of the commissioner they would be subjected to the delay and expense of interminable accounts of very large transactions of many years, and that the time, labor and money wasted in taking these accounts could hardly be estimated. They conclude their petition by referring to the order of the court, and saying, according to this plan (of the commissioner) every shipment and sale of salt will
306 have to be *enquired into; testimony will have to be taken over most of the Southern states; an interminable scaling of money received and money paid out from month to month will be necessary. And to make such a plan still more difficult, it will be found that many of the heaviest salt transactions of your petitioners are still unsettled, and many are now the subjects of litigation in various parts of the country."

This petition was received and considered by the Circuit court, and in a careful and clear written opinion, filed with the record, he proceeds to construe the legal effect and terms of the order of April term 1871; and to prescribe and limit the action of the commissioner under it. His Honor, Judge Kelly, after noticing at length the objections raised in the petition, says: "He (the commissioner) ought to confine his enquiries solely to what would be a reasonable rent of King's salt works, in the hands of complainants, from the 1st January 1861 to the 1st January 1869, and to payments made by them, on account of rents, to defendants; and not to an account of the entire operations of complainants in the manufacture of salt. If the commissioner deems it proper, in the first instance, to call upon complainants for the production of documents, he should restrict his call to such books, papers and accounts as pertain to the rental value of the King's salt works, and to any payment of rents to defendants. The complainants will then, under oath, produce such, and such only, of their books, &c., as, in their judgment, are relevant to the enquiry and account required by the commissioner. Should the commissioner not be satisfied with this production, and, in his discretion, order a further production, he will designate what other documents are to be produced. If the defendants are
307 advised that the documents *are not relevant, or that they are such as they are not bound to produce, they (at the risk of being regarded as in contempt, should the court decide that the books, &c., should be produced,) will decline to produce them, and upon the commissioner's certificate of refusal the question will come before the court." And it was thereupon ordered that Commissioner Leonidas Baugh do reform his requisition for the production of books, papers and accounts by the complainants, so as to require only the production of such as relate to or will aid him in ascertaining the rental value of the King's salt works, from the 1st day of January 1861 to the 1st day of January 1869."

These proceedings were held in vacation, and Commissioner Baugh afterwards made a report showing "his efforts to take the account ordered, and the failure of Stuart, Buchanan & Co. to produce before him the books, accounts and contracts required by him as necessary to enable him to take said account, and report such reasonable rent and payments, if any, thereon, as required."

At the April term 1872, the Circuit court after referring in its decree, to the proceedings in vacation above noticed, the instruction to commissioner Baugh, restricting his enquiries to ascertain what would be a fair rental value of the King's salt works, and limiting his requisition for books, &c., to such only as may be necessary to aid him in reaching that enquiry; and after setting forth the decree of the District court of appeals, which declared that the Circuit court of Washington county should determine either "to confirm the lease for ten years, made by Preston to Spencer, Akerman & Co., of whom Stuart, Buchanan & Co. claim to be the legal successors; or to treat them as being in possession of the
308 property under the terms *of the lease to said Preston; or to hold them responsible for such other reasonable rent as said Circuit court may determine to be right," entered the following decree: On consideration whereof, the court is of opinion and doth determine to ascertain what would be a reasonable rent under the circumstances for King's salt works in the hands of the complainants due to the defendants from 1st January, 1861, to 1st January, 1869, and what payments, if any, have been made by said complainants to the said defendants on account of rents during said period, and to hold Stuart, Buchanan & Co. responsible to the said defendants for their shares of such reasonable rents of King's salt works during said period when ascertained, subject to such payments, if any; and for this purpose the court doth review and enlarge the order of account heretofore made by decree in the first mentioned case, to be taken by commissioner Baugh, and to enable him to take it, said Stuart, Buchanan & Co. are ordered to produce before said commissioner on oath, when required by him, all contracts in their possession or power to produce, by which leases of said salt property were made by them, or privileges granted to others to manufacture salt during said period, and delivered to them by their sublessees, or those to whom such privileges were granted under such contract. * * * And said commissioner is required, from such evidence as the parties may produce before him, to ascertain and report a reasonable rent for said King's salt works, and of the shares of said defendants therein during said period, and report the same to the court with any matter specially stated deemed pertinent by himself or required by either of the parties to be stated."

It is from this decree that an appeal has been allowed to this court.

309 *The court is of opinion that there is no error in the decree complained of. It is in entire conformity with the decree of the District court of appeals at Abingdon, which not being appealed from, must be taken as a final adjudication of the questions stated by that decree. Under that decree the Circuit court of Washington was empowered and directed to hold the appellants responsible either for the amount of the lease made by Preston to Spencer, Akerman & Co., or the amount of the court's lease to Preston, or for such other reasonable rent as said Circuit court may determine to be right. It was to ascertain what is a reasonable rent that the matter was referred to a commissioner for enquiry. It was a proper mode, and the best mode of ascertaining the rental value. Nor is the decree of the court subject to the objection that it is a decree for an account of the profits, and indicates a purpose to hold the appellants responsible for, and to give the appellees a share in the profits made during the period for which the salt works were held by the appellants. On the contrary, both the instructions given to the commissioner and the decree of the court expressly limit the enquiry to what would be a reasonable rent; and he is directed to call for the production of such books and papers and contracts of lease with sub-tenants, and such only as will enable the commissioner and the court to make a correct estimate of the fair rental value.

The decree appealed from directs the production by the appellants of all contracts in their possession or power to produce, by which leases of said salt property were made by them, or privileges granted to others to manufacture salt during said period, and all books and accounts and papers in their possession or power, showing the quantity of salt manufactured

310 during *said period, and delivered to them by their sub-lessees, or those to whom such privileges were granted under such contract."

There is nothing unreasonable or oppressive in this order, and it is difficult to perceive upon what reasonable grounds the appellants can object to it. They knew when they took possession of the King's salt works, under the lease of Preston to Spenser, Akerman & Co., that this property was under the supervision and control of the Circuit court of Washington county; and that the yearly rent had been fixed by the court for many years past. They had sub-let a large portion of the property to sub-tenants, and during the period indicated in the decree had received from them large rents in manufactured salt and otherwise for the privileges granted. Surely it was a legitimate enquiry, in order to arrive at a reasonable rent which the appellants should be required to pay, to ascertain what rent they received from their sub-lessees during the same period.

Nor is the objection well taken, so earnestly insisted upon by the learned counsel for the appellants, that under the issue made by the pleadings, in the suit of Stuart, Buchanan & Co. v. White & others, no account could be ordered by the court. That objection to the decree would have been potent and conclusive if the action of the court had been confined to that case; for the only issue made by the pleadings in that case was, whether the King's heirs had a right to enter and use the property for themselves. But under the decree of the District court the Circuit court was directed to hear together with the suit of Stuart, Buchanan & Co. v. White, the suit of Mitchell v. McCall, after bringing before the court, by an amended bill, all the King's heirs. In the last named case the

311 Circuit *court of Washington had assumed, without objection, and with the approval and at the request of all the parties interested, the complete supervision and control of the property, renting it out, and distributing the rents among the parties entitled. It required therefore no issue in the pleadings in the suit of Stuart, Buchanan & Co. to enable the court to do that which for years it had done under full authority in the suit of Mitchell v. McCall, to wit: to ascertain the reasonable rent for the King's salt works, and distribute that rent so ascertained, among the parties entitled to receive it. Under proper proceedings in that suit Preston had leased the property for five years from the court's commissioner. In 1859 he made a lease to Spenser, Akerman & Co., and the latter to Stuart, Buchanan & Co. Stuart, Buchanan & Co., took the place of Preston, whose lease expired in January 1861; they held over without any authority of the court and without any new contract with the court. It was certainly the right of the King's heirs to demand, and the duty of the court which had the supervision and control of the property to compel the payment of a reasonable rent. The proceedings complained of were taken simply for the purpose of enabling the court to ascertain and fix what amount would be a reasonable rent. It had authority to do this by the express terms of the decree of the District court, which not being appealed from, as already observed, was final and conclusive. That decree, so far from limiting the enquiry of the Circuit court to the rent which had been received under the Preston lease, or to the amount for which Preston had leased the works to Spenser, Akerman & Co. as the only basis of fixing the rent to be paid by Stuart, Buchanan & Co., on the contrary left it to the Circuit court to

312 ascertain *what, under all the circumstances, would be a reasonable rent for the property during the period when it was in their hands, from January 1861 to January 1869.

It must be remembered that during a large part of this period an extraordinary and unprecedented demand for salt, combined with great scarcity of that article, of primest necessity, not only put up tho prices to

enormous figures, but taxed the fullest capacity of these words to meet the pressing demand. A stupendous war and an effectual blockade, which hermetrically sealed almost every port on the southern coast, gave to the owners and lessees of the salt works of Southwestern Virginia almost an exclusive monopoly in the manufacture of salt. They not only supplied the people of this state, and of many of the southern states, but they had contracts with the government of the Confederate states, of the state of Virginia, of some of the southern states, and with many of the counties of this state. Motives of patriotism, as well as motives of gain, impelled them to work the property to its utmost capacity, if need be to utter exhaustion. They not only made such use of the property as was never made or could be made by previous lessees, but they had numerous sub-tenants, and others to whom they sold the privilege of making salt. It may well be, that lessees who hold the property under these circumstances should be held to a different measure of responsibility from those who preceded them; and surely it would be no error in the Circuit court to conclude that what would be a reasonable rent in times of peace, when the demand for salt was ordinary, and the prices usual, would not be a reasonable rent in times of war and blockade, when the demand was so extraordinary and 313 the prices ranging *so high as to stimulate the lessees to work the property even to exhaustion. It is for the Circuit court, acting in conformity with the decree of the District court, to ascertain what, under all the circumstances, would be a reasonable rent. The proceedings taken by the decree, appealed from, were intended to furnish the data upon which the court may act. If in carrying out that decree the commissioner should put the parties to needless expense and time in producing books and papers, and taking accounts irrelevant to the enquiry he was ordered to make, the plain remedy of the appellants is to apply to the Circuit court to control the commissioner within the proper limits of his enquiry. The judge of the Circuit court has already shown himself prompt to do this upon such application already made in this cause. We cannot see how the appellants have been aggrieved by any injury, actual or threatened, in the decree appealed from.

It will be time enough to appeal to this court when they are held to an unjust measure of responsibility, by being required to pay an unreasonable rent.

The court is therefore of opinion that there is no error in the decree of the Circuit court of Washington county, and that the same be affirmed.

Decree affirmed.

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314 *Walsh v. Hale.

June Term, 1874, Wytheville.

I. In December 1862 H sold to W two hundred and sixty-five acres of land, more or less, known as Knob Fork, purchased by H of B, and bounded by the deed of B, for $3,250, of which W paid $2,000, and gave his bond for $1,250. On a survey of the land by W, it was found there was but one hundred and ninety-nine acres, and twenty-seven acres of this was recovered by V upon a superior title—HELD:

1. W is entitled to an abatement for the deficiency of sixty-six acres.
2. For the twenty-seven acres the value of the land recovered, whether more or less than the average of the whole tract, is to be abated.
3. For the remainder of the deficiency, the abatement is to be according to the average price per acre of the whole tract.
4. **Confederate Contract.**—The contract having been a Confederate contract, the amount of the bond is, under the circumstances of this case, to be scaled according to the value of the Confederate money at the time of the contract.

See 2 Min. Inst. [4th Ed.] 703.

On the 18th of December 1862, Peyton G. Hale executed a bond in the penalty of $3,250, with a condition that whereas the above bound Peyton G. Hale has this day bargained and sold unto John Walsh two hundred and sixty-nine acres of land, more or less, and known as the tract of land called Knob Fork, that P. G. Hale purchased of Samuel J. Bourn, and bounded by the deed that said Bourn made to Peyton G. Hale; and the said John Walsh has paid in hand two thousand dollars and executed a bond for twelve hundred and fifty, as 315 agreed upon by the said P. G. *Hale and J. Walsh; and the condition of this is such that whenever the said John Walsh pays to said Hale the twelve hundred and fifty dollars above specified, then the said Hale binds himself, his heirs, executors, administrators, &c., to make to the said John Walsh a good and lawful title to said land, and forever warrant and defend from my heirs, all other persons, &c.

At the time this contract was made, there was an action pending by Robert Vaughan against Hale, to recover twenty-seven acres of this land; and after the contract was made the case was decided in favor of Vaughan. Walsh then had the land surveyed, and the survey showed that the tract contained but one hundred and ninety-nine acres, including the twenty-seven acres recovered by Vaughan.

In March 1867 Walsh instituted a suit in equity in the Circuit court of Grayson county against Hale, claiming compensation for the twenty-seven acres of land recovered by Vaughan, and also an abatement of the purchase money on account of the deficiency in the quantity of the land in the tract. He afterwards amended his bill and enjoined Hale from collecting the bond.

Hale answered, admitting the plaintiff's right to compensation for the twenty-seven acres; but insisting that the land was sold by the boundaries of the tract, and not by the acre; and that he was not liable for any deficiency of quantity. It was admitted by Hale that the price of the land was to be paid in Confederate money.

There was a report by a commissioner, and much testimony was filed as to the value of the twenty-seven acres; and this court was of opinion that it was of about the same value as the other part of the land.

The commissioner reported the whole 316 tract as worth *at the time Hale sold to Walsh, $2,500 in good money, and deducting the value of twenty-seven acres, which he fixed at $324, there would remain $2,176 as the value of the land held by Walsh. To this report Walsh excepted.

The cause came on to be heard on the 4th of October 1873, when the court overruled the plaintiff's exceptions, and confirmed the report; and being of opinion that the value of the real estate at the time of the sale, in a sound currency, afforded the most equitable rule and standard by which to scale the debt due from complainant to defendant; and that from the report of the commissioner, the real estate sold by the defendant to the plaintiff, was, at the time of the sale, worth, in a sound currency, the sum of $2,500; and that plaintiff was entitled to an abatement from the purchase money of the sum of $324 on account of the loss by superior title of twenty-seven acres of land; and adopting the rule above named to ascertain the scaled value of $1,250, the court fixed the same at $961.53, with interest from the 18th of December 1862, subject to a credit of $324 as of that date. It was therefore decreed that Hale should recover of the plaintiff the said sum of $961.53, with interest from the 18th December 1862, subject to the credit of $324 as of that date, and his costs. From this decree Walsh obtained an appeal to this court.

Slater and Gilmore, for the appellant.

Terry and Pierce, for the appellee.

ANDERSON, J., delivered the opinion of the court.

On the 18th of December, 1862, G. P. Hale, the appellee, sold to John Walsh, 317 the appellant, two hundred *and sixty-five acres of land, more or less, for the consideration of $3,250, of which $2,000 were paid down, and a bond given for $1,250, the balance. By a survey made since the purchase, it has been ascertained that there are only one hundred and ninety-nine acres, showing a deficiency of sixty-six acres, and that of the one hundred and ninety-nine acres, there was a better outstanding title in one Vaughan for twenty-seven acres. It is conceded that the appellant is entitled to an abatement from the price for the value of the twenty-seven acres; but for the deficiency the appellee insists that it was not a sale by the acre, but in gross, and that the purchaser is not entitled to an abatement.

In Blessing's adm'ors v. Beatty, 1 Rob. R. 287, 302, it was said by Baldwin, J. that "the question of compensation usually arises, not in sales by the acre, but in sales for a gross sum." And Lord Chancellor Sugden lays it down as a general rule, where the land is neither bought nor sold professedly by the acre, and a misrepresentation is made as to the quantity, though innocently, "that it is the right of the purchaser to have what the vendor can give, with an abatement for so much as the quantity falls short." And it seems now to be settled that the purchaser, if the quantity be considerably less than was stated, will be entitled to an abatement, although the agreement contain the words "more or less." 1 Sug. Vend., top, p. 489 to 494, bott. 324-5; Blessing's adm'ors v. Beatty, supra.

In Portman v. Mill, 2 Russ. R. 370, cited by the same eminent jurist, the lands were described as containing three hundred and forty-nine acres, "or thereabout, be the same more or less;" and although it was expressly stipulated in the contract that the parties should not be responsible for any excess or deficiency in quantity, 318 *but that the premises should be taken by the purchaser at the quantity, more or less—the actual number of acres was less by one hundred—Lord Eldon said, "that as to this stipulation he never could agree that such a clause (if there was nothing else in the case) would cover so large a deficiency in the number of acres." This subject was considered in a case decided at this term, Hendricks v. Gillespie, and the rulings of the court in Blessing's adm'ors v. Beatty approved.

There is nothing upon the face of the contract in this case which indicates an intention to make a contract of hazard. It is in fact a sale of two hundred and sixty-five acres of land, for, it is true, a sum in gross. The land is described as the tract known as "Knob Fork;" and reference is made to the deed of Samuel J. Bourn to the appellee for its boundaries. But whilst the land is so described, it is a sale of two hundred and sixty-five acres. It is true, it is added, "more or less." But such language is understood to apply only to small deficiencies or excesses, attributable to variation of instruments and the like, as it has been repeatedly judicially construed. When used, it rather repels the idea of a contract of hazard, and implies that there is no considerable difference in quantity, either in excess or deficiency, from that which is stated, and that the purchaser gets substantially the quantity of land he contracts for. In this case the parties evidently believed the one, that he was selling, and the other, that he was buying, two hundred and sixty-five acres, but that if there should be a small deficiency or excess of that quantity, it should not affect or vary their contract. But that there was so great a deficiency, as was afterwards shown to be, was not contemplated by either of them. There was nothing to suggest such a thought. 319 The deed from Bourn to the *appellee, represented it to be two hundred and sixty-five acres. Both parties believed it to be as represented, and never thought of hazarding anything as to quantity. Both parties were innocently mistaken. But the

quantity as represented evidently influenced the price. It is clearly a case for compensation.

As to the measure of compensation. For the deficiency of sixty-six acres, there can be no other measure of compensation than the average or pro rata price agreed to be paid for the whole. But for the twenty-seven acres which was sold to the appellant, and which had been recovered by Vaughan by a better adversary title, having lost it, he is entitled to its value, whether it be of greater or less value than the average value of his purchase. He has lost an identical part of the land he purchased, and he is entitled by his contract to have it restored to him, or to receive its value as a compensation. The evidence with regard to its value is conflicting. The court is of opinion, from a view of the whole case, that it is not of greater value than the average price agreed to be paid for the whole, and that such average price will be a fair compensation to the appellant for its loss. It is therefore unnecessary that any discrimination should be made between the rate of compensation allowed for the loss of the twenty-seven acres and for the deficiency of sixty-six acres.

The court is therefore of opinion that the appellant is entitled to an abatement for ninety-three acres, at the average price which he agreed to pay for two hundred and sixty-five acres, which, together with the cash payment made of $2,000, subtracted from $3,250, the whole price, will leave the balance due from him in Confederate money as of the 18th of December 1862; the scaled value only of which is due from him to the appellee. And as the balance
320 is very inconsiderable, *and the evidence as to the value of the land is conflicting, it should be scaled according to the gold value of Confederate currency, as of the date of the contract; and further, that the injunction to the judgment which the appellee obtained against the appellant, of which he complains, except as to such balance, should be perpetuated; and that upon the payment by the appellant of such balance the appellee should be required to make him a deed with general warranty by metes and bounds, for the lands as shown by the surveys made in this cause, containing one hundred and seventy-two acres. The court is of opinion, therefore, to reverse the decree, with costs, and to enter such decree as should have been made by the Circuit court.

Decree reversed.

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321 *Dickinson v. Dickinson & Co.

June Term, 1874, Wytheville.

1. **Pleading and Practice—Irregularities in Pleading—Time to Object.**—A writ in debt is issued in May 1870, returnable to July rules, and is served in June. The office judgment is confirmed at the October rules. The plaintiff did not object to the defendants' pleading payment, with leave to plead further, at the November term of the court. He cannot afterwards object to the irregularity.
2. **Same—Appeal—Bill of Exceptions.***—The cause is continued generally at the March and July terms 1871, and at the August term defendants, under the leave reversed at the November term 1870, tendered the plea of *nil debit* and two special pleas. The first was received without objection, the other two were lobjected to by the plaintiff but admitted by the court. If it was too late then to plead, and this was the objection to the special pleas, the bill of exceptions should show it, or it will not be considered in the appellate court.
3. **Instructions—Province of Jury.**—In debt upon a note against three persons as partners, two of them plead specially that the partnership was dissolved before the note was made by the third who had been acting partner; and that the plaintiff knew of the dissolution. No notice of dissolution had been given. An instruction stating that certain facts mentioned in the instruction, if proved to the satisfaction of the jury, are sufficient to charge the plaintiff with knowledge of the dissolution, and the jury should consider him as having such knowledge, is erroneous. It was a question of fact for the jury to determine from the evidence, whether the plaintiff had such knowledge.
4. **Partnership—Contracts after Dissolution—Publicity.**—If a partner contracts, in the name of the firm, with a third person, after the partnership is dissolved, but that fact is not made public or known by such third person, the law considers the contract as being made with the firm, and upon their credit; and they are all bound.
5. **Same—Presumptions.**—In such a case, in determining which was first in point of time—notice of the dissolution, or the making of the note—effect must be given to the presumption that the instrument was made and issued on the day it bears date; unless some reason to the contrary can be shown.

322 *6. **Same—What Notice of Dissolutions Required.**—Though a public notice of dissolution may be sufficient as to persons who have had no prior dealings with the firm, a person who has had such dealings must have notice, or actual knowledge of the dissolution, to release the partners who did not make or authorize the making of the note.

7. These rules as to notice or knowledge of the dissolution do not apply to the dissolution of a partnership by death or bankruptcy.

This was an action of debt in the Circuit court of Russell county, brought by Henry Dickinson against Henry J. Dickinson,

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***Pleading and Practice—Appeal—Bill of Exceptions.**—In Lawrence v. Com., 86 Va. 573, 10 S. E. Rep. 840, the court held that nothing that transpired during the trial in the court below would be considered a part of the record unless made so by a bill of exceptions or order of the court; and that the mere statement in the record that certain pleas were rejected and that parties excepted to various rulings of the court is not sufficient, citing the principal case, and Courtney v. Com., 5 Rand. 666; Rowt v. Kile, 1 Leigh 216; White v. Toncray, 9 Leigh 347; Herrington v. Harkins, 1 Rob. 591; Bowyer v. Hewitt, 2 Gratt. 193; Johnson v. Jennings, 10 Gratt. 1; Fitzhugh v. Fitzhugh, 11 Gratt. 301; Stoneman's Case, 25 Gratt. 898, 4 Min. Inst. 746.

Stephen Banner and George Banner, late partners under the name and style of H. J. Dickinson & Co., upon a note for $800, signed in the firm name and bearing date March 9th, 1860. The writ bore date the 30th of May 1870, and was returnable to the July rules; and at this rule day a conditional judgment was entered. No other order in the cause appears from the record to have been entered until the October rules, when the conditional judgment was confirmed. The cause was on the docket at the November term of the court as an office judgment; and the defendants appeared and pleaded "payment"; with leave to plead specially. The cause was continued at the March and July terms of 1871; and at the August term of the court the defendants offered three pleas in writing, the second and third of which was objected to by the plaintiff, but were received by the court. The first was a plea of nil debit by Stephen and John Banner. The other two were special pleas by the same parties, in which they averred that they did not make or sign the note sued on, nor authorize any person to sign the same for them; and when the said note purports to have been executed by H. J. Dickinson & Co. to the plaintiff, they were not partners or members of the firm of H. J. Dickinson & Co.

323 *The plaintiff replied generally to the first plea, and specially to the said second and third pleas, averring that for years previous to the execution of the note sued on, the defendants were partners, doing business as merchants under the name and style of H. J. Dickinson & Co. That H. J. Dickinson was the acting partner; that the plaintiff had dealt largely with them, and that at the time of the making of the said note in the name of the partnership by H. J. Dickinson, the defendants, and any one for them, had not given the plaintiff any notice of the dissolution of the partnership; and he had no notice of it whatever.

The record, after stating that the plaintiff replied specially to the second and third pleas, and generally to the first plea, says: and issue was joined thereon; and the cause continued.

The cause came on for trial at the August term for 1873, when there was a verdict and judgment in favor of the defendants. And the plaintiff thereupon applied to a judge of this court for a writ of error and supersedeas; which was awarded.

The case is stated by Judge Staples in his opinion.

Burns, for the appellant.

Gilmore, for the appellees.

STAPLES, J., delivered the opinion of the court.

The first point made by the plaintiff is, that inasmuch as the conditional judgment was entered at the June rules 1870, and confirmed at the July rules, there was a final judgment by operation of law at the August term succeeding, and it was too late for the defendants to plead at the November court.

324 *The process was issued in May, was made returnable to the 1st Monday in July, and was served upon the defendants in June. It is probable that at the July rules the conditional judgment was entered: the record shows it was not however confirmed until the October rules. The cause of this delay is not explained, nor is it material now to inquire into it. The plaintiff did not complain of any irregularity in the proceeding, nor make any motion to correct it, if, in fact, such irregularity existed. So far from it, he permitted the defendants at the November term to file their plea of payment without objection. Under these circumstances, it is of course too late to raise any question in this court as to the right of the defendants to set aside the office judgment, and to plead to the merits of the action.

Another point made for the plaintiff is, that pleas Nos. 2 and 3, tendered at the August term 1871, were unreasonably delayed, and they ought for that reason to have been rejected. It appears that the plaintiff objected to the filing of these pleas, but upon what ground does not appear. If upon the ground of delay the bill of exceptions ought to show it, otherwise the defendants may be surprised by an objection first taken here, and which, if made in the court below, might have been met by a very satisfactory explanation. There is enough, however, in the record to show that the pleas were not objected to upon any such ground.

At the November term 1870, the defendants pleaded payment with leave to plead specially. At the two following terms no action was taken in the case except to enter a general continuance. At the August court the defendant, in conformity with the leave previously given them, tendered their

325 pleas. The plaintiff objected *to the second and third; but he made no opposition to the first.

This simple statement is sufficient to show that the objection of the plaintiff was not based upon the ground of unreasonable delay, for that objection was applicable as well to the first as to the second and third pleas.

But even if this objection had been urged in the court below, it is very doubtful, to say the least, whether it ought to have prevailed. The plaintiff did not object to the permission given the defendants to plead at a future term, and it does not appear that the defendants in exercising the privilege accorded them were guilty of any unreasonable delay.

Another objection made by the plaintiff is to the failure of the defendants to put in a rejoinder to plaintiff's replications to pleas Nos. 2 and 3 respectively.

The record states that the plaintiff replied specially to pleas Nos. 2 and 3, and generally to plea No. 1, and "issue was joined thereon." Upon the authority of South Side R. R. Co. v. Daniel, 20 Gratt., 344,

and cases there cited, this is sufficient to show that the issue was in fact joined and duly tried by a jury.

There are other points presented in the petition, but it is deemed unnecessary to notice them, as they were not insisted upon in the argument. Those already mentioned constitute the principal objections of the plaintiff to the preliminary proceedings in the court below. Having disposed of them, it is proper to consider the case upon its merits.

The main question before us arises upon the plaintiff's first bill of exceptions, and is presented in the sixth assignment of error. This alleged error is in an instruction given to the jury on motion of the defendants. This instruction declares 326 substantially, that if *the defendants, as early as some day in the month of March, 1859, dissolved by mutual consent, the partnership previously thereto existing between them, that neither partner had thereafter authority to create any new obligation, or execute a note therefor in the name of the firm, binding upon the other partners, unless the new obligation was created in the usual course of the partnership business to a person who had no notice or knowledge of the dissolution of the partnership. And if the jury should believe from the evidence, that as early as the spring of 1859 the defendants ceased to buy and sell goods, their store-house was closed up, H. J. Dickinson, the active partner of the firm, had moved away from the store-house, and had engaged in another employment, that their store-house remained closed up until the note in controversy was executed, and was then still closed up, that nothing prior to the execution of the note was done in the business of the partnership after the house was closed, in the spring of 1859, except what was done by the active partner, H. J. Dickinson, in settling up the business, and that all these facts were known to the plaintiff at the time the note in controversy was executed, on the 19th March, 1860, then these facts are sufficient to charge the plaintiff with knowledge of the dissolution, and the jury should consider him as having such knowledge.

The manifest error in this instruction is in assuming that the facts therein mentioned, if brought home to the plaintiff, were sufficient of themselves to charge him with actual knowledge of the dissolution of the partnership, whether in fact he had or had not such knowledge.

It seems that the defendants did not give notice, public or private, of the dissolution: they did not notify their customers of 327 the fact: they did not even *take the trouble to publish or post it at their place of business. At least the instruction does not assume that either of these acts was done by the defendants; but it does assume that, in the absence of each and all of them, certain other acts constituted notice which the plaintiff was not permitted to controvert. Now these facts, as stated in the instruction, may be sufficient to satisfy a jury that the plaintiff was informed of the dissolution of the partnership; but certainly they do not constitute notice: they are not sufficient as a matter of law, to charge the plaintiff with such notice. Each and all of them may have been known to him, and still the plaintiff may not have had such knowledge or information in regard to the dissolution as would invalidate the note in his possession.

The instruction was therefore a manifest invasion of the province of the jury, and as such was clearly erroneous. The learned counsel insists, however, that no injustice was done the plaintiff, because the question of notice is not involved in the inquiry. His proposition is, that one partner cannot, by a new contract entered into after the dissolution, impose any new obligation upon his copartners without some special authority for that purpose. The note in controversy having been executed after the partnership was dissolved, was not binding upon the partners who did not unite in its execution, although the creditor may have had no notice of such dissolution. The plaintiff could not therefore have been prejudiced by anything in the instruction upon the subject of notice, however erroneous it may have been.

If the learned counsel's premises are correct, his conclusion is undoubtedly correct also. But are his premises correct? The only authority he cites to sustain his position is that of Parker v. Cousins, 2 328 Gratt. *372. That case does, unquestionably, affirm the general proposition that one partner cannot, after the dissolution, create a binding obligation upon the firm without some special authority for that purpose; but this decision was made upon a state of facts which showed that the person dealing with the partner was informed of the dissolution at the time of the renewal of the note.

The principle is well established, that if a partner contracts in the name of the firm with a third person after the partnership is dissolved, but that fact is not made public, or known by such third person, the law considers the contract as being made with the firm and upon their credit. The rule upon this subject is thus laid down in Lindly on Partnership, p. 328: "So if a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified, the power of each to bind the rest remains in full force; although as between themselves, a dissolution or retirement is a revocation of the authority of each to act for the other. Thus if a known partner retires (which is in fact a dissolution), and no notice is given, he will be liable to be sued in respect of a promissory note made since his retirement by his late partner, even though the plaintiff had no dealings with the junior before the making of the note. And in determining which was first in point of time, to wit: notice of the dissolution or the making of the note, effect must be given to the presumption that the instrument was

made and issued on the day it bears date, unless some reason to the contrary can be shown."

In Ketcham & Black v. Clark, 6 John. R. 144, the draft was accepted in the name of the firm after the dissolution. It was held that both partners were 329 *bound by the acceptance; there being no evidence of any public notice of the dissolution of the partnership, nor any special notice of its dissolution to the party dealing with the firm.

It is useless to multiply citations upon the point. The authorities are believed to be almost uniform in support of the proposition. National Bank v. Norton, 1 Hill's N. Y. R., 572; Story on Partnership, §§ 160, 161, 334, 336.

In regard to notice of dissolution, a distinction has been justly made between persons who have had previous dealings with the firm, and those who have had no such dealings. As to the former, it has been universally held that actual notice is indispensable. It must not be inferred, however, that special notice must be given to each customer. If actual knowledge of the dissolution is brought home to the party, he will be concluded, although no notice whatever may have been given. Whether in such case the evidence is sufficient to justify the inference of actual knowledge, is a question of fact for the consideration of a jury, under the supervision of the court. Irby v. Vining, 2 McCord's R. 379; Coddington v. Hunt, 6 Hill's R. 595; Collyer on Partnership, § 332.

It may be proper to add, that these rules apply only to cases where the dissolution is by act of the parties. It is well settled, that upon the death or bankruptcy of a partner, notice of the dissolution to third persons is not necessary. The reason seems to be, that in those cases the dissolution is by operation of law. It would be the height of injustice to allow the acts of the other partners to bind the estates of persons who are incapable of acting themselves, or of continuing an authority for that purpose.

It follows, from what has been said, 330 that the Circuit *court erred in giving the instruction set out in plaintiff's first bill of exceptions. This view renders it unnecessary to consider particularly the instruction asked for by the plaintiff and refused by the court, which is set out in the second bill of exceptions.

It is sufficient to say, that where there is evidence tending to make out the supposed case, however inadequate, or however little weight it may be deemed entitled to, it is best and safest to give the instruction if it propound the law correctly. Early v. Garland's lessee, 13 Gratt. 1.

This well established principle will guide the Circuit court if upon a future trial the question shall again arise upon a like instruction.

For the error already mentioned, the judgment of the Circuit court must be reversed, and the cause remanded to be proceeded with in accordance with the views herein announced.

Judgment reversed.

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331 *Bowman v. Miller & Co. & al.

September Term, 1874, Staunton.

[18 Am. Rep. 686.]

I. B being in want of money, in August 1867, went to the city of Baltimore with a negotiable note for $3,500, blank as to date and place of payment, but signed by himself and endorsed by five persons, he and they living in Virginia. This note he sold to M, of Baltimore, at a discount of one and one-fourth *per cent.* per month; the proper date was inserted and the place of payment fixed at the National Exchange of Baltimore. This note was renewed with the same parties, and in April 1868 B made a payment on it of $550, and another note to meet the balance was made by the same parties, payable at the same bank, and M agreed to take this note at the same discount. The last note not being paid, M sent it and all the previous notes and papers connected with the loan, with a statement of the amount due him, to a friend residing in Harrisonburg, with a request that he would take B's note for what was due, endorsed by the same parties. This was done, and the note was made payable at the National Bank at Harrisonburg.—HELD:

1. **Conflict of Laws—Situs of Contract—Novation.**—The taking of the last note was not a novation of the previously existing debt; but the contract is still a Maryland contract, to be governed by the law of Maryland.
2. **Same—Same—Maryland Usury Laws.**—By the law of Maryland the contract was not null and void; but M might recover upon it there the principal and legal interest.
3. **Same—Enforcement of Maryland Contract in Virginia Courts.**—The last note, not providing on its face for the payment in future of more than legal interest, it not being a Virginia contract, and not being void by the law of Maryland, it will be enforced as a Maryland contract in the courts of Virginia.
4. QUÆRE.—If a Virginia court examining into contracts entered into in a foreign country, can do more than affirm the validity or invalidity of such contracts: or can in such case administer any remedies other than those afforded by the laws of Virginia.

332 *5. **Virginia Court Administering Maryland Remedy.**—If a Virginia court may administer the Maryland remedy on a defense of usury, the defendant must file such a plea as the law of that state prescribes.

This was an action of debt in the Circuit court of Shenandoah county, brought by Daniel Miller & Co. of Baltimore, against John Bowman, Jr., as maker, and five other persons as endorsers of a negotiable note for $3,048.75. The note bore place and date, "Rockingham Co., Va., March 20th, 1869,"

See Fant v. Miller, 17 Gratt. 47 and monographic *note* on "Usury" appended to Coffman v. Miller, 26 Gratt. 698.

and was made payable at the "First National Bank of Harrisonburg, Va.;" and was protested for non-payment. The defendants pleaded payment, nil debet, and usury, the latter in the form given in the Virginia Statute; upon which pleas issues were made up.

On the trial the plaintiffs and the defendants asked for instructions. That of the plaintiffs was given, and that of the defendants was refused: and the defendants excepted.

The jury found a verdict in favor of the plaintiffs for $2,888.14, with six per cent. interest thereon from the 22d of May, 1869, until paid. The defendants thereupon moved for a new trial, upon the ground that the verdict was contrary to the law and the evidence; but the court overruled the motion, and entered a judgment upon it and the defendants again excepted. Upon the application of John Bowman, Jr., a supersedeas was allowed by a judge of this court. The case is sufficiently stated by Judge Staples in his opinion.

John C. Woodson and John E. Roller, for the appellant.

Walton, for the appellees.

STAPLES, J. delivered the opinion of the court.

333 *The note in controversy was executed by parties residing in Rockingham county, and is payable at the First National Bank of Harrisonburg, Virginia. It is, however, founded upon transactions which occurred in the state of Maryland. It seems that John Bowman, Jr., one of the defendants, being in want of money, in August 1867, went to the city of Baltimore with a negotiable note for $3,500, blank as to date and place of payment, but signed by himself and endorsed by certain persons residents of Virginia. This note, after some negotiation, he sold to Daniel Miller & Co. of that city at a discount of one and one-fourth per cent. per month. The proper date was inserted, and the place of payment fixed at the National Exchange Bank of Baltimore. The note was not paid at maturity, and another was given in renewal in December 1867 for $3,602.68, with the same endorsers, and payable at the same place. Upon this note the sum of $550 in cash was paid by Bowman on the 25th April, 1868; and a new note bearing the same date was executed by him and his endorsers to meet the balance due Daniel Miller & Co. Efforts were made by Bowman's agent in Baltimore to sell this note in market; but they were unsuccessful; and it was finally agreed that Daniel Miller & Co. should take the note at a discount of one and one-fourth per cent. This was done, and the nett proceeds of sale were applied in discharge of the amount due Daniel Miller & Co., leaving a small balance due them.

This last mentioned note was not paid at maturity, or at any other time, but remained in the possession of Daniel Miller & Co. until the early part of the year 1869, when they sent it and all the notes and papers connected with the Bowman loan, together with a statement of the amount due 334 them to a friend residing *at Harrisonburg, with a request that he would take Bowman's note for what was due, endorsed by the same parties as were on the previous notes. They gave no instructions in regard to the place of payment, but they enclosed two blank notes, one payable at the National Exchange Bank of Baltimore, and the other blank as to the place of payment. One of these was taken by Bowman, the word "Baltimore," at the beginning of the note, erased, and Rockingham county was inserted. It was then filled up with the amount due Daniel Miller & Co., made payable at the bank at Harrisonburg, endorsed by the same parties, delivered to the agent of Daniel Miller & Co., and by him transmitted to his principals in Baltimore.

It is not claimed that the writing contains any stipulation for the payment of illegal interest, except so far as it is derived from the antecedent transactions of the parties. The defendant's pretension is, that the notes sold to Daniel Miller & Co., in Baltimore, were negotiated at a usurious rate; and that this taint adhered to and was carried into all the succeeding notes, including the one now under consideration; and this note having been executed in Virginia, and payable here also, is a Virginia contract, to be determined by the Virginia laws upon the subject of usury.

This is the real issue between the parties. In considering it I do not propose to follow the learned counsel in their elaborate discussions of the various propositions supposed to be involved in the case. The whole subject lies in a very narrow compass, and may be disposed of upon a few well established principles of law.

In the first place, the rule is well settled, that the validity of a contract is to be determined by the laws of the country where it is made and to be executed. 335 *If valid there it is recognized in every other state as of binding force and obligation; unless, indeed, it be immoral, contrary to the public policy of the foreign state, or prejudicial to the rights and feelings of its citizens. Andrews v. Pond, 13 Peters R. 65, 78. On the other hand, if it is declared by the court of the country where made and to be executed to be void, it will be condemned by the tribunals of every country. These principles of law are almost universally recognized. That contracts for the loan of money are directly within their influence does not admit of a question. If valid where made and to be executed, they are valid everywhere, and will be enforced by all foreign tribunals. Story Conflict of Laws, § 291.

In view of these principles, it becomes important to enquire how the transactions and notes of the parties are affected by the Maryland laws relating to usury. I mean the notes executed in the city of Baltimore anterior to the one in controversy. That

these were Maryland contracts, to be governed and their validity determined by Maryland statutes, is too plain for argument. If authority is desired on this point, it may be found in Fant et als. v. Miller & Mayhew, 17 Gratt. 47.

What then is the Maryland law upon the subject of usurious contracts? Under its operation as found in this case a contract or evidence of debt, although tainted with usury, is not null and void; but it is a valid contract upon which an action may be maintained for the recovery of the principal and interest actually due on said contract or evidence of debt; and it is only void to the extent of the usurious interest. And it is provided that a person who seeks to avail himself of the defense of usury shall plead the same specially, and set out the true
336 amount due, principal *and interest, at six per cent.; and thereupon judgment is to be rendered in favor of the plaintiff for the amount of such principal and interest.

It will thus be seen that under the Maryland laws usurious contracts are not avoided under any circumstances, but are valid securities to the extent of the principal, and six per cent. interest. This is the settled rule of construction. Baugher et als. v. Nelson, 9 Gill's R. 299.

It is clear, therefore, that the notes of the defendant executed in Maryland, and payable there, were valid securities; that actions could have been maintained thereon, and recoveries had in the courts of that state if the defendants could have been served with process there, and they could only have been relieved of paying the usurious interest.

Are the plaintiffs in a worse condition by the execution of the note in controversy? That note changes the place of payment, but it does not otherwise affect the rights and obligations of the parties. It is not a novation of the old debt; it is not the creation of a new one; it is simply a continuation of the old one. Concede that it is a Virginia contract, it is, nevertheless, a contract to pay a valid debt to the extent of the principal, and six per cent. interest, with a right on the part of the defendants to escape the payment of the excess.

Suppose Daniel Miller & Co. had sent the last note executed in Baltimore, that of the 25th April, 1868, to Rockingham county for suit, instead of renewal, I imagine there can be no doubt of their right of recovery thereon. It cannot be that the execution of a new note, for the amount of an old one, can make the debt or the security invalid simply because the place of payment is changed. No well considered case can
337 *be found giving countenance to such an idea. The case of Dewar v. Span, 3 T. R. 425, has been relied on as an authority for the appellant. In that case a bond had been executed at the island of St. Christopher, where the interest was six per cent. A new bond was afterwards executed in England as a substitute for the old one, providing for the payment of six per cent. interest also. It was held, that as the new bond was an English contract, it was void for usury. The reason is apparent. The new bond provided not merely for the old debt, but it contained an express stipulation for the payment of six per cent. thereon in the future, which was not allowable in England. No one pretends that a bond for the payment of the aggregate of principal and interest upon the old debt, according to the rates allowed at the island of St. Christopher, would have been invalid. It was the insertion of a stipulation to pay six per cent. in England that vitiated the obligation. And this is in harmony with the doctrine laid down by Judge Story in his "Conflict of Laws;" and that is, "If a debt is contracted in one country (New York), and afterwards, in consideration of further delay, the debtor in another country (Virginia) enters into a new contract for the interest allowed in the country where the debt was contracted, (New York), but higher than in the country where the contract is made, it is held that the contract is invalid. And so in the present case, if the note in controversy had contained an express stipulation to pay a higher rate of interest than is allowed by our laws upon the amount of the Maryland debt, such a stipulation would probably have been invalid. But, as already seen, it does nothing of the kind; it is a mere promise to pay the debt already subsisting, and bears of course only the legal rate of interest.

338 *The case mainly relied upon as in conflict with this position is that of Turpin v. Povall et als., 8 Leigh 93. There is certainly nothing in the decision itself that can be so construed; but Judge Tucker, in the course of his opinion, gave expression to certain views which were not called for by the case, and which, if not carefully considered, are well calculated to produce erroneous impressions.

The facts briefly stated, are, that Povall, a resident of Pennsylvania, made a loan to Johnson, of Virginia, of eight thousand dollars. The loan was made and the money advanced in Philadelphia, though this is not very clear, the bond, was however, taken in Virginia by the agent of Povall, with Turpin as surety. The contract was to pay ten per cent. interest, which, it seems, was illegal by the law of Pennsylvania; but under that law the debtor was entitled to relief only against the usurious excess, while under the Virginia law the entire debt was forfeited. The great question was therefore whether it was a Virginia or a Pennsylvania contract. The court held that it was a Virginia contract. And the reason assigned was that a new party was introduced; and by the execution of the new bond with the new party, the old contract was annihilated. But Judge Tucker in coming to this conclusion, admitted that he was by no means satisfied with the reasoning or the authorities upon this point. He said the new contract was obviously executed in reference to the law of Pennsylvania, where the loan was made;

and where that is the case it would seem that the contract is to be governed by the law of the place of reference, and not by that of the place of execution.

In the present case no new party was introduced. The maker and endorsers
339 of the note were the same. *The new note was not a novation of the debt, but a mere renewal and a continuation of the same liability. And although the place of payment was changed for the mere convenience of the parties, it is obvious that the contract was made with reference to the laws of Maryland, where the loan was made, and where all the transactions occurred.

This view is fully sustained by the case of Jacks v. Nichols, 1 Selden New York R. 178. There a loan was made between parties in New York, and notes given; when due they were given up upon an arrangement for further time, and new notes executed to the lender, who was then in Connecticut. In actions upon these notes it was held that it was still a New York contract, not changed by the execution of the new notes. They constituted a mere renewal, and did not change the nature of the debt or the liability of the parties.

There is another material difference between the present case and that of Turpin v. Povall. In the latter case there was an express stipulation to pay a future interest of ten per cent. In the present case the note in controversy embraces only the amount of the debt as contracted in Maryland, including the legal interest that had accrued up to the time of its execution.

It is said, however, that conceding the present note was executed with reference to the Maryland laws, it was in violation of those laws and can derive no countenance or support from them. In support of this view, the opinion of Judge Tucker, already referred to, is much relied on. He does say that a contract made in any state, contrary to its laws, must, in every other state be looked upon as uninfluenced by them, and must, therefore, always fall within the
340 influence *of the lex fori. This, however, was a mere obiter dictum of Judge Tucker's, not called for by anything in the case before him. Whether the observation be or not correct in the comprehensive terms used, it has no application to the present case. It is not an offence under the Maryland law to take usury, as it is here. The contract is not thereby vacated as here. The taint does not affect the instrument as here. On the contrary, the security is valid; the debt perfectly secure to the extent of principal and interest; though the debtor, under the proper pleading, may be relieved of the excess. Now, concede it is a violation of that law to demand more than six per cent.; is it possible that when a suit is brought here upon a Maryland contract executed upon the faith of their statutes, we are to apply our laws, and declare the whole contract null and void, in the very teeth of the Maryland statutes, which affirm the validity of the contract to the extent of principal and lawful interest? Such a doctrine is in violation not merely of the principles of the comity of states, but of the plainest maxims of equity and justice. I have already shown, or attempted to show, that the execution of the note in controversy does not vary the rights and obligations of the parties, and the courts will consider it a mere acknowledgment of the Maryland contract, and given with reference to the rights of the parties under the laws of that state.

Upon this point I do not deem it necessary to cite any other authority except the case of Fant et als. v. Miller & Mayhew, 17 Gratt. 47, already mentioned. I think that decision fully sustains most of the views I have presented.

It only remains to notice one other ground taken by the counsel of the defendants.
341 It is insisted that *the court ought to have abated the usurious excess, and given the plaintiff a judgment for his principal, and six per cent. interest. I do not mean to discuss the question whether the Virginia courts can administer any remedies other than those afforded by our own laws. In examining into contracts entered into in foreign states, it may be questioned whether the courts here can do more than affirm the validity or invalidity of such contracts. There is a strong authority for the proposition that they will not undertake to administer the peculair remedies which the policy of a foreign state may prescribe for its citizens in its own domestic forums.

The case of Walriss v. Pierce, 32 New Hamp. R. 560; Sherman v. Gassett, 4 Gilman's R. 521; 7 Metc. R. 14, are decisions affirming this doctrine. It is not necessary, however, nor is it intended, to express any opinion upon this point. It is sufficient to say, that if the defendants desired the special relief allowed by the Maryland statutes, it was incumbent upon them to put the matter in issue by proper pleadings. This is required by the statute of that state, and this seems to have been the view of this court in Fant et als. v. Miller & Mayhew. In this case the defendants put in no such plea, nor did they ask the court to abate the usurious interest, or to instruct the jury to do it. It does not appear the point was made, or even alluded to, in the court below. It is certainly too late to raise it for the first time here. It is worthy of observation, that while the note is for $3,048.75, the judgment is for $2,888.14, a difference of $160.61. It would seem, therefore, that the plaintiff has voluntarily released the usurious excess, or that the court and jury have refused to allow him more than
342 his principal and *legal interest. All ground for complaint in this particular is of course removed.

There are other errors assigned in the petition for an appeal, but they relate to the form of the proceedings exclusively; they are clearly not tenable, and I do not deem it necessary to consider them.

Upon the whole, I think the judgment should be affirmed for the reasons already stated.

Judgment affirmed.

343 *Dillard v. Collins.*

September Term, 1874, Staunton.

1. **Slander—Plea of Plaintiff's Bankruptcy.**—In an action of slander, a plea that since the commencement of the action the plaintiff has been adjudicated a bankrupt, is not a good plea.
2. **Same—Same—Right to Sue for a Tort Not Transferred to Assignee.**—Under the English bankrupt act and the bankrupt act of 1841, and the present act, the rights of action which are transferred to the assignee do not include claims for personal damages.
3. **Assignee in Bankruptcy—Action Founded on Contract.**—The rights of action transferred to the assignee are rights of action founded upon beneficial contracts made with the bankrupt, where the pecuniary loss is the substantial and primary cause of action, and for injuries affecting his property, so far as they do not involve a claim for personal damages.
4. **Same—Comparison with Executor.**—An assignee in bankruptcy, in many respects, stands in the same relation towards the bankrupt's estate as that of an executor towards the personal estate of his testator.
5. **Same—Same—Transfer of Rights of Action.**—The proper and reasonable construction would seem to be that the statute transfers all such rights of action as would be assets in the hands of an executor for the payment of debts, and no others.
6. **Slander—Essential Elements—Malice—Burden of Proof.**—In every instance of slander, whether verbal or written, malice is an essential ingredient, and must be averred. But when averred, and the language, verbal or written is proved, the law will infer malice, until the proof, in the event of denial, be overthrown, or the language itself satisfactorily explained.
7. **Same—Privileged Communications.**†—Confidential or privileged communications are an exception to this rule; and in such a case the burden is on the plaintiff to prove malice.
8. **Same—Same—Classes.**—Confidential or privileged communications are of four classes: 1st. Where the author or publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests. 2d. Anything 344 said or *written by a master in giving the character of a servant who has been in his employment. 3d. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4th. Publications duly made in the ordinary mode of parliamentary proceedings.
9. **Same—Same—Effect as to Presumptions of Malice.**—These excepted instances so far change the ordinary rule with respect to slanderous or libelous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or in the situation of the parties, adequate to authorize the conclusion.
10. **Same—Same—Relation of Landlord and Tenant.**—R, G and J rented land of D. They were strangers in the neighborhood. C lived on his farm in the same neighborhood. On several occasions D told R, G and J that C and all his sons were horse thieves, and made their living by that means; and that they frequently harbored that kind of men. There is nothing in the relation of landlord and tenants between D and R, G and J, which raises any presumption in favor of D, that the words were spoken without malice, or brings them within the class of privileged communications.
11. **Same—Motives in Speaking Slanderous Words.**—On a trial in an action for slander by C against D, the slanderous words having been proved, D will not be allowed to prove by his own testimony what were his feelings and motives in making the charge, whether with any ill will against C, or only for the protection of his own interests.
12. **Depositions—Exceptions—Grounds of Objection.**—A deposition is taken to be read on a trial at law, and the witness is asked if he was acquainted with the general character of C, the plaintiff, for honesty. If so, state what it was and is. To which he answered, as far as he could see he did not see anything against the man. He never heard anything against him by any man except by D, the defendant. To this answer the defendant excepted generally. On the cross-examination it appears that witness did know enough of C's general character to authorize him to speak of it. The exception of the plaintiff should have stated the grounds of his objection to the answer. And it appearing from the whole deposition that the witness was competent to speak as to the character of C, the answer will not be stricken out.
13. **Slander—Evidence.**—In an action for slander, the defendant cannot enquire into the social intercourse of the plaintiff with his neighbors. And where the slander charged is for horse-stealing, the defendant cannot introduce evidence of rumors as to the plaintiff or his sons having stolen a hog.

345 *This was an action for slander in the Circuit court of Albemarle county, brought by Zachariah Collins against George W. Dillard. The slander charged is, that Dillard spoke of Collins as follows: "He and all his sons are horse thieves, and make their living by that means, and that

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***For monographic note on Bankruptcy and Insolvency, see end of case.**

†**Slander—Privileged Communications.**—The court, in Chaffin v. Lynch, 83 Va. 118, 1 S. E. Rep. 803, says: "A communication honestly made in the performance of a social duty, is no less privileged than one made in self defense, or in the protection of one's own interest. And a communication made under such circumstances, and without malice, is protected, notwithstanding its imputations be false, or founded upon the most erroneous information." Coxhead v. Richards, 52 Eng. C. L. 569; Davies v. Snead, L. R. 5 Q. B. 608; Blackham v. Pugh, 2 C. B. 611 (52 Eng. C. L. 611); Coward v. Wellington, 7 C. & P. 531 (32 Eng. C. L. 616); Todd v. Hawkins, 8 C. & P. 88 (34 Eng. C. L. 304); Whiteley v. Adams, 109 Eng. C. L. 569; Clark v. Molyneux, 3 Q. B. D. 237; Stevens v. Sampson, 5 Exch. D. 53; Stace v. Griffith, L. R. 2 P. C. 420; Van Wyck v. Aspinwall, 17 N. Y. 190; Swan v. Tappan, 5 Cush. 104; Shurtleff v. Stevens, 51 Vt. 501; Hamilton v. Eno, 81 N. Y. 116; White v. Nicholls, 3 How. 266; Garrett v. Dickerson, 19 Md. 418; Dillard v. Collins, 25 Gratt. 343; Moore v. Butler, 48 N. H. 161; 6 Rob. Pr. 885, 903; 1 Am. Lead. Cas. marg. p. 168, *notes* to Howard v. Thompson." See also, Chaffin v. Lynch, 84 Va. 889, 6 S. E. Rep. 474, and Johnson v. Brown, 13 W. Va. 93.

they frequently harbored that kind of men." The defendant pleaded "not guilty," and also a special plea of justification; on which issues were taken.

The cause came on for trial in October 1869, when the jury found for the plaintiff, and assessed his damages at $500; and there was a judgment according to the verdict. The defendant thereupon applied to a judge of this court for a supersedeas to the judgment; which was awarded. The case is sufficiently stated by Judge CHRISTIAN in his opinion.

Wm. J. Robertson and Blakey, for the appellant.

T. J. Michie and H. B. Michie, for the appellee.

CHRISTIAN, J. delivered the opinion of the court.

This was an action of slander and is before us upon a writ of error to a judgment of the Circuit court of Albemarle. The first error assigned in the petition, is the refusal of the court to permit the defendant to file a plea alleging that since the action was brought the plaintiff had been adjudicated a bankrupt. The court is of opinion that there was no error in rejecting the plea. It has been held in numerous decisions, English and American, that under the English bankrupt acts and the act of congress of 1841, the rights of action which are transferred to the assignee, do not involve claims for personal damages. They are rights of action founded upon beneficial con-
346 tracts made with *the bankrupt where the pecuniary loss is the substantial and primary cause of action, and for injuries affecting his property, so far as they do not involve a claim for personal damages.

A right of action, such as slander, which is merely personal, and dies with the party, is not transferred to the assignee. The assignee, in many respects, stands in the same relation towards the bankrupt's estate as that of an executor towards the personal estate of his testator. The proper and reasonable construction would seem to be, that the statute transfers all such rights of action as would be assets in the hands of an executor for the payment of debts, and no others; all which could be turned to profit; for such rights of action are personal estate. Of such, the executor is assignee in law; and the nature of the office and duty of a bankrupt's assignee, requires that he should have them also. But rights of action for torts, which would die with the testator, according to the rule actio personalis moritur cum persona, and all action affecting the person only would not pass. James' Bankrupt Law, pp. 38, 39, and cases there cited.

The learned counsel for the appellant concedes in his argument, that it is clear that if the question had arisen under the English bankrupt act, or under the act of congress of 1841, the plea would have been properly rejected. But he insists that the words choses in action being inserted in the present act, and those words not being found in the former acts referred to, gave to the present act a wider scope and larger signification. We do not concur with the learned counsel in this interpretation. The words "choses in action" mean nothing more and can have no broader signification than the words "rights of action," and it has been uniformly held that these
347 latter *words, "rights of action," only include rights of action founded on contracts, or for injuries to property, and not rights of action for torts, which are purely personal, such as the action for slander, which dies with the person, and never survives to the personal representative. This interpretation of the present act seems to have received judicial sanction in the Circuit courts of the United States. See Bump on Bankruptcy, (6th ed.) 357; 5 B. R. 152; 3 C. L. N. 297.

The court is therefore of opinion that the Circuit court did not err in rejecting the plea of bankruptcy.

The court is further of opinion that the words charged in the declaration, and proved to have been spoken by the defendant, were not, under the circumstances, such as fall within the class of confidential or privileged communications. The words charged in the declaration were as follows: "He (the plaintiff) and all his sons are horse thieves, and make their living by that means, and that they frequently harbored that kind of men." Four witnesses testify that these words were spoken to them substantially as laid in the declaration. Three of them lived upon lands rented of the defendant, and were the near neighbors of the plaintiff. One of them lived at the mill, being the miller of the defendant.

One of these witnesses (Thomas J. Rowland) says in answer to the question, "Did the defendant make any statement to you and the Shropshires in regard to the plaintiff about horse-stealing? "He did at different times. I do not recollect how often. He said that Mr. Collins and his boys were horse thieves, and that they were connected with that class of men, and I had better be careful and not make any acquaintance with them, that their bad character might injure my character;
348 *that there would come strangers there frequently in the back way in a very suspicious manner, and leave in the same way, and in a day or two there would be horses missing from the neighborhood." In answer to the question, "Did Dillard make these statements to you and the Shropshires, all being present, or to you alone?" He says, "In both ways. He did to me alone, and in their presence."

Another witness (John W. Shropshire) states: "The first time I heard Dillard say anything disrespectful of Mr. Collins was about the 19th March, 1866. He then warned me and my brother Gilbert and Mr. Rowland to avoid the company of Mr. Collins, saying that Collins and his sons were horse thieves, that they made their living by stealing horses and harboring horse thieves."

Speaking of another occasion, he says: "He came past the barn where we were at work, and riding up to the door, said to us that we had better watch our horses that night, as he (Dillard) had heard two strange men enquiring the way to Collins'. He stated when he left that some one would lose some horses; that they were a part of the clan who usually assembled at Collins', and when ever they assembled there some one was sure to lose horses, and that as we had good horses we had better watch them; and on account of this warning we kept guard over our horses every night for some time after that." Witness further stated, that he afterwards learned that the men referred to by Dillard were men belonging to a slate roofing company doing business near Charlottesville, who having heard that there was a slate mine on the farm of Collins came to see the quality of the slate.

Another witness (Gilbert Shropshire) says: "My *brother, myself and Mr. Rowland settled in Albemarle county, Virginia, in March 1866, on Mr. Dillard's farm. Sometime after we went there, Mr. Dillard visited us frequently, and upon some of those occasions told us we had better have nothing to do with Collins and his sons; that they were horse thieves, and we had better watch our horses, Mr. Collins or some of his guests would steal them; that they made their living that way, and harbored that kind of men; that strangers came there and soon disappeared through the back part of their farm, and that horses would be missing from the neighborhood. For a month or two after Mr. Dillard told us this, some of us slept in the stable every night, and kept a close watch of our horses, and of Collins and his family; but we gradually got acquainted with them, and found them good neighbors and gentlemen, and was then satisfied that what Dillard told us was untrue."

Another witness testified that "he was employed by defendant to attend his grist and saw mill; that defendant said to him he did not know how Collins and his sons rode such fine horses and wore such fine clothes; they could not do it by their pumpboring, for they hardly ever worked; that they got their living by horse-stealing and negro-trading. That defendant told him to watch them and see that nothing was taken from the mill. Witness understood at the time that defendant told him this, that the object of his statement was to put the witness on the watch to see that nothing was taken about the mill."

It will thus appear from these extracts taken from the evidence, that the slanderous words laid in the declaration were fully proved to have been uttered to at least four witnesses. It will be observed that there were two pleas upon which issue was joined, one, *"not guilty," and the other, justification. Upon these two issues the parties went before the jury, who were to decide first, whether the defendant was guilty or not guilty of speaking the slanderous words; and if they believe him guilty, they are next to consider whether he has proved that the specific words are true or not. The proof of speaking the words substantially as charged is conclusive, and there is not a particle of evidence to sustain the plea of justification.

Under the plea of "not guilty" the defendant might have shown, in mitigation of damages, under the decisions of this court, the general bad character of the plaintiff for honesty; (see McNutt v. Young, 8 Leigh 542); but in this, too, he wholly fails. He relies exclusively upon the defense that the words spoken "fall strictly within the class of confidential or privileged communications; and that they were uttered bona fide, not with the malicious purpose of injuring the plaintiff, but with a view to the protection of his own interests, or the interests of the person to whom they were spoken."

It is a familiar and well settled rule of law, that in every instance of slander, verbal or written, malice is an essential ingredient; it must in either be expressly or substantially averred in the pleadings, and whenever thus substantially averred, and the language, either written or spoken, is proved as laid, the law will infer malice, until the proof, in the event of denial, be overthrown, or the language itself be satisfactorily explained. There is but one exception to this rule, and that is where the words spoken or written fall within the category of what the law characterizes as confidential or privileged communications.

The legal effect of this exception is simply to change the *burden of proof. Where the words spoken or written are shown to be within a confidential or pivileged communication, the presumption of malice no longer exists; but the plaintiff, in such a case, must show express malice, and cannot rely on the presumption of malice which the law attaches in all other cases to the utterance or publication of the words spoken or written. But even in such a case it is for the jury to determine whether (where the words written or spoken without doubt come within the scope of confidential or privileged communication), they were uttered or published maliciously.

The appellant in this case invokes this exception to the general rule, and insists that what he said of the appellee falls strictly within the class of confidential or privileged communications recognized by the law. It becomes necessary, therefore, to enquire into the peculiar character of such communications, and the extent of their influence upon words spoken or written, as to which, apart from that character, the law will imply malice.

I know of no treatise or decision where this subject is treated with more clearness and precision than in the opinion of the Supreme court of the United States delivered by Mr. Justice Daniel in White v. Nicholls, 3 How. U. S. R. 266. After a careful and elaborate review of the authorities on the subject, he says: "The exception relied upon belongs to a class which,

in the elementary treatises and in decisions upon slander and libel, have been denominated privileged communications or publications. They are as follows: 1. Whenever the author or publisher of the alleged slander acted in the bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or
352 interests. For example, words *spoken in confidence and friendship as a caution, or a letter written confidentially to persons who employed A as a solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had entrusted to him, and in which the writer of the letter was also interested. 2. Anything said or written by a master in giving the character of a servant who has been in his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Publications duly made in the ordinary mode of parliamentary proceedings. These are the acknowledged exceptions to the general rule. But the term "exceptions," as applied to cases like these just enumerated, could never be interpreted to mean that there is a class of actors in transactions placed above the cognizance of the law, absolved from the commands of justice. It is difficult to conceive how in society, where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury legibus soluti; and still more difficult to imagine how such a privilege could be instituted or tolerated upon the principles of social good. The privilege spoken of in the books should, in our opinion, be taken with strong and well-defined qualifications. It properly signifies this, and nothing more: "That the excepted instances shall so far change the ordinary rule, with respect to slanderous or libelous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or in the situation of the parties adequate to authorize the conclusion. Baldwin, J. in White v. Nicholls, supra 266, 287.

353 *In Cockaym v. Hodgkisson, 5 Car. & Pa. 543, we find it declared by Baron Parke, in a case of libel, which applies equally to a case of slander, "That every wilful and unauthorized publication, injurious to the character of another, is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or is bound by his situation to protect the interests of such person, that which he writes under such circumstances is a privileged communication, unless the writer be actuated by malice."

So in Wright v. Woodgate, 2 Cromp. Mees. & Rosc. R. 573, it is said "A privileged communication means nothing more than that the occasion of making it rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact, but not of proving it by extrinsic evidence only: he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it." This opinion is cited with approbation by the Supreme court of the United States in White v. Nichols, supra.

Even in the case most usually cited in the books as a case of privileged communication, that of a master giving the character of a servant, Lord Mansfield said, in Weatherstone v. Hawkins, 1 T. R. 110, that if express malice be shown, the master will not be excused; and the result of the authorities is that if the conduct of the defendant entirely consists of an answer to an enquiry, the absence of malice will be presumed, unless the plaintiff produces evidence of malice; but in the case of a master, if unasked and officiously, he gives a bad character to a servant, or if his answer be attended with circumstances from
354 which malice may *be inferred it will be a question for the jury to determine, whether he acted bona fide or with malice.

Applying these well settled principles to the case before us, we must conclude, that the words charged and proven do not come within the exceptions to the general rule, known as confidential or privileged communications. If the slanderous words could be brought within either of the four exceptions laid down by the Supreme court of the United States, they must be referred to the first exception above stated, to wit, "when the author of the alleged slander acted in the bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests."

If the slanderous words proven had been spoken to the witness Snead alone, who was the miller of the defendant, it might be argued with some plausibility, that they were spoken confidentially and bona fide, with a view to protect the defendant's own interest, and therefore without malice. But there was certainly no "public or private duty, legal or moral," which impelled him to repeat the slander to Rowland and the Shropshires; nor can he justify himself that he was only protecting his own interests. There is nothing in the relation of landlord and tenants, which raises any presumption in his favor. These tenants were working their own horses and not the horses of the defendant. It was their own horses, and not the horses of the defendant, that these parties were guarding night after night, upon the information of the defendant that "Collins and his sons were horse thieves and would certainly steal them." There is no evidence to show that these tenants of Dillard had in their possession any property whatever belonging to him. It can-
355 not *therefore be said, that the author of the slander in this case "acted bona fide, in the prosecution of his own rights and interest." Indeed, all the cir-

cumstances of the case, the situation and relation of the parties, the manner in which the communication was made, sometimes to one witness alone, and then publicly in the presence of all (if not of others present), repeated over and over again, imputing to the plaintiff not only a grave charge, which must destroy his reputation, but an infamous crime which the law punished at that time with death; all show that it was peculiarly a case where the law will imply malice and a wicked intent to injure. The law holds the ægis of its protection not only over the person and property of the citizen, but vigilantly guards, as equally sacred, his personal reputation and character. And the man who assails the character of his fellow man, and would secure himself from responsibility upon the ground that what he has spoken or written was only done confidentially and with no intent to injure, and without malice, must be careful that what he has said or written comes within the well defined qualifications which the law attaches to confidential or privileged communications. In the case before us the slanderous words charged and proved do not come within that category.

Having disposed of the main question in the case, and concluding that the alleged slander does not fall within the class known as privileged or confidential communications, it follows that the court did not err in refusing to allow the defendant to answer the questions as set forth in the third bill of exceptions. The defendant was put upon the stand, and a number of questions put in various forms as to his feelings and motives in making the charge, whether
356 with any ill will *against the plaintiff, or only for the protection of his own rights and interests.

The court did not err in rejecting these questions and answers. What boots it, that a man may come forward after he is sued for damages for slander and say that what he said was not maliciously said. What have his feelings and motives to do with the controversy? Can a man who has charged another with a crime, punishable with death, come forward and say, "I made this charge, but I had no unkind feelings against the plaintiff: I was not actuated by malice." To allow this mode of proof, would be to say that while the law imputes malice to the party who utters words actionable in themselves, he may absolve himself from the commands of justice if he will say at the trial that he had no unkind feelings against the plaintiff, and that what he said was not said maliciously, but only confidentially, with a view to protect his own interests. The law will not tolerate such a subterfuge, and the court below was right in rejecting such evidence. It was held by this court in McAlexander v. Hume, 6 Munf. 465, that proof of declarations by the defendant, after the institution of suit for slander, that he did not mean to charge the plaintiff with the crime alleged by the slanderous words, or that words were spoken in heat of passion, are inadmissible. The fact that the defendant is a competent witness under the statute does not change the rule of evidence.

Another objection made by the appellant is, that the court refused to strike out from the deposition the following question and answer of the witness Rowland.

The 5th question objected to is in these words:—

"5th question by same. Did you
357 become acquainted *with the general character of Zachariah Collins for honesty? If so, state what it was and is."

To which the witness answered:

"Answer. As far as I could see I didn't see anything against the man. I never heard anything against him by any man except by Mr. Dillard."

It is noted in the deposition that "the defendant by his counsel excepts to the above answer." The only objection to this answer as legal evidence is, that the witness does not state in reply to that question, that he is acquainted with the general character of the plaintiff. But the defendant, as he ought to have done, does not state the ground of his objection. If he had, the objection would have been at once removed; for in the cross-examination the witness in reply to the question, "You don't know what the plaintiff's neighbors think of his character as an honest man do you?" says "I don't know what all of them thought. I talked with a number: they all spoke favorably of his character." If the evidence of the witness had been confined to the part of the answer objected to, it ought to have been excluded, for a witness cannot give his own opinion of the character of the plaintiff. But when the witness knows the general character of the party of whom he is speaking, and proves it to be good among his neighbors, and adds to this statement, "that as far as he could see he did not see anything wrong in the man," a court will certainly not reverse the judgment because these latter words were not stricken out. The court, looking to the whole deposition, saw that the witness knew the general character of the plaintiff, and could therefore speak of it intelligently. It is not sufficient that a party objecting (in a deposition) should simply record his objection to an answer of the witness, but he must
358 put his finger on *the point of objection, so that the other party may supply the deficiency, if any; otherwise it takes the other party by surprise at the trial. But, in this case, the court looking to the whole deposition, and seeing that the witness was well acquainted with, and proved in cross-examination his knowledge of the general character of the plaintiff, did not err in refusing to strike out the answer in the examination in chief.

As to the remaining questions and answers referred to in the second bill of exceptions, it is sufficient to remark that these were not objected to at the time the depositions were taken. Not being objected to then, it was too late to move to exclude them at the trial.

As to the fourth bill of exceptions, no proper ground of error is stated. The defendant introduced a witness to whom he asked the question whether he had or had not heard of threats from the sons of the plaintiff, made since the commencement of this trial, against witnesses of the defendant who had testified or should testify against the character of the plaintiff and his sons. The court properly excluded this evidence. It was not pertinent or relevant, and could not, in any manner, affect the issues which the jury were sworn to try—those issues being not guilty and justification.

The fifth and sixth bills of exception state as ground of error, the refusal of the court to permit the defendant to propound the following questions to a witness introduced by him: 1st. What was the habit of the neighbors of the plaintiff in reference to social intercourse with him; and to what cause was that habit due? 2d. Was or was not the reputation of the plaintiff such as to affect social intercourse between him and his neighbors? If so, to what extent and how did it affect such intercourse?

359 These questions *were properly rejected by the court. It is true that it has been settled by this court that a defendant in an action of slander may, in mitigation of damages, when the pleas are not guilty and justification, offer evidence of the general bad character of the plaintiff with regard to the specific matter with which he is charged. But the enquiry as to his general bad character must be limited to that specific matter. It would certainly have been competent in this case, for the defendant to have offered evidence to prove the general bad character of the plaintiff for honesty, but all enquiries as to "the habits of his neighbors with reference to social intercourse with him," and the cause of that want of social intercourse, or whether "his reputation was such as to affect social intercourse between him and his neighbors," were properly rejected. The inquiry must be limited to his general bad character for honesty, the charge being that he was a thief.

There remains to be noticed the seventh and eighth bills of exceptions, which may be disposed of in a few words. The questions ruled out by the court below, which form the ground of these exceptions, were enquiries as to common rumors connecting the plaintiff with hog-stealing, and as to the conviction of the plaintiffs and his sons with stealing a cow from the witness. Both of these questions were properly rejected by the court. Under the pleading in the cause these were not proper subjects of enquiry. The charge was, that the plaintiff was a horse-thief. It would have been no answer, under the plea of justification, to show that the plaintiff had stolen a hog or a cow, much less would it be competent to prove common rumors in the neighborhood that he had been guilty of either of these crimes.

360 *Upon the whole case, the court is of opinion, for the reason herein stated, that there is no no error in the judgment of the Circuit court of Albemarle, and that the same should be affirmed.

Judgment affirmed.

BANKRUPTCY AND INSOLVENCY.

I. Definitions.
II. General Principles.
III. Jurisdiction and Procedure.
IV. Discharge and Its Effect.
V. Powers and Duties of Assignee.
VI. Articles in Virginia Law Register.

I. DEFINITIONS.

Bankrupt.—The term "bankrupt" originally meant a trader who secreted himself or did certain other acts tending to defraud his creditors. It was distinguishable from "insolvent" in that a bankrupt must have been a trader, and the object of the proceedings against, not by, him. This distinction was preserved by the English bankruptcy acts until recent times, when it was practically abolished. In the United States the distinction is not generally regarded, and it seems to be settled that the word is used in the constitution of the United States, not in the early English sense, but as commensurate with "insolvent." As used in the bankruptcy acts, "bankrupt" means a person who has done or suffered to be done some act which is by law declared to be an act of bankruptcy. Bl. Com. 471; 2 Kent Com. 389; Bouv. Law Dict., "Bankrupt"; Burr., Law Dict., "Bankrupt."

Insolvency.

Technical Definition.—As used in the insolvency and bankrupt laws, especially when applied to traders or persons engaged in commercial pursuits, the term "insolvency" generally means the condition of a person who is unable to pay his debts as they become due in the ordinary course of business. 16 Am. & Eng. Enc. Law 636.

General Definition.—In McArthur v. Chase *et als.*, 13 Gratt. 683, it was held that, in the act of March 29, 1837, Sess. Acts 1836-7, p. 41, relating to limited partnerships, the word "insolvency," in § 20 of said act, means that the partnership has not sufficient property and effects to pay all its debts.

II. GENERAL PRINCIPLES.

What Amounts to an Act of Bankruptcy.—A general assignment for the benefit of creditors is an act of bankruptcy, whether the grantor be solvent or insolvent. Lea Brothers & Co. v. West Co., 4 Va. Law Reg. 662.

Fiduciary Debts.—J, the surety of M, who was the guardian of R, paid R $4,000 of the indebtedness due from M to R, as guardian. J. dies and his administrators sue M in *assumpsit* for the amount so paid, and M pleads his discharge in bankruptcy in bar to the recovery. The administrators of J reply that the debt due by M to their intestate is a fiduciary debt from which he is not discharged under section 32 of the bankrupt act. *Held*, the debt due by M to the estate of J is not a fiduciary debt, and his discharge in bankruptcy is a bar to the recovery of the same. The debt due by M to J's estate was a simple contract debt, provable under the bankrupt act and discharged by it. Cromer v. Cromer, 29 Gratt. 280.

Conclusiveness of Bankruptcy Proceedings.—A creditor by judgment of a bankrupt, who proves his

debt in the bankruptcy proceedings, and takes an active part in these proceedings, cannot afterwards go into a state court to subject property sold by the assignee of the bankrupt, and the proceeds distributed in that proceeding, to satisfy his judgment, on any ground of error which might have been corrected in the bankrupt court, or by appeal from the order or decree of that court. Spilman v. Johnson, 27 Gratt. 33.

Salary of Public Officers.—In Blair v. Marye, 80 Va. 485, it was held that the salary of the attorney general being of constitutional grant, and of public official right, is not liable to assignment in bankruptcy.

As against the State.—The state is not subject to the provisions of the bankrupt laws, and the discharge of a bankrupt does not dicharge him from his liabilities to the state. Saunders v. Commonwealth, 10 Gratt. 496.

Public Officers.—In Saunders v. Commonwealth, 10 Gratt. 494, it was held that the sureties of a public officer are not excluded from the benefit of the bankrupt act of 1841.

Prior Attachment.—The twenty-first section of the bankrupt act, of 1867, so far as the stay is concerned, applies to personal final judgments against the debtor, and not to judgments against property attached, or the proceeds of the sale thereof, when the attachment lien accrued prior to the filing of the petition in bankruptcy. An attachment lien, acquired regularly, without the procurement or sufferance of an insolvent debtor, to give preference to the attaching creditor over other creditors, will not be displaced by virtue of the thirty-fifth or thirty-ninth sections, by subsequent proceedings in bankruptcy, though commenced within four months after the levy of the attachment. Under said sections something more than passive non-resistance in an insolvent debtor is necessary to invalidate an attachment lien on his property, when the debt is due and he has no defence. In such case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the attachment and levy thereof, and a failure to do so is not sufficient evidence of an intent to give a preference to the attaching creditor or to defeat the operation of the bankrupt law. Though the attaching creditor, in such case, may know the insolvent condition of the debtor, his attachment and levy upon his property are not, therefore, void and are no violation of the bankrupt law. Mason v. Warthens, 7 W. Va. 532.

Secured Claims.—A judgment creditor of a bankrupt whose judgment is a lien upon any estate *bona fide* sold and conveyed by the bankrupt, before the bankruptcy, may claim and secure in the proceeding in bankruptcy, his portion of the estate of the bankrupt, in virtue of his said judgment, without accounting or giving credit for anything on account of the lien of his judgment upon the estate so sold and conveyed. And though such creditor may have so claimed and received in the proceeding in bankruptcy, his portion of the estate of the bankrupt, such judgment creditor may, by a suit in equity, enforce the lien of his said judgment upon the estate *bona fide* sold and conveyed before the act of bankruptcy, for the recovery of any balance of said judgment which may remain unsecured in the proceeding in bankruptcy; and that, though he may not, in the said proceeding, have asserted or given any notice of the lien of his said judgment upon the estate so sold and conveyed. McAden v. Keen, 30 Gratt. 400.

Debt Secured on Property of Third Person.—Only the estate of a bankrupt, whatever it may be, at the time of his becoming such, including any estate he may have aliened by an act fraudulent and void as to his creditors, is vested in his assignee in bankruptcy for the benefit of his creditors. And, therefore, no estate which may have been sold by him to a *bona fide* purchaser for valuable consideration fully paid prior to the act of bankruptcy, becomes so vested in said assignee. McAden v. Keen, 30 Gratt. 400.

Bankruptcy of Agent.—Y agrees with D to assign to D a bond held by Y, to indemnify D for becoming his surety; but the bond not being present, is not then delivered to D. Afterwards Y commits an act of bankruptcy, upon which he is duly declared a bankrupt. After committing the act of bankruptcy, Y writes upon the bond an assignment of it to D, and delivers it to D, who collects the money from the obligor. *Held*, D is entitled to hold the money as against the general assignee of the bankrupt. Tucker v. Daly, 7 Gratt. 330.

Bankrupt Partnerships.—When partners as such are declared bankrupt, their property, both partnership and individual, is to be administered under section 36 of the bankrupt act of 1867, in the bankrupt court; and every creditor, whether individual or social, must prosecute his claim in that court. Lindsey v. Corkery, 29 Gratt. 650.

Bankrupt Partners.—Where a partnership is dissolved, and the individual partners are declared bankrupts in different bankrupt courts, in different states, each with his own assignee, and in their schedules make no mention of partnership debts due to them or by them, a creditor of the partnership may proceed in a state court to subject the partnership effects to the payment of the partnership debts. Lindsey v. Corkery, 29 Gratt. 650.

Homestead.—Where defendant, before going into voluntary bankruptcy, has made a deed of settlement upon his wife for certain real estate, which was afterwards set aside as fraudulent, he can then, being a householder and head of a family, claim his homestead exemption in the property embraced in the deed; and the fact that he has made such claim in the bankrupt proceedings, in which only a small part of the exemption was then set off to him, does not preclude him from claiming the residue. Hatcher v. Crew's Adm'r, 83 Va. 371, 5 S. E. Rep. 221.

Sale by Sheriff.—When a debtor takes the insolvent oath, and delivers in a schedule, the sheriff is vested, by the act of assembly, with all the insolvent's estate, rights and interests, whether they are named in the schedule, or not, and whether the property be in the possession of the debtor, or in that of any other person. The sheriff has the right to sell, and to pass by deed, a slave, or other chattel, which the insolvent debtor has made a fraudulent gift of to his child (but of which he retains the possession), and the purchaser under such sale may recover the slave, or other chattel, although the sheriff had not possession of it, at any time. But if the property so fraudulently given, be not in the possession of the insolvent debtor, but of some other person, although the title vests in the sheriff, it seems that he cannot sell the property in such case, but must proceed by summons against the person holding it. However, even if the spirit of the act were violated by selling the chattels of the insolvent, before they come into possession of the sheriff, yet as the legal title is vested in him, if he does sell, the sale is not void, and the purchaser may recover.

The sheriff is a trustee for the creditors, and for a violation of his trust, he may be responsible but that does not prevent the legal title from passing to the purchaser. Shirley v. Long, 6 Rand. 735.

In Taylor v. Mallory, 96 Va. 19, 30 S. E. Rep. 472, it was held that, under the insolvent debtor's act in force in 1888, all property owned by the debtor at the time he took the oath of insolvency, whether mentioned in his schedule or not, and whether fraudulently conveyed or still retained by him, vested in the sheriff. But the evidence in the case at bar does not show that the sheriff ever set up any claim to the land in controversy, or that he ever sold or conveyed one foot of it, and the instruction objected to does not tell the jury what property vested in the sheriff under the insolvent debtor's oath, but only what the sheriff conveyed to the party under whom the defendants claim title.

III. JURISDICTION AND PROCEDURE.

Jurisdiction—Federal Courts.—The administration of the effects of a bankrupt rests exclusively in the federal courts; and where, before adjudication, a state court has taken jurisdiction to administer the assets transferred under a general deed of assignment, the parties will be enjoined from further proceeding in the state court, and plenary jurisdiction will be assumed by the district court of the United States. Lea Brothers & Co. v. West Co., 4 Va. Law Reg. 662.

State Courts.—Where there has been a judicial sale and confirmation in the state court to enforce a judgment lien, and after the sale the defendant is declared a bankrupt, and without taking any step in the state court he applies to the United States district court and there obtains a decree setting aside the sale, which decree was reversed by the United States circuit court and the assignee in bankruptcy directed to proceed in the state court for relief, it was held: (1) the state court having possession of the case and having made a decree therein before the bankruptcy of the defendant, he or his assignee can proceed only in that court to maintain their rights; (2) the assignee knowing the proceedings in the state court, and not having made himself a party in that court, and it not appearing that such court even knew of the bankruptcy of the defendant, the decree of the court confirming the sale was valid, even in the absence of the assignee; (3) the purchase being *bona fide* and being confirmed by the court, the onus is on the bankrupt or his assignee if he would set the sale aside, to show the inadequacy of price, or that only a portion of the land should have been sold to pay the plaintiff's debt, and this they failed to do; hence the assignee is entitled only to what the bankrupt would have been entitled if he had not been declared a bankrupt, *i. e.*, the surplus of the purchase money after satisfying the plaintiff's judgment and cost of the suit. Barr, Assignee, v. White *et als.*, 30 Gratt. 531.

Proceedings in State Court—Finality.—Where a state court in attachment proceedings has legally and properly taken hold of the property of an insolvent and divided the proceeds thereof among all of the creditors, equally and ratably, all but two of them consenting and releasing the debtor, all of which was consummated before the involuntary feature of the bankrupt act went into effect, the dissenting creditors cannot, by proceedings in bankruptcy, have annulled the action of the state court. Botts v. Hammond, 5 Va. Law Reg. 789.

Effect of Bankruptcy Proceedings in Suit Pending in State Court.—Subsequent proceedings in bankruptcy, to which a lien creditor is not made a party, do not divest the state court of jurisdiction of a suit pending therein for the enforcement of his lien, the rule being that the court that first takes jurisdiction of the parties and the subject-matter retains it. Francisco v. Shelton, 85 Va. 779, 8 S. E. Rep. 789.

A creditor of a bankrupt having a lien on his real estate, has two courses open to him, either of which he may adopt. He may decline to appear in the bankrupt court; and he will be unaffected by any proceeding in that court; unless, indeed, the proper steps are taken to sell the estate clear of all incumbrances; or he may elect to proceed in the bankrupt court, prove his debt there, and rely upon his security. If the creditor elects to proceed in the bankrupt court, this is a waiver of his right to institute any suit or proceeding at law or in equity, which is in any way inconsistent with his election to obtain satisfaction of his debt under the bankruptcy proceedings. Spilman v. Johnson, 27 Gratt. 83.

Parties to Suit.—In a suit by judgment creditors to subject their debtor's land to the payment of their debts, pending the cause the debtor is declared a bankrupt, and he applies for a homestead under the constitution and law of Virginia and the acts of bankruptcy of the United States. *Held*, that the assignee in bankruptcy of the defendant debtor should be made a party to the suit. Barger v. Buckland, 28 Gratt. 852.

In Abernathy v. Phillips, 82 Va. 769, 1 S. E. Rep. 113, it was held that a bankrupt cannot appear as a party plaintiff in a suit, except as by his assignee.

In a creditor's suit the defendant debtor becomes a bankrupt *pendente lite*. His assignee is not made a party, but is counsel in the cause, and one of the commissioners to sell the land. It is no objection to a sale that he had not been made a party to the suit. Bank v. Campbell, 75 Va. 455.

Where land is sold under proceedings in bankruptcy, persons interested in the land, but not parties, are not bound by the sale, though the bankrupt was the administrator of the estate through which they claim. Moorman v. Arthur, 90 Va. 455, 18 S. E. Rep. 869.

Averment of Appointment of Assignee.—Whether sound law or not that "a suit to set aside fraudulent deed made by bankrupt before his bankruptcy can only be maintained by his assignee," there must be an averment that there was such assignee duly appointed and qualified before the matter will be considered. Elder's Ex'ors v. Harris, 76 Va. 187.

Authority of United States Supreme Court Decisions in State Courts.—*Quære:* Have the decisions of the supreme court of the United States application to judgments of state courts prior to the adjudication in bankruptcy, the liens whereof have not been affected by the proceedings of the bankrupt court? Ferrell v. Madigan, 76 Va. 195.

Assignee Appointed in Another State.—In Cannon v. Wellford, 22 Gratt. 195, bankruptcy proceedings had been instituted in New York, and an assignee appointed by the court of that state. *Held*, the New York court having first taken cognizance of the matter as to both partners, acquired complete and exclusive jurisdiction of the whole case; the assignee appointed by that court was the regular and legal assignee of both partners; and it was not competent to the Virginia tribunal, by subsequent proceedings, to oust that jurisdiction, and appoint other and different assignees. The fact that there

were assets in different districts, and different states, does not, in any degree, affect the rights of the assignee. He represents the bankrupt and their estate in every state, and collects the assets wherever found.

Conflict of Laws.—In Devisme v. Martin, Wythe 133, it was held that, if a British subject be declared a bankrupt in England, having debts due him in this commonwealth, his British creditors cannot recover satisfaction out of said debts in our courts; for the English law will govern in our courts in such a case and by that law said debts would be transferred to the assignees in bankruptcy.

Remedy for Wrongful Discharge.—The acts of courts of competent jurisdiction, having cognizance of the parties and the subject-matter, cannot be questioned elsewhere. If bankrupt court wrongfully allows the bankrupt the exemption claimed by him, the remedy is not in the state courts. Brengle v. Richardson, 78 Va. 406.

Prosecution of Pending Actions.—An action is not abated by the bankruptcy of the plaintiff, but it can no longer be prosecuted in his own name, for the right to prosecute such action belongs exclusively to the assignee or trustee in bankruptcy, and must be in the name of the latter. Cannon v. Wellford, 22 Gratt. 195.

Powers of Bankrupt Court.—The bankrupt court controls the property of the bankrupt, and though such property be encumbered by liens, it may bring the lien-holders into court, sell the property free of liens, and distribute the proceeds according to priorities. Blair *et als.* v. Carter's Adm'r *et als.*, 78 Va. 621.

IV. DISCHARGE AND ITS EFFECT.

Effect on After-Matured Judgments.—Judgments matured against a bankrupt after his adjudication on pre-existing provable debts, are not liens on his after-acquired lands; but the bankrupt is released by his discharge from them, as well as from the debts whereon they are founded. Blair *et als.* v. Carter's Adm'r *et als.*, 78 Va. 621.

Provable Debts.—In Blair *et als.* v. Carter's Adm'r *et als.*, 78 Va. 621, it was held that, under statute (U. S. Rev. Stat. sec. 5106), no suit on the provable debt can be prosecuted to judgment, against a bankrupt, until the question of his discharge is determined; but by leave of the bankrupt court the suit may proceed to ascertain the amount which ought to be proved therein.

By maturing a pre-existing provable debt of the bankrupt into a judgment, the form and remedy are changed, but the debt remains the same and is provable in bankruptcy. Accordingly by U. S. Rev. Stat. sec. 5119, the bankrupt is released from such judgment by his discharge, and the debt is not merged in the judgment. Blair *et als.* v. Carter's Adm'r *et als.*, 78 Va. 621.

Effect on Prior Judgments—Liens.—All interest on property held by a bankrupt, and all property which he has fraudulently conveyed, comes within the jurisdiction of the bankrupt court. But that court has no jurisdiction over property *bona fide* conveyed to a purchaser by the bankrupt before he is declared a bankrupt. And a creditor by judgment docketed against the bankrupt recovered before a *bona fide* conveyance of land, may proceed in a state court to enforce his judgment lien against said land. Parker v. Dillard, 75 Va. 418.

A judgment of state court, regularly docketed, before debtor was adjudicated a bankrupt, was assigned to a third person, who had no notice of the proceedings in the bankrupt court, made no claim and received nothing from the bankrupt's funds there administered. Judgment debtor afterwards sold to purchaser, for value, land owned by him at time of his bankruptcy. On bill filed in state court for benefit of assignee of the judgment against judgment debtor, his assignee in bankruptcy, and the purchaser, to subject the land to pay the judgment, *held*, the judgment having been obtained before the bankruptcy, the state court has jurisdiction to enforce its lien on the land in possession of the alienee of the bankrupt; and conceding that the bill should have been filed in the name of the assignee in bankruptcy, yet he, being a defendant, made no objection to the jurisdiction. Had the point been made at proper time the difficulty would have been removed. It is too late to raise the objection for the first time here in argument. Ferrell v. Madigan, 76 Va. 195.

The lien of a judgment is not defeated by the discharge of the debtor as a bankrupt. And it may be enforced in the state courts. In such case the *elegit* sued out upon the judgment may be in the usual form; and in executing it the sheriff must take notice of the bankruptcy of the debtor, and disregarding all property of the debtor not subject to the lien, levy it upon that which is so subject. McCance v. Taylor, 10 Gratt. 580.

A judgment debtor having obtained his discharge as a bankrupt subsequent to the judgment, may enjoin the suing out or levy of any execution upon said judgment. Peatross v. M'Laughlin, 6 Gratt. 64.

Liability of Homestead after Discharge.—Judgments obtained and docketed, and liens acquired before the debtor is adjudicated a bankrupt, may, after he is discharged as such, be enforced in the state courts at the instance of persons who were not parties to the bankrupt proceedings, on lands owned by him before his adjudication and allotted him for his homestead. But the decree of the state court for sale of the land does not impinge the decree of the bankrupt court allotting the land to the bankrupt for his homestead, because the judgment lienors were not parties to the proceedings wherein the latter decree was rendered. McAllister v. Bodkin, 76 Va. 809.

Liability of Surety of Bankrupt.—Parties having obtained decrees against their debtor in a suit pending in the county court, and he having become bankrupt, may bring another suit in the circuit court against the administrator and heirs of a surety of the bankrupt to subject the real estate of the surety to satisfy their debts. Ewing v. Ferguson, 33 Gratt. 548.

In Appellate Court.—Where, after the reversal of the judgment appealed from, appellees have been declared bankrupt, and obtained their discharge, the appellate court will, in their judgment of reversal, see that execution shall not issue upon the judgment without a previous order to take effect by the court below after due notice. Exchange Bank v. Knox, 19 Gratt. 739.

Ex-Territorial Effect of Discharge.—G., a citizen of Maryland, gave his bond, in Virginia, to B., a citizen of Virginia, and, afterwards, in Maryland, became a bankrupt, by the laws of Maryland. Under which he was duly discharged, by the competent tribunal of Maryland, under a general direction, with respect to his creditors. This did not discharge him, in a suit afterwards brought upon the bond, in Virginia. Banks v. Greenleaf, 6 Call 271.

Since, under Acts 1877, c. 114, 1, non-residents are

not entitled to homestead exemption, a resident of Virginia declared a bankrupt by a United States district court sitting in that state was not entitled to homestead in land situated in West Virginia, in a suit by his creditors there, though the land had been so set apart by his assignee in Virginia, and confirmed by the bankrupt court there. Gibbs v. Logan, 22 W. Va. 208. See especially, monographic *note* on "Homestead" appended to Hatorff v. Wellford, 27 Gratt. 356.

When Assignment Takes Effect.—The assignment of bankrupt effects relates back to the commencement of proceedings in bankruptcy; therefore, by operation of law, all attachments on mesne process, of the property of the debtor, made within four months next preceding the commencement of the proceedings, are dissolved. Weisenfeld v. Mispelhorn, 5 W. Va. 46.

Conclusiveness of Discharge.—A decree discharging a bankrupt from his debts under the act of congress of August 19th, 1841, is conclusive upon all his creditors in all suits which may be brought against him in any court, except where the discharge is impeached for some fraud or willful concealment by the bankrupt of his property or rights of property, contrary to the provisions of that act. Tichenor v. Allen, 18 Gratt. 15.

Fraud of Bankrupt.—In Jones' Ex'ors v. Clark *et als.*, 25 Gratt. 642, a person had purchased from an executor bonds given to the executor for the purchase price of land sold by him in his representative capacity, at a discount of eighteen per cent. *Held*, the purchaser was guilty of constructive fraud in purchasing the bonds at so large a discount and was liable for the amount of the bonds; that the purchaser having pleaded that he was a discharged bankrupt, it was held that section 33 of the bankrupt act of 1867, which provides "that no debt by the fraud," etc., of the bankrupt "shall be discharged under this act, applies as well to implied as to actual fraud, and the purchaser was not discharged from the payment of this debt.

A creditor of a discharged bankrupt who has not proved his debt in the proceeding in bankruptcy, may under the statute, Code, ch. 179, § 2, p. 677, file his bill to set aside a fraudulent conveyance made by the bankrupt and impeach his discharge on the ground of fraud or a willful concealment of his property, without having first recovered, a judgment against the bankrupt. Tichenor v. Allen, 18 Gratt. 15.

Creditors who have not proved their debts in the proceeding in bankruptcy, may institute suits to set aside fraudulent conveyances made by their debtor before he petitioned for the benefit of the bankrupt law; and may impeach his discharge in bankruptcy on the ground of fraud or the willful concealment of his property or rights of property contrary to the provisions of the act of congress; such suits being instituted more than two years after the decree of discharge in bankruptcy. Such suits may be instituted in any court, state or federal, in which, independent of the bankrupt act, a suit may be properly brought against the bankrupt. Tichenor v. Allen, 18 Gratt. 15.

Assignment of Debts Due from Bankrupt.—A debtor of an insolvent bank purchasing debts due from such bank after a decree for an account rendered under a bill against the bank by the stockholders, is only entitled to stand in the shoes of his assignor, and receive his proportion of the assets realized. Finney v. Bennett, 27 Gratt. 365.

Effect of Discharge upon Vendee's Title.—The vendee of a bankrupt may defend his own title by defending that of his vendor, which can be done by setting up the latter's discharge in bankruptcy, and his release from the debt claimed. Blair *et als.* v. Carter's Adm'r *et als.*, 78 Va. 621.

New Promise to Pay after Discharge.—A verbal promise to pay an old debt, will be sufficient to bind one discharged in bankruptcy, if it be of such a character (not casual or implied, but so express and unequivocal) as to show that the promisor intended deliberately to waive the protection of his discharge in bankruptcy, and to re-bind himself legally to pay the old debt: but a mere acknowledgment of the justice of the debt, of the moral obligation to pay it, and an expression of purpose to pay it at some future time, or when able, will not have the effect, in the absence of a deliberate intention thereby to bind himself. A moral obligation to pay a debt is never stale, and may be the consideration for a new promise to pay an old debt, at any distance of time after the discharge of the debt by bankruptcy. Horner v. Speed, 2 Pat. & H. 617.

Limiting Suit on New Promise.—When a debt is discharged in bankruptcy within five years after it is incurred, and a suit is brought on a new promise to pay it, within five years after the new promise—a plea, that five years have elapsed since the original cause of action, or since the discharge in bankruptcy, is bad, and should be rejected. Horner v. Speed, 2 Pat. & H. 617.

V. POWERS AND DUTIES OF ASSIGNEES.

It is held that under the bankrupt acts the rights of action which are transferred to the assignee do not include claims for personal damages. The rights of action which are transferred to the assignee are rights of action founded on beneficial contracts made with bankrupt, where the pecuniary loss is the substantial and primary cause of action, and for injuries affecting his property so far as they do not involve a claim for personal damages. In many respects the assignee in bankruptcy stands in the same relation towards the bankrupt's estate as that of an executor towards the estate of his testator. Hence the proper and reasonable construction seems to be that the statute as to bankruptcy transfers such rights of action as would be assets in the hands of the executor for the payment of debts, and no others. Dillard v. Collins, 25 Gratt. 343.

Powers of Assignee.—An assignee in bankruptcy has no power to sell the land of his bankrupt free of liens, without a special order of court; a district court alone has jurisdiction to make such order, and then only after the lien creditors have been served or affected with notice to appear and show cause against it. Boulware v. Hartsook's Adm'r *et als.*, 83 Va. 679, 3 S. E. Rep. 289.

An assignee or trustee in bankruptcy not only represents the bankrupt, but the creditors as well, and may pursue any remedy that may be necessary to protect the interest of the latter, and therefore he may contest claims and rights which the bankrupt himself could not contest. Cannon v. Wellford, 22 Gratt. 195.

Homestead of Bankrupt.—M was adjudged a bankrupt and discharged in 1873. He claimed as his homestead certain land, which the bankrupt court allotted him, but without notice to his creditors, who were lienors by judgments recovered in 1857. Those creditors in 1878 filed their bill in the state

court to enforce their liens on said land, but did not make T, who was the assignee in bankruptcy of M, a party. M demurred, answered, and pleaded that the enforcement of the judgments was barred by the lapse of twenty years between their date and the filing of the bill. The demurrer was overruled and decree of sale entered, but the commissioner of sale was not directed to give the usual bond. On appeal by M, *held*, under the bankrupt laws of the United States, the legal title to the bankrupt's homestead does not vest in his assignee; and if it does vest, *eo instante* the homestead is allotted him, the legal title thereto reverts to him. Therefore the assignee had no interest in the subject of this suit and was not a necessary party.

The assignee had not even a reversionary interest in the subject of this suit, as by Code 1873, p. 1171, ch. 183, § 8, if the homestead be not alienated in the householder's lifetime, after his death it continues for benefit of his widow and children, until her death or marriage, and after her death or marriage until the youngest child becomes twenty-one years of age; after which it passes to his heirs or to his devisees, not subject to dower, but subject to all his debts. In no event does it pass to his assignee in bankruptcy. McAllister v. Bodkin, 76 Va. 809.

Property Held in Trust for Debtor.—An assignee in bankruptcy may assert his right to the proceeds of his bankrupt's trust property sold by a trustee, in a suit wherein the ownership of said proceeds is litigated. Smith v. Profitt, 82 Va. 883, 1 S. E. Rep. 67.

Limitation of Actions by or against Assignees.—In Cobbs v. Gilchrist, 80 Va. 503, it was held that, U. S. Revised Statutes, section 5057, limiting action by or against assignees to two years after accrual of rights, applies to all litigation between him and any adverse claimant.

The assignee's claim is barred by lapse of two years from maturity of his claim, and not from date of assignment. Smith v. Profitt, 82 Va. 883, 1 S. E. Rep. 67.

The limitation of two years after the decree in bankruptcy or after the cause of suit shall first have accrued, provided in § 8 of the bankrupt act, has relation to proceedings by or against the assignee in bankruptcy; and does not apply to suits by creditors who have not proved their debts to set aside fraudulent conveyances by the bankrupt. The only effect of this provision on such creditors is to prevent such a suit until the two years have expired. Tichenor v. Allen, 13 Gratt. 15.

VI. ARTICLES IN VIRGINIA LAW REGISTER.

Numerous interesting questions on the law of bankruptcy may be found discussed in the Virginia Law Register. See, 5 Va. Law Reg. 365; 4 Va. Law Reg. 440; 4 Va. Law Reg. 812; 4 Va. Law Reg. 402; 4 Va. Law Reg. 554; 4 Va. Law Reg. 268.

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361 *D. Martz's Ex'or v. D. Martz's Heirs.

September Term, 1874, Staunton.

1. **Wills—Probate Proceedings—Testimony of Legatee—Executor.**—Upon the proceeding for the probate of a will, J, who is the nominated executor and propounder of the paper, and also a devisee and legatee under it, is a competent witness to sustain the probate. See Code of 1873, ch. 172, §§ 21 and 22.
2. **Same—Executor Not a Party.**—A will is not a contract and an executor or legatee is not a party to it in the sense of the statute.
3. **Witnesses—Interest—Capacity.***—One party to a suit is incompetent as a witness on account of the disqualification of the other party only in a case where he was a party to the transaction which is the subject of the suit or proceeding, and the other party to it is dead, insane, or incompetent from some legal cause.
4. **Same—Same—Exceptions.**—Where the objection is to the competency of the witness, and the objection is sustained, it is not necessary to state in the exception what the party offering him expects to prove by him.
5. **Same—Same—Same—Time for Preparing Bill of Exceptions.**†—If an exception to the ruling of the court excluding a witness, is taken at the time, the bill of exception may be prepared, and signed and sealed after the verdict and judgment. And if the counsel of the parties do not agree as to the fact whether the exception was taken at the time, the court, not remembering, may certify the facts: and the entry of the clerk in the memorandum stating that the exception was taken on the trial, the court was right in certifying the facts, and the appellate court may consider the question raised by the bill of exceptions.

This was a motion in the Circuit court of Rockingham county by Jackson Martz, the nominated executor, for the probate of the will of Dorilas Martz, deceased. The heirs of Dorilas Martz were summoned, and appeared and opposed the probate.

***Witnesses—Interest—Capacity.**—See Simmons v. Simmons, 33 Gratt. 451, and *note*; Ellis v. Harris, 32 Gratt. 684, and *note*; Parent v. Spitler, 30 Gratt. 819; Grigsby v. Simpson, 28 Gratt. 348, and *note*.

Exceptions—Time of Taking.—See Page v. Clopton, 30 Gratt. 415, and *note*; Danville Bank v. Waddill, 31 Gratt. 469; Peery v. Peery, 26 Gratt. 320, and *note*.

†**Bill of Exceptions—Time of Signing.**—See Page v. Clopton, 30 Gratt. 415, and *note*. See especially, Winston v. Giles, 27 Gratt. 530, and *note*.

Appellate Proceedings—Bill of Exceptions Must Show Materiality of Evidence Excluded.—The court, in Union Central Life Ins. Co. v. Pollard, 94 Va. 157, 26 S. E. Rep. 421, says: "In order to show that the trial court erred in rejecting an offer of evidence, or in excluding evidence, the bills of exceptions must show the materiality of the evidence tendered. Where a question is asked, and the witness is not permitted to answer, the bill of exceptions must show what the party offering the witness expected or proposed to prove by him. If the witness is permitted to answer, and the answer is excluded, it should show what the answer was. This is necessary because it may be that the witness had no knowledge upon the subject, or what he knew was irrelevant or immaterial. A judgment will not be reversed because evidence has been excluded or rejected by the trial court unless its materiality is made to appear. Carpenter v. Utz, 4 Gratt. 272; Johnson's Ex'x v. Jennings, 10 Gratt. 1; McDowell's Ex'or v. Crawford, 11 Gratt. 387; Martz v. Martz, 25 Gratt. 367; Stoneman's Case, 25 Gratt. 887; Continental Ins. Co. v. Kasey, 25 Gratt. at page 276; Beirne v. Rosser & Turner, 26 Gratt. 537, 547; Valley Mut. Life Ass'n v. Teewalt, 79 Va. 421; Taylor v. Commonwealth, 90 Va. 110, 17 S. E. Rep. 812." But in Metz v. Snodgrass, 9 W. Va. 194, the same rule is followed as is laid down in the fourth headnote of the principal case.

On the trial of the motion, the pro-
362 pounder of the *paper, after having offered it in evidence to the jury, proposed to introduce as a witness Mary M. Martz, who was a sister of Dorilas Martz, and a devisee under the will; but she was objected to, on the ground that she was an incompetent witness to testify in favor of the will; and the court sustained the objection, and excluded the witness: and the propounder excepted.

The propounder then proposed to introduce as a witness, in behalf of said will, one Jackson Martz, a brother of Dorilas Martz, deceased, and a devisee under said will, the executor therein named, and the scrivener who wrote the will, and one of the propounders of the will; to the introduction of which witness the contestants objected; and the court sustained the objection: and the propounders excepted.

The contestants, to maintain the issue on their part, offered in evidence the will of Sarah Martz, the mother of Dorilas Martz, deceased, by which she gave to Dorilas Martz all her estate, real and personal, and directed him to pay to certain of her children each $750. And also proved by a witness, Curtis Yates, that the said Sarah Martz had made a previous will some years before; and that the said Dorilas Martz had told said witness that the reason the said Sarah Martz had changed her will, and made her last will, was that she was afraid if she left her property, or any part of it, to her sons and daughters, that it would be sequestered by the Confederate government, as they lived outside of the lines of the said Confederate states. To the introduction of said will of Sarah Martz, and the testimony of Yates, the propounder of the will objected; but the court overruled the objection: and the propounder excepted.

In relation to this exception, the court certified that the propounder by his
363 counsel alleges and claims that *he excepted and tendered this exception; the contestants by their counsel claim that if any exception was taken at the time the said evidence was permitted to go to the jury, they did not hear the exception taken; and the court, not remembering whether the exception was taken at the time, certifies these facts as a part of the record.

The jury found that the paper was not the will of Dorilas Martz, deceased. And, thereupon, the said motion for probate coming on to be finally heard, the court approved the verdict, and refused to admit the paper to probate. And, thereupon, Jackson Martz applied to a judge of this court for an appeal; which was allowed.

Haas, Woodson and Berlin, for the appellant.

Walton and Robert Johnston, for the appellees.

ANDERSON, J. delivered the opinion of the court.

This is a case of probate. The first question I will consider is, did the court err in excluding the testimony of Jackson Martz and Mary M. Martz from the jury on the ground of incompetency. They were both legatees and devisees, and propounders of the will; and the former was the scrivener who wrote it and was named the executor.

Neither of them was incompetent because of interest. Act of March 2d, 1866, first clause of section 1; Code of 1873, p. 1109, ch. 172, § 21. And the former was not incompetent because he was executor. Code of 1873, p. 913, § 21. Were they incompetent on the ground of being parties? In said twenty-first section of chapter 172, it is enacted that "in all actions, suits or other proceedings of a civil nature,
364 at *law or in equity, &c., the parties thereto, &c., shall, if otherwise competent to testify, &c., be competent to give evidence on their own behalf, and shall be competent and compellable to give testimony on behalf of any other party, &c., except as afterwards provided." This language is very comprehensive; and this being a suit or proceeding of a civil nature, the parties to it are competent to give evidence on their own behalf, not being otherwise incompetent unless they fall within one or other of the exceptions.

The exceptions are contained in the second section. § 22 of ch. 172 of the Code. The first is incompetency, on the ground of the relation of husband and wife. If they are incompetent as husband and wife the law is not altered; they are not made competent by the twenty-first section. Jackson Martz and his sister Mary do not come within that exception.

Second. Attesting witnesses to wills, deeds, &c., are excepted. They do not come within that exception, as neither of them are attesting witnesses.

Third. When one of the original parties to the contract or other transaction which is the subject of investigation is dead or insane, or incompetent to testify by reason of infancy or any other legal cause, the other party shall not be admitted to testify in his own favor, unless first called to testify on behalf of the party first named. It will be observed that this disqualification which renders a party to the suit incompetent, applies only to one who is a party to the contract or transaction which is the subject of investigation. The exception applies only to a case where there were two or more parties to a contract or transaction, and one of them dies, or becomes insane, or is incompetent to testify for any other legal cause, the other party to the contract
365 or transaction shall not be *admitted to testify. It only applies to parties to the contract or transaction which was the subject of the suit or proceeding. The only question then is, were Jackson Martz and his sister Mary parties to the transaction which is the subject of this suit or proceeding? If they were not, they are not embraced in this exception and not rendered incompetent by it.

The execution of the paper, purporting to be the last will and testament of Dorilas

Martz, is the transaction which is the subject of this proceeding. Is it his will? Jackson Martz, and Mary his sister, are legatees and devisees. They may be said to be parties in interest under the will. But are they parties to the transaction of making it? They cannot be said to be parties to the making of the will, because it invests them with an interest. If it be the will of Dorilas Martz, he can be the only party to the transaction. It was his act alone. He may have consulted others, and been advised, and he may have employed a scrivener to write it. But if it is his will it is his act alone. He is the only party to the transaction of making and executing it. His counsel and advisers and the scrivener are not parties, but only ministering agents. The legatees are parties interested in the will, but they are in no sense parties to the making of it. The transaction of making the will cannot, in any sense, be said to "have been had" with them. It is not a transaction between parties, one of whom is dead or insane, or incompetent to testify from any legal cause, and therefore is not embraced by the exception. There is great force in the argument of the learned counsel for the appellees that the design appears to have been to limit the contract or other transaction to that to which these are parties." It cannot be said with any propriety that a will is a contract. 366 *The very essence of a genuine will is, that it is the voluntary, independent, individual act of the testator. But unfortunately for the argument this reasoning is applicable only to the exception.

For the same reason these legatees are not incompetent, because other legatees are disqualified to testify by reason of their relation of husband and wife. One party is not incompetent to give testimony because another party is incompetent on account of insanity, or the relation of husband and wife, or for any other legal cause, unless he was a party to the contract or transaction, which is the subject of the investigation. In a suit by an executor upon a contract, between the defendant and his testator, the executor, not being a party to the contract, would be a competent witness, although the defendant could not testify because of the death of the other party to the contract, who is the testator. His incompetency is expressly within the remaining exception. It is in these words: "Where one of the parties is an executor, &c., the other party shall not be permitted to testify in his own favor, unless the contract or other transaction in issue, or subject of investigation, was originally made or had with a person who is living and competent to testify, except as to such things as have been done since the powers of such fiduciaries were assumed." But the executor is not included in the exception, and consequently is not incompetent. One party to the suit, under this exception, is incompetent as a witness on account of the disqualification of the other party, only in a case where he was a party to the transaction, which is the subject of the suit or proceeding, and the other party to it is dead or insane, or incompetent from some other legal cause.

These are the only exceptions to the 367 competency of *parties to the action, suit, or proceeding of a civil nature, to give evidence in their own behalf, as provided by the 21st section. And Jackson and Mary Martz not being parties to the transaction, I can see no reason why they should not be admitted to give evidence, which would not apply with equal force to the admissibility of interested parties in any case. At all events they are not excepted by the statute, and if it is wrong, the remedy is with the legislature and not with the courts. It seems to be the policy of the law, that the objection, on account of the relation of the parties to the cause, should apply to their credibility and not to their competency. I am of opinion, therefore, that Jackson Martz, and Mary his sister, and co-legatee, were competent witnesses under the statute.

But it is argued that the exception is not well taken, inasmuch as it does not state what was offered to be proved by the witness. It is not a case as to the relevancy of testimony, as in Carpenter & wife v. Utz, cited by the appellee's counsel. 4 nGratt. 270. If it were, it would have bee necessary for the exceptor to have shown its relevancy by setting out what could be proved by the witness. But it is a question whether the witness shall be heard at all, though his testimony may be ever so relevant and important. It is not necessary to state what his testimony would be in order to present to the appellate tribunal the question as to the legality and propriety of the decision of the lower court; and the adverse party objecting to his giving testimony at all, implies that his testimony would be unfavorable to him. I am of opinion, therefore, that it was error to exclude these witnesses, and that the exceptions, first and third, which raise the question, are well taken.

I am of opinion that there was no 368 error in admitting *Daniel G. Martz to testify on behalf of the appellees, as set out in appellants' second bill of exceptions.

A preliminary objection is made to the appellants' fourth bill of exceptions, that it was not taken in time. The exception may be taken on the trial and before verdict; though the bill may be prepared, and be signed and sealed by the court after verdict and judgment. It appears from the bill of exceptions that the appellants' counsel alleged and claimed that he had excepted in time; and that the appellees' counsel claimed that if any exception was taken at the time the evidence was permitted to go to the jury, they did not hear the exception taken. The court not remembering and the entry of the clerk in the memorandum stating that the exception was taken on the trial, I think the court did right to certify the facts, and that it is incumbent

on the appellate court to consider the question raised by the bill of exceptions. That question is, was the will of Sarah Martz, the mother of Dorilas Martz, by which she bequeathed the most of her estate to him, legal and relevant testimony in this case. And was the testimony of Curtis Yates of the declarations of Dorilas Martz, to the effect, that "the reason that said Sarah Martz had changed her will, and made her last will was, that she was afraid if she left her property or any part of it to her other sons and daughters that it would be sequestered by the Confederate government, as they lived outside the lines of the said Confederate states." What bearing could the will of Sarah Martz, or the declarations of Dorilas Martz, as testified to by Yates, have upon the question at issue in this proceeding?

Sarah Martz was the mother of Dorilas, and also of the contestants, and of the
369 propounders of his will. *And the evidence tended to impeach his right and title to the property, or a part of it, which he had bequeathed to his brother and sister, Jackson and Mary Martz, and to show a joint right with him to the said property by the contestants of his will. But I do not think that the testator's right of property in the subject of his devises and bequests was proper to be litigated on a motion to admit his will to probate. If they claimed right to the property devised adversely to the devisor, they might assert it in an action at law or by a bill in equity, as the case might be, adapted to one or the other of those jurisdictions. And the probate of the will of Dorilas Martz, could not prejudice them in such proceeding. The introduction of such evidence upon a motion to admit the will to probate, might tend to mislead and prejudice the minds of the jury; and I think its admission in this case was error. I am of opinion therefore, both upon the ground of the exclusion of Jackson and Mary Martz as witnesses, and the admission of the will of Sarah Martz and the testimony of Curtis Yates to go to the jury, to reverse the judgment with costs.

The judgment was as follows:

This day came again the parties by their attorneys, and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the court below erred in excluding the testimony of Jackson Martz and Mary M. Martz from the jury on the trial of this cause, they being competent witnesses under the statute; and also in admitting the will of Sarah Martz and the testimony of Curtis Yates of the declaration of Dorilas Martz. It
370 is therefore ordered *that the judgment of the said Circuit court be reversed and annulled, the verdict of the jury set aside and a new trial awarded the appellant; and that the appellees pay to the appellant his costs expended in the prosecution of his appeal here. And this cause is remanded to the said Circuit court of Rockingham county for further proceedings to be had therein. And in any further trial, the testimony of Jackson Martz and Mary M. Martz, if again offered, shall be admitted; and the will of Sarah Martz and the testimony of Curtis Yates as to the declarations of Dorilas Martz, if again offered, are to be rejected. Which is ordered to be certified to the said Circuit court of Rockingham county.

Judgment reversed.

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371 *Armentrout's Ex'ors v. Gibbons.

September Term, 1874, Staunton.

1. **Parties—Objection—Appeal.***—In a suit by G, the assignee of two bonds given for the purchase money of land, against the executors of the purchaser, to subject the land to the payment of them, they answer and say, that C has sued them to establish a prior lien on the land; that all the purchase money has been paid without notice of this prior lien, except the two bonds held by G, and one held by S, and they insist that they are entitled to have C's lien credited on the bonds held by G and S. S is a necessary party in the suit, and no decree should be made in the cause until he is made a party. And this objection may be taken at the hearing, or even in the appellate court.

In January 1870, Abel Gibbons filed his bill in the County court of Rockingham, in which he alleged that, on the 4th of April, 1860, James M. and H. M. Lofland sold and conveyed with general warranty to D. Armentrout four hundred and eighty-eight acres of land, lying in the county of Rockingham, in consideration of $23,500; of which $7,833.33 was paid in hand, and the balance to be paid as follows, to wit: $2,000 annually on the 1st of April, 1861-62-63-64-65-66-67, and $1,666.66 on the 1st of April, 1868. That for these deferred payments Armentrout executed his bonds to H. M. Lofland, and to secure them a lien was reserved in the deed. That two of said bonds, of $2,000 each, to wit: one falling due April 1st, 1866, and one falling due April 1st, 1867, have been transferred to the plaintiff. That certain payments have been made upon them; which he sets
372 out. That said *Armentrout is dead, leaving a will; and his sons B. F. and H. B. Armentrout are his executors. That the personal estate is exhausted; and that under the lien reserved in the deed he is entitled to subject the land to the payment of his debt. And making the executors and the devisees of the land parties

*Parties—Objection—Appeal.—See Clayton v. Henley, 32 Gratt. 65, and *note*; Dabney v. Preston, 25 Gratt. 842; Snavely v. Pickle, 29 Gratt. 42; Yost v. Porter, 80 Va. 859; Fitzgibbon v. Barry, 78 Va. 755; Lynchburg Iron Co. v. Tayloe, 79 Va. 676, and cases cited; Simon v. Ellison, 90 Va. 158, 17 S. E. Rep. 836, and cases cited; Burlew v. Quarrier, 16 W. Va. 143; Jones v. Ried, 12 W. Va. 359; Dower v. Church, 21 W. Va. 50, citing the principal case and McCoy v. McCoy, 9 W. Va. 443; Lyman v. Thompson, 11 W. Va. 427. See also, Barton's Ch. Pr. (2d Ed.) 142, 235, 239.

defendants, he prays that the land, or so much as may be necessary, may be sold, &c.

The plaintiff filed with his bill the will of Armentrout, and the bonds. Both of the bonds were assigned by H. M. Lofland to C. M. Kirtly, on the 11th of December, 1860; and the first was assigned by C. E. Kirtly to Gibbons on the 18th of April, 1861, and the second on the 26th of November, 1865.

The executors and devisees of the land answered the bill. The executors admitting the sale and conveyance of the land to their testator, with the lien reserved, the execution of the bonds, and the assignment to C. E. Kirtly, as alleged, they say that on the same day the bond for $1,666.66, falling due April 1st, 1868, was assigned to her by H. M. Lofland; as to the date of the assignments to the plaintiff, they know nothing and require proof. That one of the executors had paid to C. E. Kirtly the bond for $1,666.66, by several payments, the last of which was on the 12th of May 1869; and they exhibit the bond. That the bonds due April 1861, 1862, 1863 and 1864 were paid by David Armentrout in his lifetime, and he made some payments on the bonds of 1865 and 1866. That the bond falling due in 1865 was assigned to Z. Shirley and lost during the war; and since the war, as respondents believe, the said David Armentrout, at the instance of said Shirley, executed another bond, being a duplicate of the original, in order that he might have evidence of
373 the debt; but without any *purpose of changing the debt, or in any way affecting the rights or the responsibilities of the parties; which bond is now held by said Shirley.

They further say that there could have been no difficulty in the payment of any of said bonds, but for the fact that within the last few months one T. D. Collins has instituted a suit in this court on the chancery side thereof, claiming that he held a prior lien on the land in the bill mentioned, as sold by H. M. and J. M. Lofland to said David Armentrout, for the sum of $1,209.93, with interest from the 26th of August 1861, due by the bond of said H. M. & J. M. Lofland executed to Mary K. Lofland, for the same land, and assigned to the said Collins; which bond purports to be executed on the 26th day of August 1856, and to be secured by a lien in the deed from Mary K. Lofland to said H. M. & J. M. Lofland, of the same date. They do not admit that said debt is a lien upon said land; but if it is, they claim that the amount thereof must be deducted from the bonds of $2,000 held by the plaintiff and Shirley; as their testator, in his lifetime, and respondents, since his death, have paid all the residue of the purchase money for said land, without any knowledge or intimation of the lien of said Collins, or any other lien, thereon; the evidence of which was lost by the burning of the records in 1864, and only accidentally discovered by Collins in January 1871. That by the burning of said records they had no means of knowing the existence of said lien, and they are satisfied their testator never knew it in his life-time. That all the bonds having been paid up in good faith, and without notice of any prior liens, except those held by the plaintiff and Shirley, and as the land was conveyed to
374 their testator by deed with *general warranty, if the lien of said Collins upon the land is established, the burden of it must fall upon the plaintiff and Shirley; and no decree should be rendered against the land or the respondents until that question is decided; and if that lien is established, then respondents should receive credit on said bonds for the amount thereof, as the said H. M. & J. M. Lofland and Mary Lofland are insolvent. And they further say, that a decree has been made in the suit of Collins v. Lofland by which the land aforesaid is ordered to be sold to pay said Collins said debt of $1,209.93 and interest. And they exhibit the record. And they insist that said debt is a good legal offset against these bonds.

The devisees answered referring to the answer of the executors. And one of the executors was examined as a witness, whose testimony sustained the answer; and he stated that the only bonds of the testator given for the land which remained unpaid were the two held by the plaintiff and the one held by Shirley.

The cause was removed to the Circuit court of Rockingham, and came on to be heard on the 11th of October 1872, when the court decreed that the executors of David Armentrout, out of the assets in their hands, should pay to the plaintiff $828.51, with interest thereon from the 17th of March 1870, and $2,000, with interest thereon from the 1st of July 1870, subject to a credit of $200 as of the date of the 8th of September 1871, and his costs. These were the amounts due upon the two bonds after crediting them with the payments made upon them. And it was further decreed that if the money was not paid within sixty days, commissioners named should proceed to sell the land, or so much as might be neces-
375 sary, *at public auction, for so much cash as would pay the debt and costs, and the residue, &c. From this decree the executors obtained an appeal to this court.

Woodson, for the appellants.

Robert Johnston and Newman, for the appellees.

BOULDIN, J., delivered the opinion of the court.

It appears as a fact proved in this record, and is also distinctly alleged in the answer of Armentrout's executors, that Zachariah Shirley, as assignee, prior to the institution, and at the trial of this cause, was the holder of one of the bonds of David Armentrout, deceased, in the proceedings mentioned, and that the said bond was unpaid. It further appears from the answer of the executors, that the same equity claimed against the bonds held by Gibbons, as as-

signee, was expressly and distinctly asserted against the bond held by Shirley. The court is therefore of opinion that the said Zachariah Shirley was directly and materially interested in the matters in controversy, and that the same should not have been adjudicated without bringing him before the court.

No principle of equity is more familiar or better settled than this: that "all persons materially interested in the subject of controversy ought to be made parties in equity, and if they are not, the defect may be taken advantage of, either by demurrer or by the court at the hearing." Clark v. Long, 4 Rand. 451. It is not necessary (although certainly more regular) that the objection for want of parties should be made either by plea, answer or demurrer. On the contrary, "if it appear on the face of the record that proper parties are wanting, the decree will be reserved, unless the ob-
376 jection was expressly relinquished *in the court below." Sheppard's ex'or v. Starke & wife, 3 Munf. 29.

In referring to that decision, this court does not intend to affirm that even the express relinquishment, by any party in equity, of an objection for want of proper parties, would justify the court in proceeding with the cause in the absence of such parties. We think it would not. But the case is cited to show that the appellate court will reverse for want of proper parties if apparent on the face of the record, although the objection was not made in the court below.

In that case the objection was not taken advantage of either by demurrer, plea or answer, nor was it suggested to the court below at the hearing. It was pressed for the first time in the appellate court, and the record showing on its face that there ought to be other parties, the decree was reversed.

In the case before us, the answer of Armentrout's executors distinctly and in express terms alleged that Zachariah Shirley then held, as assignee, one of the bonds aforesaid of David Armentrout, deceased, which was unpaid; and the same fact is proved by B. F. Armentrout, a witness in the cause. The answer also asserts against the bond, in the hands of Shirley, the same equity precisely which is claimed against the bonds in the hands of Gibbons. It is very manifest, therefore, that Shirley is directly interested in the questions:

1st. Whether there is an equity against either of the bonds; and secondly, if such equity exist, whether it shall be applied against the bond held by him, or those held by Gibbons, or be equitably apportioned. It was error, therefore, to dispose of the case at all without making Shirley a party, his interest being apparent on the face
377 of the record. Without then *intimating any opinion on the merits of the controversy, which would be improper in the absence of Shirley, except to say, that the equity asserted by the appellants should be further considered by the court below, the court is of opinion that the decree complained of is for the reasons above stated erroneous, and should be reversed and annulled with costs to the appellants, and the cause remanded to the Circuit court for further proceedings in accordance with the principles above declared.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in disposing of the cause in the absence of Zachariah Shirley as a party. It is therefore decreed and ordered that the decree complained of be reversed and annulled; and that the appellee, Gibbons, do pay to the appellants their costs by them expended in this court. And this cause is remanded to the Circuit court, with instructions to that court to require the appellee, Gibbons, to make the said Zachariah Shirley, or his personal representatives, parties to the cause; and to consider further the equity set up in the answer of Armentrout's executors. Which is ordered to be certified to the said Circuit court of Rockingham county.

Decree reversed.

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378 *Bank of the Valley for &c. v. Marshall.*

September Term, 1874, Staunton.

1. The principles of the cases of *Exchange Bank* v. *Knox* and *Farmers Bank* v. *Anderson*, 19 Gratt. 739, and *Saunders* v. *White*, 20 Gratt. 327, approved and acted on.

2. **Tender—When Not a Valid Defense.**—In a suit in the Circuit court of the United States against The Bank of the Valley, the court, on the 21st of September 1869, made an order that the receiver receive the notes of the bank in payment of debts due to the bank. After the decision of the cases of *Exchange Bank* v. *Knox*, &c., the court set aside this order. A plea of tender of these notes in payment of debts of the bank, filed in a case pending in a state court, after the rescinding of the order of the United States court, the note having been obtained after the execution and recording of the deed of the bank and notice thereof to the defendant, is not a valid defense to the action.

This was an action of debt in the Circuit court of Frederick county, brought in April 1870, by the Bank of the Valley for H. G. Fant, receiver, against James Marshall, as endorser upon two negotiable notes, amounting to $1,100, and costs of protests, $5.56. On the 17th of June 1870, the defendant pleaded payment, with notice of set-off; and filed with his plea notes of the bank to the amount of the debt. And on the 2d of July 1872, he filed a special plea of tender, referring to the notes filed with his plea of payment. To this plea of tender the plaintiff demurred, but the court overruled the demurrer; and then the plaintiff replied generally. The plaintiff replied specially to the defendant's second plea—that the plaintiff had, in pursuance of
379 the act of February *1866, on the 10th

*For monographic note on Banks and Banking, see end of case.

of March 1866, executed a deed, which was recorded on the 15th, assigning to H. M. Brent, trustee, all the assets of said bank, including the notes sued upon, to be by him held and distributed as directed in said act, of which assignment defendant had notice; and after that time, in a suit in the Circuit court of the United States at Richmond, H. G. Fant was appointed receiver, to hold and administer the assets of the bank, &c.: of which the defendant had notice. And if he has any offsets, as he claimed, he acquired the same after said assignment, and notice of the same. Wherefore, &c. To this replication the defendant demurred; and the court sustained the demurrer.

When the cause was called for trial, the parties waived a jury, and submitted the case to the judgment of the court; and the court held that the defendant had paid the debt in the suit mentioned, by his payment of money into court since the institution of the suit; and gave the plaintiff a judgment for his costs; but as to said debts and interest, in favor of the defendant. And it was ordered that the money in court be paid to the plaintiff. To this ruling of the court the plaintiff excepted.

The case is sufficiently stated in the opinion of Christian, J.

Barton & Boyd, for the appellant.

Conrad & Son, for the appellee.

CHRISTIAN, J., delivered the opinion of the court.

The act of the general assembly passed February 12th, 1866, requiring the banks of the commonwealth to go into liquidation, was the subject of judicial construc-
380 tion *and interpretation by this court in the case of "Exchange Bank v. Knox," and "Farmers' Bank v. Anderson," 19th Gratt. 739; which cases were afterwards reaffirmed in "Saunders v. White," 20 Gratt. 327. By these decisions it was held—

1. That the act forbids and prevents all preferences among the creditors of the bank.

2. That a debtor of the bank cannot set off notes of the bank bought up by the debtor after the execution and recording of the deed and notice thereof to the debtor.

3. The banks being utterly insolvent, the trustees are the trustees of the creditors, not of the banks, and are purchasers and assignees for value of all the property and effects of the banks for the benefit of the creditors.

4. Though the charters of the banks require them to take these notes in payment of debts due to them, this does not authorize debtors of the bank to pay their debts in the notes of the bank, bought up after the execution and recording of the deeds conveying their assets to trustees for the benefit of their creditors, because the debts are no longer due to the bank but to the creditors of the bank.

These principles must govern the case now before us. If there was no other plea but payment and set off, this case would be precisely the same as those reported in 19 and 20 Grattan. There was, however, in this case a plea of tender, or what the learned counsel for the appellee calls a special plea in the nature of a plea of tender: and it is insisted that this plea, and the evidence to sustain it, distinguishes this from the decided cases, and withdraws it from the operation of the principles above stated.

Respect for the opinion of the able
381 and learned *judge who decided the case in the Circuit court, and for the learned counsel who maintain that view in argument here, requires a brief consideration of the points raised. The suit is brought upon notes due the Valley Bank, of which the defendant, James Marshall, is endorser.

At the June term of the Circuit court the defendant pleaded payment and set off, and filed with his plea of set-off notes of the Bank of the Valley to the full amount upon their face value of the plaintiff's claims. These bank notes were not held or owned by the defendant when the notes sued upon came into the hands of the trustee, but were acquired by the defendant after the defendant's notes came into the hands of Fant, as receiver, and after the institution of this suit, and after knowledge of the assignment to Brent, trustee. Upon the filing of this plea of set-off the cause was continued from term to term until July term 1872. At that term the defendant tendered a plea in the following words: "The defendant for further plea states, that pursuant to a decree and order of the Circuit court of the United States, made in the cause of the Merchants Bank of Baltimore v. The Bank of the Valley of Va. et al., in which case the said Fant was appointed receiver, dated day of September 1869, herewith exhibited, he, the said defendant Marshall, did heretofore, to wit, on the day of 1870, offer to pay the whole sum with interest and costs claimed in the plaintiff's declaration in circulating notes (commonly called bank notes) issued theretofore, and put in circulation by the said nominal plaintiff to the said Fant as receiver; which offer was by said Fant refused, saying that he would not receive said circulation; and said defendant brings said money in court with this plea, and has
382 already filed the same *with his plea of set-off. Wherefore he says, that he has fully tendered the whole sum claimed by the plaintiff in a currency which he was bound by said decree to take in payment; and this he is ready to verify," &c., &c.

To this plea the plaintiff demurred; but the court overruled the demurrer: and thereupon the plaintiff replied generally. A jury was waived, and all the matters of law and fact submitted to the court. And the following judgment was entered: "And the parties waiving a trial of the issue by a jury, agreed to put themselves upon the judgment of the court; and being fully heard, it is the opinion of the court, that

the defendant hath paid the debt and interest in the writ mentioned, by the payment of money into court since the institution of this suit. Therefore it is considered by the court that the plaintiff may have execution for its costs about its suit in this behalf expended; and as to said debts and interest the defendant go thereof without day," &c. To this judgment a writ of error and supersedeas was awarded by this court.

The pretension of the appellee (the defendant in the court below) is, that he is discharged by his tender of the circulating notes of the Bank of the Valley, because of the following order entered in the Circuit court of the United States, by Judge Underwood, on the 21st September 1869, before the decision of the court in Exchange Bank &c. v. Knox, 19 Gratt. 739, to wit: "It is ordered and decreed by this court, that the receiver in this cause be and he is hereby authorized to receive the bank bills or circulating notes of the Bank of the Valley in payment of all notes, bills discounted or receivable, or other debts of any
383 *kind whatsoever, due to said Bank of the Valley and now in his hands as receiver."

I do not deem it necessary to enter upon the discussion of the question argued by the counsel here, whether this order was merely permissive, or mandatory and imperative.

Conceding that the order of Judge Underwood was imperative on his receiver, yet when the judgment of the Circuit court of Frederick was entered (July term 1872) this order of Judge Underwood had been rescinded by Judge Bond, who followed the decision of the Supreme court of this state, which had declared that a debt due to the bank could not be paid in the depreciated notes of the bank, acquired after notice of the assignment of the assets of the bank.

This suit having been brought in a state court, must be governed by the laws of this state as expounded by this court.

It is urged, however, that the defendant ought to be protected because he acquired these depreciated notes, and was induced to purchase them in consequence of the order of Judge Underwood authorizing the receiver to take them in payment of debts held by the bank.

But the proof shows that Mr. Marshall in acquiring these notes, had no reference to the order of the said Circuit court of the United States; but that they were acquired by him because he was firmly of opinion that these notes of the bank could be pleaded as a set-off to the notes the bank held of which he was endorser; and the notes filed with his plea of tender are the same notes which he had before filed in his plea of set-off off.

Mr. Barton's deposition proves conclusively that Mr. Marshall did not acquire the notes filed with his plea of set-off and afterwards filed (the same notes)
384 *with his plea of tender, because of the order of Judge Underwood; but because, as Mr. Barton states, that he (Marshall) was confident that this court would hold that the debtors to the bank could pay their indebtedness with the depreciated notes of the bank. There is nothing in the record to show that Mr. Marshall ever saw or heard of the order of Judge Underwood authorizing his receiver to take the notes of the bank. But if he had, this was an erroneous order, so declared by Judge Bond of the Circuit court and revoked by him. He certainly could acquire no rights under an order confessedly erroneous, and revoked by the court which made it.

When the plea of tender was filed (July 2d, 1872,) this court had decided that a debtor of the bank could not pay his debt by notes of circulation acquired after notice of the assignment by the bank of its assets; and the Circuit court of the United States had, on the 23d November, 1871, revoked the order of Judge Underwood, and after referring in its order to the decision of this court in Exchange Bank v. Knox, and Farmers' Bank v. Anderson, 19 Gratt. 739, and adopting these decisions as the law of the land, had prohibited the receiver "from receiving any circulating notes of the Bank of the Valley, except in cases where such circulating notes were acquired by the debtors before any assignment was made by the Bank of the Valley to a trustee for the benefit of its creditors."

The Circuit court of Frederick, however, notwithstanding the decision of the court above referred to, and the order of Judge Bond in accordance therewith, appears to have felt itself constrained, by the original order of Judge Underwood, authorizing its receiver to take the depreciated notes of the bank in payment of debts due the bank.
385 *No doubt this conclusion was adopted by the learned judge upon the theory that the Circuit court of the United States having jurisdiction of the subject, and having settled the mode of payment of debts due to the bank, the parties who acted under this order were fully discharged when they complied with it. But it must be remembered, that when the plea of tender was filed, the order referred to had been declared erroneous, and had been revoked by the same court which had entered it. The notes tendered by the defendant were not a legal tender in any sense; but, on the contrary, were such notes as both the court and the Circuit court of the United States had declared should not be received in payment of debts due the bank, because they (it is conceded) were acquired after notice of the assignment by the bank of its assets for the benefit of its creditors.

The court is therefore of opinion that the judgment of the said Circuit court of Frederick, declaring that "the defendant has paid the debt and interest in the writ mentioned, by his payment of money into court since the institution of this suit," is erroneous, and that the same be reversed and annulled; and that a judgment be entered

for the plaintiff in conformity with the principles herein declared.

STAPLES, J., dissented.

The judgment is as follows:

This day came again the parties by their attorneys, and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment is erroneous. 386 Therefore it is considered *that the same be reversed and annulled, and that the plaintiff in error recover against the defendant in error its costs by it expended in the prosecution of its writ of error and supersedeas aforesaid here. And this court now proceeding to render such judgment as the said Circuit court ought to have rendered, it is further considered that the plaintiff recover against the defendant the sum of eleven hundreddollars ($1,100), the debt, and $5.56, the costs of protest in the declaration mentioned, with legal interest on $900, part thereof, and $2.76 costs of protest, from the 26th day of June 1861, and on $200, the residue, and $2.80 costs of protest, from the 26th day of April 1861, till payment, and the costs expended by the said plaintiff in the prosecution of the suit in the said Circuit court. Which is ordered to be certified to the said Circuit court of Frederick county.

Judgment reversed.

BANKS AND BANKING.

I. Definition and Organization.
- A. Definition.
- B. Organization.

II. Stock and Stockholders.

III. Officers and Agents.
- A. In General.
- B. President.
- C. Directors.
- D. Cashier.

IV. Powers and Functions.
- A. In General.
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- C. Loans and Circulation of Notes.
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V. Insolvency and Liquidation.

VI. Actions by and against Banks.

VII. National Banks.

VIII. Savings Banks.

IX. Special References.
- Banking Cases, Annotated.
- Virginia Law Register.

I. DEFINITION AND ORGANIZATION.

A. Definition.—A bank is an institution for the custody and loan of money, the exchange and transmission of the same by means of bills, drafts, and the issuance of its own promissory notes, payable to bearer, as currency; or for the exercise of one or more of these functions. 8 Am. & Eng. Enc. Law (2d Ed.) 789.

B. Organization.—In Virginia and West Virginia, banks are usually incorporated institutions, but unlike many other corporations, banks are organized under general, as distinguished from special, statutes; being thus general or public, such statutes are not required to be proved, but are noticed by the courts *ex officio*. Stribbling v. The Bank of the Valley, 5 Rand. 132; Hays v. Northwestern Bank of Virginia, 9 Gratt. 127.

So also, in an action by a bank, it is not required to prove its incorporation. Hays v. Northwestern Bank of Virginia, 9 Gratt. 127; Farmers' Bank v. Willis, 7 W. Va. 31.

II. STOCK AND STOCKHOLDERS.

Lien of Bank on Stock.—In Bohmer v. City Bank, 77 Va. 445, the charter of a bank provided, that "the bank shall have a lien prior to all others upon any stock held by a stockholder for any debt of said stockholder to said bank." A stockholder, indebted to the bank, borrowed money from a third person and gave him the certificate as collateral with power of attorney to transfer the stock; after becoming bankrupt the original stockholder applied to the bank to transfer the stock, but the bank refused to do so until paid its debt due from the said stockholder. *Held*, the act incorporating the bank, superseded the general law providing for the transfer of stock, and gave the bank the prior lien for any debt due it from a stockholder, on his stock; hence the bank had the right to be first satisfied before transferring the stock to the lender of the stockholder; nor is this lien waived by the company's leaving the certificates outstanding. See also, Petersburg, etc., Co. v. Lumsden, 75 Va. 327; monographic *note* on "Stock and Stockholders" appended to Osborne v. Osborne, 24 Gratt. 392.

Bank Stock—Taxation—Residence of Stockholders.—Under Acts 1883-'84, p. 568, § 17, the state, without regard to the residence of stockholders, levies for state purposes a tax on the assessed value of their shares of stock as it does upon other moneyed capital. And Code 1887, § 833, requires the supervisors of each county to levy for county purposes annually, and to order the levy on all property assessed with state taxes. Bank of Abingdon v. Washington County, 88 Va. 298, 13 S. E. Rep. 407.

Subscriptions for Stock in Other Corporations—Construction of Statute.—In Goddin v. Crump, 8 Leigh 120, it was held that the statute authorizing the Bank of Virginia to subscribe for stock in a company incorporated to effect a line of transportation from Ohio to the city of Richmond is valid, since the purchase of such stock is germane to the banking business.

Transfer of Stock—Control of Bank.—When application is made for the transfer of stock in a bank in conformity with its by-laws by one *prima facie* entitled to have the same transferred, the bank has no control or discretion as to the transfer, or right to prevent it on their transfer book; hence where stock, standing in the name of the guardian of an infant, but belonging to the latter, was sold by the guardian, and transferred to the purchaser by the bank, in accordance with its by-laws, it is not liable therefor, though the sale was in fraud of the ward's rights, and with the intent by the guardian to appropriate the proceeds to his own use. Bank of Virginia v. Craig, 6 Leigh 399; monographic *note* on "Stock and Stockholders" appended to Osborne v. Osborne, 24 Gratt. 392.

III. OFFICERS AND AGENTS.

A. In General.

Duties and Powers of Officers Generally—Official

Bonds.—The words, "which may be prescribed," in the official bond of a cashier of a bank, conditioned for the faithful performance of "the duties of the said office of cashier, which may be prescribed by the Board of Directors," were held, under the circumstances, to mean the same as if the words had been "the duties which have been, are now, or may hereafter be prescribed by the Board of Directors." The words "which may be prescribed," were intended to enlarge and not to limit the responsibility of the obligors. Durkin v. The Exchange Bank of Virginia, 2 Pat. & Heath 277. See especially, monographic *note* on "Officers and Agents of Private Corporations" appended to Richmond Enquirer Co. v. Robinson *et als.*, 24 Gratt. 548.

Duties of Officers—Construction of Charter and By-Laws.—The charter and the by-laws of the bank required that the Board of Directors should prescribe the duties of its officers, and the charter also required the directors to keep a book, "in which shall be entered and faithfully recorded a journal of all their proceedings." *Held:* (1) These provisions were merely directory, and the prescriptions of certain duties of the cashier by the Board might be inferred and presumed from evidence of acts of the board and of the cashier, and a written entry on the journal of a vote, order, or resolution on the Board, was not necessary to establish such prescription. (2) That the cashier, by the performance of certain duties in his office of cashier, was estopped to deny that they had been prescribed by the Board. Durkin v. The Exchange of Virginia, 2 Pat. & Heath 277.

B. President.

Election.—A majority of the directors of a bank constitute a board to do business; and if in the election of a president a majority vote, the person receiving a majority of the votes cast is duly elected. Booker v. Young, 12 Gratt. 303.

Authority.—The inherent powers of a president of a bank by virtue of his office are very limited, and it is difficult to say what powers he inherently possesses, if any other than the power to take charge of litigations of the bank by employing counsel and otherwise. But a president of a bank may be authorized by its directors to do any act, which they are authorized by their charter to do, unless the act to be done can by the charter be done only by the directors themselves. Such authority need not be proven by showing that it was expressly conferred by the board of directors, but may be proven by showing the existence of such facts, as constitute clearly a public holding out that the particular act done or contract entered into was within the scope of his legitimate delegated authority. The inference, that such authority has been impliedly conferred, may be legitimately drawn by proving that he was in the habit of doing acts or making contracts of the same general character as the particular act or contracts which he has done or made, and that these acts or contracts, which he was in the habit of doing, though applied to different subjects, involved the same general power, except when the acts and contracts, which he was in the habit of doing or making, were so very numerous and so variant in their character as clearly to justify the inference, that he was authorized impliedly to do all acts and make all contracts, which the directors had the power to do or to make, and to confer on the president the right to do or to make. First National Bank of Wellsburg v. Kimberlands, 16 W. Va. 555.

Powers—Indorsement and Transfer of Note Belonging to Bank.—The cashier of a bank has *prima facie* the authority to endorse or transfer by delivery negotiable notes belonging to the bank, but the president of a bank has no inherent authority to endorse or transfer negotiable notes belonging to the bank, nor has any other officer this inherent power except the cashier. But the president may be authorized by the board of directors to transfer or assign negotiable notes belonging to the bank; and such authority need not be proven by showing that it was expressly conferred by the board of directors, but may be proven by showing the existence of such facts as constitute clearly a public holding out, that he was authorized to transfer or assign the notes belonging to the bank. The inference, that such authority had been conferred, may be legitimately drawn from proof, that he was in the habit of doing acts of the same general character though applied to a different subject, and especially where such acts were the exercise of still greater power, as the assignment of other choses in action such as bonds or judgments; but such power could not be legitimately inferred from proofs, that he was in the habit of receiving deposits or payments of notes, or proofs, that he was authorized to receive generally deposits and payments made to the bank. The board of directors of a bank may ratify or approve a transfer of a negotiable note of a bank, which has been made by the president without authority. The acceptance and appropriation of the consideration, which was received, when the president without authority transferred a negotiable note belonging to the bank, is an implied ratification of his act, when such acceptance and appropriation is made by the directors of the bank, after they have been informed of the unauthorized act of the president, and if the acceptance of such consideration and its appropriation have been made by the officers of the bank without the knowledge of the directors, unless the directors return the consideration, when the receipt becomes known to them, the failure and the retention of the consideration by them will be a confirmation of the act of the president. Smith v. Lawson, 18 W. Va. 212.

Release of Maker of Note Payable to Bank.—In Hodge v. First Nat. Bank, 22 Gratt. 51, it was held that the president of a bank has no authority to release the maker of a note payable to the bank.

Power to Receive Payment of Debt Due Bank—Ratification.—In Parker v. Donnally, 4 W. Va. 648, it was held that though the president of a bank has no authority to receive payment of a debt due the bank, yet such payment will not be set aside after it has been acquiesced in by the bank for many years.

Liability to Bank.—M was president of the O. D. bank located in the city of Alexandria, and he was a member of the firm of B & Co. of that city. In May 1861 M went to Richmond, where he remained during the war; and B & Co. removed to the same city. In January 1863, M collected of the treasurer of the state the interest on state bonds held by the bank in Confederate money. After the war the O. D. bank may maintain an action of assumpsit against M for the money so collected by him. McVeigh v. The Bank of the Old Dominion, 26 Gratt. 188.

C. Directors.

Appointment.—If a person appointed a director of a bank by the executive under the act of March the 22nd, 1837, Sessions Acts, p. 57, declines to accept the office or resigns, the executive is not authorized to make another appointment; but his place is to

be supplied by the appointment of the directors of the bank. Prest. & Dir. of the Bank of Va. v. Robinson, 5 Gratt. 174.

Duties and Powers Generally—Preferences.—Directors of a bank are bound to discharge their duties prudently, diligently, and faithfully, and apply the assets, in case of insolvency, for the benefit of creditors in preference to stockholders and other persons. But they are not technically trustees nor bound to apply the assets ratably among the general creditors. They may not only make preferences between creditors, but such preferences may be made in their own favor if they be creditors. But in such cases they must act with the utmost good faith. Planters' Bank of Farmville v. Whittle, 78 Va. 737.

Objection that assignments of assets made by the directors of a bank to pay debts for which they are individually bound, are void, under Code 1873, ch. 57, § 18, which provides that "No member of the board shall vote on a question in which he is interested, otherwise than as a stockholder," must be made in the court below, and cannot be raised for the first time in an appellate court. Planters' Bank of Farmville v. Whittle, 78 Va. 737.

Ratification of Unauthorized Acts of President.—The directors of a bank may ratify any act done or contract made by the president without authority, which they could have authorized him to do or to make. The acceptance of the benefits of a contract made by the president for the bank is an implied ratification of such contract, and if money is received by its cashier for the bank under such contract, even when such receipt was unknown to the directors, it will be a confirmation of the contract, unless the money so received is returned, when its receipt becomes known to the directors. First National Bank of Wellsburg v. Kimberlands, 16 W. Va. 555.

Liability for Non-Feasance.—A creditor of an incorporated monied institution, cannot generally maintain an action at law against the directors thereof for simple non-feasance of duty to the corporation, or fraud in the management or disposition of the money or property of the corporation. But directors of such institutions, may make themselves liable in an action at law for loss and damages, for false representations made or caused to be made by them, and perhaps acts done or caused to be done by them, with intent thereby to deceive and defraud the plaintiff, and which had the designed effect, and caused loss and damage to the plaintiff, but the false representations made or caused to be made, or acts done or caused to be done by the defendants, and relied on by the plaintiff, and the intent thereby to deceive and defraud the plaintiff, must be averred or alleged in positive terms. Zinn v. Mendel, 9 W. Va. 580.

Directors—Fraud—Liability.—A director of an insolvent bank, who is also a depositor and the surety on notice held by the bank and not yet due, cannot by an arrangement with the cashier, at a time when both he and the cashier know the bank is about to fail, if he can do so at any time, obtain from the cashier such notes in payment of the deposits due him from the bank. In a suit by the assignee of the bank for the proceeds of such notes such director and surety will not be entitled to set off the debt of the bank due him for deposits against the plaintiff's demand, except to the extent he may be entitled to dividends from the assignee on account of his debt against the bank. Lamb, Trustee, etc., v. Pannell's Adm'r, 28 W. Va. 663; Lamb v. Cecil, 28 W. Va. 653.

Fraud of Director—Laches.—When a director of an insolvent banking corporation by fraud and collusion with the cashier of such institution receives from the cashier for his deposits, without the authority of the board of directors, discounted bills and notes, the property of said corporation, and suit is not brought therefor until nearly five years after such transaction, the doctrine of *laches* does not apply. Lamb v. Cecil, 25 W. Va. 288.

D. Cashier.

Powers—Sale and Transferring Discounted Bills.—The power to sell and transfer the discounted bills and notes of the bank does not belong to the ordinary powers of the cashier, but inasmuch as he may do so under some circumstances, a transfer made by him in the usual course of the business of the bank to a person, who has no cause to question the propriety or good faith of the transaction, will be *prima facie* valid. Lamb, Trustee, etc., v. Cecil, 28 W. Va. 653.

Where the management of the affairs of a banking corporation is entrusted by its charter to a board of directors, unless specially authorized by the charter, the cashier of such banking corporation has no power to assign the discounted bills and notes to a depositor in payment of his deposits without authority from the board of directors. Lamb v. Cecil, 25 W. Va. 288; Lamb v. Pannell, 25 W. Va. 298.

Transfer of Notes.—The cashier's *prima facie* authority to transfer the negotiable notes of a bank will not make such transfer valid, if it be proven that the transferee knew that the transfer was made by the cashier not in the usual course of business and for an improper purpose. Smith v. Lawson, 18 W. Va. 214.

Release of Maker of Note.—In Hodge v. First Nat. Bank, 22 Gratt. 51, it was held that the cashier of a bank is not empowered, *virtute officii* merely, and without express authority from the board of directors, to release the maker of a note payable to and held by the bank, from his legal liability on such note.

Misappropriation of Funds—Liability to Bank—Equity Jurisdiction.—The cashier of a bank, intrusted with the control and custody of its funds, will, in a court of equity be held as a trustee for said bank and may be sued by it in such court, and compelled to account for and pay any loss sustained by it, which was caused by any negligence or wrongful conversion or by any misapplication or use of any of its funds by such cashier in violation of the duties of his said trust. Merchants' Bank v Jeffries, Adm'x, 21 W. Va. 504.

Accountant—Liability of Sureties.—The sureties of an accountant of a bank, are not liable for monies taken by him from the teller's drawer, without his knowledge or consent, it appearing that the accountant is not entrusted with, or put in possession of, any monies of the bank, as accountant. Allison v. Bank, 6 Rand. 204.

IV. POWERS AND FUNCTIONS.

A. In General.

Acquisition of Property—Real Estate.—Under an act of Assembly, authorizing a bank to hold as much real property as may be requisite for its immediate accommodation, in relation to the convenient transaction of its business, and no more, the bank may purchase more ground than is nec-

essary for the erection of a banking-house, build fire-proof houses on the vacant land, for the greater security of the banking-house, and sell them out to third persons. Even if the bank violated its charter in so doing, the only proceeding against it, would be by *quo warranto*; and the purchasers of the houses, cannot resist a specific performance of their contracts, by alleging that the bank had exceeded its powers, in erecting and selling the houses. The Banks v. Poitiaux, 3 Rand. 136.

Agreement for Sale of Lands—Corporate Seal.—In The Banks v. Poitiaux, 3 Rand. 136, it was held that the seal of a banking corporation is not necessary to give validity to an agreement for the sale of real property.

Rights of Mother Bank.—In Smith v. Lawson, 18 W. Va. 212, it was held that the mother bank has a right to receive payment of a negotiable note discounted by the branch.

B. Deposits.

Nature of a Deposit.—In Robinson v. Gardiner, 18 Gratt. 509, it was held that a deposit of money in a bank is a loan and not a bailment.

Liability of Bank for Interest on Deposits.—In Parkersburg Nat. Bank v. Als, 5 W. Va. 50, it was held that a bank is not chargeable with interest on sums deposited to the credit of customers to be drawn against by check, until payment be demanded, unless upon special contract. Upon money not so deposited, however, interest may be charged.

Raised Check—Liability of Bank—Duty of Depositor in Drawing Check.—A bank is responsible to a depositor for the payment of a check which has been altered in a material particular after signature, unless the negligence of laches of the drawer has laid the foundation for the error of the bank. The depositor, however, is only chargeable with the duty of ordinary care and diligence. Merely giving a stranger a check in exchange for money is not such negligence on the part of the drawer as will excuse the bank on which it is drawn for paying the check after it has been raised to a larger amount by the drawee without authority. The National Bank of Va. v. Nolting, 94 Va. 263, 26 S. E. Rep. 826.

Depositor's Right of Set-Off.—In Spilman v. Payne, 84 Va. 435, 4 S. E. Rep. 749, a judgment creditor of a bank had deposited money with its branch subject to check, and the money was lost by the bank's failure. *Held*, the deposit did not discharge the judgment, and is no set-off against the assignee thereof.

Insolvent Banks—Rights of Depositor.—When a depositor is entitled to dividends from the assignee of the bank, which have not been declared or paid by reason of the controversy in the suit, he will be entitled to be paid out of the fund recovered from his dividends on his deposit equal to those paid to the other depositors with interest on the same from the time the same would have been paid if there had been no controversy or suit. Lamb, Trustee, etc., v. Cecil, 28 W. Va. 653.

Bank's Right of Set-Off.—W. G. having contracted a debt to a bank, by note payable sixty days after date discounted by the bank for his accommodation, dies before the note comes to maturity, having on deposit in the bank, at the time of his death, a sum of money exceeding the amount of the note. *Held*, that in case W. G.'s estate prove insolvent, the bank has a right, in equity, to retain the amount of his note out of the money it held for him on deposit, whether there be debts of W. G. of superior dignity to the debt he owed the bank, or not; equity, in such case, regarding the bank as the debtor to W. G. only for the excess of his money on deposit above the contents of his note. Ford's Adm'r v. Thornton, 3 Leigh 695.

Right to Set-Off Deposits Made after Maturity of Debt.—A joint note, signed by several parties, for $6,000 was presented to a bank for discount by the principal in the note; they discounted it for $4,000 only, and the cashier endorsed it "discounted for $4,000 only, and should be so read." This was done without the knowledge of the sureties in the note. *Held*, that they were nevertheless bound, the transaction being equivalent to a discounting of the note for $6,000 and a repayment by the principal of $2,000 thereon; and that it not being paid at maturity, general deposits made by the principal in the note, after its maturity, could not, without his direction so to apply them, be regarded as payments on this note. Merchants & Mechanics' Bank of Wheeling v. Evans & Dorsey, 9 W. Va. 373.

Banker's Lien.—If a collecting bank has no notice that the bank sending the remittance was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the collecting bank is not entitled, as against the real owner, to a lien for general balance of account, unless credit was given to the bank sending the paper, or balance suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of dealings between the two banks. If, in mutual dealings between banks, the collecting bank regarded and treated the bank transmitting negotiable paper as the owner of such paper transmitted for collection, and had no notice to the contrary, and upon the credit of such transmittance, made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the bank making the remittance, to be met by the proceeds of such negotiable paper, then the collecting bank is entitled to a lien against the real owner of such paper, for the balance of account due from the bank transmitting such paper. Carroll v. Exchange Bank, 30 W. Va. 518, 4 S. E. Rep. 440, 8 Am. St. Rep. 101.

Accounts between Banks—Lien for Balance.—Where there have been for several years mutual and extensive dealings between two banks, and an account-current kept between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged all costs, and accounts were regularly transmitted from one to the other, and settled upon these principles, and upon the face of the paper transmitted it always appeared to be the property of the respective banks, and to be remitted by each of them upon its own account, there is a lien for a general balance upon the paper thus transmitted, no matter who may be its real owner. But if the receiving and collecting bank, at the time of mutual dealings with the bank sending paper, has notice that such bank has no interest in the paper transmitted, and that it transmits such paper merely as agent, then the collecting bank is not entitled to retain against the bank transmitting the paper for the general balance of the account with such bank. Carroll v. Exchange Bank, 30 W. Va. 518, 4 S. E. Rep. 440, 8 Am. St. Rep. 101.

Deposits as Collateral—Application.—It is a well-settled rule that collaterals deposited with a bank for one debt, or class of debts, cannot be appropri-

ated to another debt, or class of debts. So where a firm having deposited with a bank as collateral for its note to the bank, another note of the firm endorsed by third party, stipulated as follows: "If we should come under any other liability, or enter into any other engagement, with said bank, while it holds this obligation," etc. *Held*, construing the word *or* as *and*, the stipulation refers to any other liability or engagement of the same kind with the first mentioned note; and not to a draft drawn on, and accepted by, said firm, and discounted for the drawer and placed to his credit. Loyd v. Lynchburg National Bank, 86 Va. 690, 11 S. E. Rep. 104.

Deposits of Public Moneys.—The banks of this commonwealth in which the public moneys were on deposit, paid the interest falling due in January 1840 upon public loans, in specie or its equivalent. Under the proviso to the second section of the act of March 28, 1838, (Sess. Acts of 1838, p. 27, ch. 13,) they claimed credit in account with the commonwealth for the premium which they had to pay to the public creditors for the then difference between specie and the notes of the banks. *Held:* 1. That under the acts in 2 R. C. of 1819, ch. 174, § 6, p. 2, and in Sess. Acts of 1838, p. 27, ch. 14, the claim of any bank for such premium may properly be presented to the first auditor. 2. That, upon the disallowance of such claim, the bank may file a petition for redress to the court of chancery for Henrico and Richmond, created by the act of March 13, 1841, in Sess. Acts of 1840-41, p. 65, ch. 48. 3. That according to the true construction and effect of the act of December 11, 1839, in Sess. Acts of 1839-40, p. 52, ch. 63, (especially of the first proviso thereto) the claim of any bank for the premium so paid must be disallowed. Commonwealth v. Farmers' Bank, 2 Rob. 737.

C. Loans and Circulation of Notes.

Loans—Usury.—In Stribbling v. The Bank of the Valley, 5 Rand. 132, it was held that the law of usury applies to banks, subject to the modifications produced by their charters.

Circulating Notes—Actions to Enforce Payment—Demand.—In November 1864, during the war, H. and S. issued an attachment in a chancery suit against the Bank of Virginia, as a non-resident for a debt of $36,500, being notes of that bank owned by them, some of which were payable at branches of that bank in Virginia and had not been presented at such branch banks for payment. *Held:* (1) The attachment was properly issued against the Bank of Virginia as a non-resident. (2) The court properly decreed the payment of the whole of this $36,500, out of the attached effects of the bank. Hall v. The Bank of Virginia, 14 W. Va. 584.

Circulating Notes—Payment—Mutilated Notes.—The *bona fide* owner of a bank note, having transmitted one-half thereof by mail, which has been stolen therefrom, or is lost, cannot demand payment from the bank of any part of its amount, in consequence of holding the retained half, merely; but he is entitled to demand the whole amount of the said note, on satisfying the bank of the verity of the above facts, or establishing them by the judgment of a court of equity, and giving, in either case, a satisfactory indemnity, to secure the bank against future loss from the appearance, and setting up, of the other half of such note. Bank of Virginia v. Ward, 6 Munf. 166.

Payment of Mutilated Notes.—Where a bank note is cut in two, and one half sent by mail and lost, the holder of the remaining half has a right to demand payment at the bank, upon presentation of the half in his possession, proving ownership, and giving bond with adequate security for the indemnification of the bank. But if these pre-requisites are not complied with, and the bank is sued in consequence of refusing payment, the holder shall not recover interest or costs, although he may perform the conditions after the suit is brought. Farmers' Bank of Virginia v. Reynolds, 4 Rand. 186.

D. Collections.

Collections—Authority to Receive Payment.—If a note deposited for collection in a bank where it is made payable, is not paid at maturity, but being protested, is permitted by the owner to remain in the bank, however long or from whatever motive, he may permit it thus to remain there, it may, as a general rule, be safely paid to the bank by the debtor; provided he has no notice that the bank in fact has no authority to receive the money. Alley v. Rogers, 19 Gratt. 366.

Collections—Paper Payable at a Particular Bank.—In debt against the makers of a promissory note (made in Virginia) negotiable and payable at the United States branch bank at Washington City, the first count of the declaration, after describing the note, averred that the same was duly presented at the bank, and payment there required. At the trial, there being no proof of a demand of payment at the bank, the circuit court instructed the jury that the plaintiff could not recover on this count. The second count of the same declaration merely set forth the note, without any averment of presentment at the place; and the defendants having demurred thereto, the circuit court sustained the demurrer. *Held*, the circuit court erred in sustaining the demurrer, and also in its instruction to the jury. Armistead v. Armisteads, 10 Leigh 512.

Collections—Right to Proceeds.—The plaintiff, a banking corporation, sent a number of checks to its correspondent, a banking firm at A., for collection; the checks being drawn upon the latter firm. Afterwards, but before the checks were received, the latter firm was dissolved by the death of one of its members. The surviving partner paid the checks by charging them to the accounts of the drawers, and gave credit for the amount thereof to the plaintiff on the books of the firm. *Held*, that he had no such authority, but that he should have either sent back the checks or remitted the proceeds. And where the moneys represented by the checks were afterwards transferred by the surviving partner to an assignee for the benefit of creditors, but remained easily traceable on the books of the firm, no checks having been drawn against the credit to the plaintiff, the latter could reclaim such moneys from the assignee. First Nat. Bank of Alexandria v. Payne & Co.'s Assignees, 85 Va. 890, 9 S. E. Rep. 158.

V. INSOLVENCY AND LIQUIDATION.

Insolvent Banks—General Assignment—Collection of Claims by Trustee.—An insolvent banking corporation has the right to assign all its property for the benefit of its creditors generally. Whatever claims a bank could collect by suit or action before an assignment may be so collected afterwards by the trustee in the deed of assignment. Lamb v. Cecil, 25 W. Va. 288.

Assignment for Benefit of Creditors.—In Farmers' Bank v. Willis, 7 W. Va. 31, it was held that the bank had the right to assign its assets for the benefit of creditors, independently of the act of the general assembly passed in 1866 on that subject.

Suit by Trustee of Insolvent Bank—Bank Notes as Set-Off.—The provision in the Code of Virginia, that, "though a bank had a branch * * * all its notes should be received in payment of debts to the bank, whether contracted at the parent bank, or a branch," applied only while the debts remained due to the bank. When a negotiable promissory note discounted by the Farmers' Bank of Virginia had been assigned by the bank to trustees, for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the bank, he could not, with these, pay his debt so assigned, or set them off against it. Farmers' Bank v. Willis, 7 W. Va. 31.

Suit by Trustee in Insolvency—Estoppel.—If before suit brought by the trustee in the deed of assignment from an insolvent banking corporation to recover the amount of discounted bills and notes fraudulently received from the cashier without authority by a director of such insolvent banking institution the said trustee had paid such director dividends on the indebtedness of such institution to him, this fact does not work an estoppel to maintain such suit. Lamb v. Cecil, 25 W. Va. 288.

Suits by Trustee in Insolvency.—A bank having, in pursuance of the act of February 12th, 1867, conveyed all its property to trustees for the purpose of closing up its affairs, a suit may be brought in the name of the bank for the benefit of the trustees upon a note discounted by the bank prior to the execution of this deed. Code of 1873, ch. 56, § 31, p. 843; Crews v. Farmers' Bank of Va., 31 Gratt. 349.

Dissolution—Creditor's Bill—Receiver.—The bank of P. was ruined by the late war; and no officers of the bank have been elected nor has there been a meeting of the board since April 1865, and it has done no business since, and in fact it had been abandoned and ceased to exist. In April 1866, H. and M. suing as well for themselves as for all the other stockholders, creditors and depositors, etc., filed their bill against the bank and the president, for a settlement of its affairs and a distribution of its assets. The court appointed a receiver in the case, and in June 1866, there was a decree for an account. *Held:* (1) It is a proper case for a creditor's suit. (2) A debtor of the bank purchasing debts due from the bank after the decree for an account, is only entitled to stand in the shoes of his assignor, and receive his proportion of the assets realized. (3) In an action by the receiver against a debtor of the bank, the record in the chancery cause is evidence for the plaintiff. Finney v. Bennett, 27 Gratt. 365.

Receiver—Injunction.—Until the appointment of a receiver and the award of the injunction, the management of the affairs of a bank remains in the hands of the directors, and assignments by them in payment of the company's debt may be lawfully made. Planters' Bank of Farmville v. Whittle, 78 Va. 737.

Liquidation—Receiver—Authority—Plea of Tender—Not a Valid Defense.—In a suit in the circuit court of the United States against The Bank of the Valley, the court, on the 21st of September 1869, made an order that the receiver receive the notes of the bank in payment of debts due to the bank. After the decision of the cases of Exchange Bank v. Knox, etc., the court set aside this order. A plea of tender of these notes in payment of debts of the bank, filed in a case pending in a state court, after the rescinding of the order of the United States court, the notes having been obtained after the execution and recording of the deed of the bank and notice thereof to the defendant, is not a valid defence to the action. Bank of the Valley v. Marshall, 25 Gratt. 378.

Liquidation—Construction of Statute.—Under the act of February 12th, 1866, requiring the banks of the commonwealth to go into liquidation, the banks, being insolvent, execute deeds conveying all their property, including debts due to them, to trustees for the payment of their debts. *Held:* (1) That the act forbids and prevents all preferences among the creditors of the bank. (2) That a debtor of the bank cannot set off notes of the bank bought up by the debtor after the execution and recording of the deed and notice thereof to the debtor. (3) The banks being utterly insolvent, the trustees are the trustees of the creditors, not of the banks, and are purchasers and assignees for value of all the property and effects of the banks, for the benefit of the creditors. (4) Though the charters of the banks require them to take their notes in payment of debts due to them, this does not authorize debtors of the banks to pay their debts with the notes of the banks, bought up after the execution and recording of the deeds. (5) After the judgment in the court below the appellees are declared bankrupts and obtain their discharge. The appellate court will, upon their petition, make it a part of their judgment of reversal, that execution shall not be issued upon the judgment without a previous order to that effect by the court below, made upon notice to them. Exchange Bank of Va. v. Knox, 19 Gratt. 739; Saunders v. White, 20 Gratt. 327.

Liquidation—Construction of Statute.—Upon the true construction of the act of February 12th, 1866, Sess. Acts 1865-66, p. 204, entitled "An act requiring the banks of this commonwealth to go into liquidation," all the creditors of a bank, not having a specific lien upon property of the bank, are placed upon the same footing, and are entitled to share the assets ratably. The general assembly having reserved the right to alter or repeal the charter of the bank, the act is not obnoxious to the charge of interfering with vested rights or impairing the obligation of contracts. Robinson v. Gardiner, 18 Gratt. 509.

VI. ACTIONS BY AND AGAINST BANKS.

Suit against Bank—Corporate Name—Summons.—Where an action is brought under the act passed March 19, 1832, entitled "an act authorizing suits against the branches of banks in this commonwealth in certain cases," the summons is not to be issued nor the declaration filed against the branch bank, but both must be against the mother bank by its corporate name. Tompkins v. The Branch Bank, 11 Leigh 372.

Process against Bank.—In The Bank of Va. v. Craig, 6 Leigh 399, where a restraining order was issued against "The President and Directors of the Bank of Virginia," it was held not binding on the bank whose corporate name by which it sues and is sued under its charter was "The President, Directors, and Company of the Bank of Virginia."

Actions against Bank for Failure to Collect Note—Declaration.—And in an action against a bank for negligence in failing to protest a note placed with it for collection, it is sufficient if the declaration avers it was so placed before its maturity, though the date of the placing is not specified. The fact that cashier handed plaintiff, in lieu of an old note which should have been protested, a renewed note, saying former was lost, and plaintiff retained latter some time, is not conclusive of plaintiff's ratification of the bank's

action, but evidence from which the jury might or might not infer such ratification. Roanoke National Bank v. Hambrick, 82 Va. 135.

Actions by Depositors—Right of Bank to Interplead.—"O. D." deposited in bank fourteen bags of silver coin of the value of $7,496.75, which was claimed by "H. R." administrator, etc., as the property of his decedent. Upon the refusal of the bank to deliver the coin to "O. D." she brought an action of detinue, to recover the same. The bank appeared to the action, filed the affidavit prescribed by sec. 1 of ch. 107 of the Code of 1868, and on its motion said administrator was required to interplead with the plaintiff. *Held*, that under said sec. 1 of ch. 107, the interpleader was properly directed. Dickeschied v. Exchange Bank, 28 W. Va. 340.

Bill against Cashier for Settlement of Accounts—Sufficiency of Allegations.—Where a bill filed by a bank against its cashier for a settlement of his accounts as such only alleges that the defendant was such cashier; "that during his term as cashier he lent sundry sums of money to sundry irresponsible persons without the consent of the board of directors of said bank, for which he is liable personally; and that the books and papers and cash-items show a large deficiency in the assets of said bank during the said cashier's term" of office; and said bill contains no averments that said bank sustained any loss by such unauthorized loans; or that the moneys so lent have not been repaid; or that said deficiency in its assets was caused by any act or negligence of such cashier, it is clearly insufficient; and a demurrer thereto ought to be sustained, because it presents no cause of action against said defendant. Merchants' Bank v. Jeffries, Adm'x, 21 W. Va. 504.

Branch Banks—Actions against—Corporate Name.—Upon the construction of the statute of March 19, 1832, "authorizing suits against *branches* of banks in this commonwealth," *held*, a suit cannot be maintained against the president and directors of the branch; the suit must still be brought against the principal bank by its corporate name. And where a suit is brought against the president and directors of a branch bank, this is not a mere *misnomer*, which must be pleaded in abatement, but is a bar to any recovery; and though a verdict be founded upon the general issue pleaded, the error is not cured by the statute of *jeofails*. In such case, however, the defendants cannot have judgment for costs; for they can no more have judgment against the plaintiff, than he can have judgment against them. Mason v. Farmers' Bank of Petersburg, 12 Leigh 84.

Unchartered Banks—Actions by.—In Wilson v. Spencer, 1 Rand. 76, it was held that no action brought by an unchartered bank, on a bond given for bank notes emitted by such bank, can be sustained.

Unauthorized Banking—Proceedings against.—In Commonwealth v. Scott & Thompson, 4 Rand. 148, it was held that the Act of 1816, 2 Rev. Code III, providing that it shall not be lawful for an unorganized company to engage in banking, and that members of such company shall be guilty of a misdemeanor, is penal, and that therefore the court of appeals has no jurisdiction in the case of an information against the members. See also, construing this Act, Commonwealth v. Horner, 10 Leigh 700; Wilson v. Spencer, 1 Rand. 76.

Unincorporated Banks—Liabilities—Equity Jurisdiction.—A private unchartered company, associated for the purpose of carrying on business as a bank, though such associations are contrary to law, will be entertained in a court of chancery, in a suit against its cashier, for an account of his agency. Berkshire v. Evans, 4 Leigh 223.

Unchartered and Illegal Banks—Defense.—To an action of debt on a note alleged to have been made and discounted by the plaintiffs in Virginia, but made payable at a bank out of the state, a plea that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note, contrary to law and public policy, sets up a good defense to the action. So in such a case, a plea that the consideration of the note declared on was the bank paper of the plaintiffs unlawfully issued by them as currency, they being an unchartered banking company, presents a good defense to the action. Hamtramck v. Selden, Withers & Co., 12 Gratt. 28.

Foreign Banks—Jurisdiction.—In Bank of Marietta v. Pindall *et als.*, 2 Rand. 465, it was held, that though a foreign corporation may maintain an action against its debtor in the courts of Virginia, yet that a bank of another state cannot make a primary contract in Virginia by discounting notes there.

Foreign Banks—Construction of Statute.—In Bank of Old Dominion v. McVeigh, 20 Gratt. 457, it was held that, the Act of March 3, 1861, authorizing payment of debts due to mother banks within the Federal lines to be made to branch banks within the Confederate lines, is not obligatory upon the mother banks, but is unconstitutional as to debts contracted before its passage, although payment has been made in Confederate money to a branch bank.

VII. NATIONAL BANKS.

National Banks—Loans on Stock Security.—Section 5201, U. S. Revised Statutes, prohibits national banking associations from making loans upon security of shares of their own stock. Hence a by-law, though notice thereof be endorsed on the certificate of stock, is void, which prohibits a stockholder who is indebted to bank from transferring his stock without the consent of the board of directors. Feckheimer v. The National Exchange Bank of Norfolk, 79 Va. 80.

National Banks—Stock—Transfer—Enforcement.—L. & S. own shares of stock in N. E. bank of N., and failing, indebted to the bank, assign the shares to F., trustee. The certificates contain notice of such a by-law. Transfer could only be made upon the books of the bank, which refuses to allow said shares to be transferred to trustee. Latter files bill, asking that the bank be required to allow such transfer to be made on its books, and to issue new certificates therefor. *Held*, the remedy at law is not adequate, and it is not a case for compensation in damages, but for specific performance, which can only be enforced in a court of chancery. Feckheimer v. The National Exchange Bank of Norfolk, 79 Va. 80.

National Bank Stock.—A deed which conveys all the grantors' "property, real and personal," embraces and conveys all their shares of stock in a national bank. Feckheimer v. The National Exchange Bank of Norfolk, 79 Va. 80.

National Banks—Powers—Acceptance of Check without Funds.—The act of congress passed the 3d day of March, 1869, making it unlawful for a national bank to certify checks, unless the drawer has, at the time, an amount of funds on deposit in said bank equal to the amount specified in the check, does not invalidate an oral acceptance of a check, or an oral promise

to pay a check, there being at the time sufficient funds of the drawer in possession to meet it. But the said act of congress does not invalidate a conditional acceptance of a check by a national bank having no funds of the drawer in its hands at the time, but that it will pay the same whenever a draft, left with it for collection by the drawer, and sufficient in amount for the purpose, shall have been paid. National Bank v. National Bank, 7 W. Va. 544.

National Banks — Organization — Construction of Statutes.—The act of congress of the 3d of June, 1864, Revised Statutes of the United States, §§ 5136-5137, under which the National Bank of Fredericksburg was organized, does not imply a negation of the corporate power on the part of the national banks which might be organized under it to make a loan of money on real estate; does not annul any loan made by any such bank; or release or discharge any deed of trust or mortgage on real estate taken by the bank to secure the payment of such loan. If the act of congress plainly prohibited a bank organized under it to take a deed of trust or mortgage to secure a loan in any case, or make it penal to do so, such a provision could only have been intended for the benefit of the government, which might or might not, at its pleasure, enforce the forfeiture; and it could not be avoided by the borrower or his creditors. Wroten's Ass'nee v. Armat, 31 Gratt. 228.

VIII. SAVINGS BANKS.

Savings Banks — Deposits — Repayment. — When money has been deposited with such institution, and there has been no contract that a different rule shall prevail, such institution, when the deposit is made, ordinarily, becomes the owner of the money deposited, and consequently a debtor for the amount, and under obligation to pay, on demand, not the identical money received, but a sum equal in legal value. But it seems this rule does not apply where the thing deposited is not money but a commodity. Zinn v. Mendel, 9 W. Va. 580.

Savings Banks—Directors—Liability.—The president of a savings bank misappropriated its funds and overdrew his accounts, and a brother of the president, and corporations of which the officers and directors were also officers, largely overdrew their accounts, and were loaned large sums by the bank with little or no security, though such borrowers were irresponsible, and another borrower was permitted to withdraw his security. The directors, though required to meet weekly, met but once, twice, or three times a year, and never caused the books to be examined, nor called for statements of accounts with other banks. The capital of the bank was small, and much of it was not paid up, and the paid-up portion was treated as a loan. The bank, on suspension, was able to pay but 10 per cent. on the deposits. *Held*, that though the directors were ignorant of the affairs of the bank, and were not guilty of bad faith, they were guilty of such negligence as rendered them liable to the depositors. Marshall v. Farmers & Mechanics' Sav. Bank, 85 Va. 676, 8 S. E. Rep. 586.

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387 *Hoover v. Mitchell & als.

September Term, 1874, Staunton.

1. **Judgment of Court—Dismissal of Suit Agreed by Parties.***—The judgment of a court of competent jurisdiction, dismissing a suit agreed, upon the ground that it had been agreed by the parties, is at least *prima facie*, a final determination as to those parties of the matters litigated in that suit.

This was an action on the case in the Circuit court of Augusta county, brought by Joseph T. Mitchell against George F. Hoover and Robert G. Bickle, to recover the amount which Mitchell had paid as endorser of a note made by John D. Fairbairn, and on which the defendants were also endorsers. The plaintiff charged that the defendants were to endorse the note before him, and had fraudulently placed their names after his on the paper.

The defendants appeared and pleaded "not guilty," and the Statute of Limitations, and also tendered a special plea of a former judgment of the court for the same cause of action between the same parties; and they set out the judgment as follows: "This day came again the parties by their attorneys, and this suit having been agreed, on motion it is ordered that this suit be dismissed agreed." And they vouched the record.

The plaintiff objected to the plea, and the court excluded it: Whereupon the defendants excepted. There were other exceptions taken by the defendants, but they need not be stated.

The parties dispensed with a jury, and submitted the case to the court: and
388 the court rendered a judgment *against Hoover for $319.12, with interest from April 12th, 1859, till paid, and in favor of the defendant Bickle. And thereupon Hoover applied to this court for a supersedeas; which was allowed.

Fultz, for the appellant.

G. M. Cochran, for the appellees.

ANDERSON, J. delivered the opinion of the court.

The court is of opinion that the judgment of a court of competent jurisdiction, dismissing a suit agreed, upon the ground that it had been agreed by the parties, is a final determination, as to those parties, of the matters litigated in that suit. It is virtually an acknowledgment by the plaintiff in open court, as in retraxit, that the plaintiff has no cause of action, or rather, no further cause of action. It is not merely an abandonment of his suit by the plaintiff, as in a non-suit; it is the concurrent action of both parties. It is a representation by the plaintiff to the court, that the suit has been agreed, which is assented to by the defendant; and thereupon the suit is dismissed agreed by the judgment of the court, without costs to either party. To say that a suit is agreed by the parties is, in effect, to say that the cause of the suit has been agreed. It is a declaration of record sanctioned by the judgment of the court, that the cause of action has been adjusted by

*Dismissal of Suit Agreed.—The principal case was cited with approval in Siron v. Ruleman, 32 Gratt. 215; Wohlford v. Compton, 79 Va. 333, and also in Mason v. Bridge Company, 20 W. Va. 223.

the parties themselves, in their own way, and that the suit is dismissed agreed.

An agreement to compound civil rights, or forego or settle an action that has been commenced, is valid, and may be enforced. Addison on Contracts, p. 96, § 2. A compromise itself, or the loss by the defendant of the costs he has expended in his 389 defense, is a *sufficient consideration of an agreement to dismiss. The plaintiff may be satisfied that he has not, or may be doubtful whether he has good cause of action against the defendant, and offers to dismiss his suit and pay his costs, if defendant will pay his, and end the controversy, and the suit is dismissed agreed. It should be an end of the controversy, and may be pleaded in bar of a subsequent suit for the same cause of action. The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. On the ground that mutual promises are a consideration each for the other, compromises are sustained. So, giving up a suit or any equivalent proceedings instituted to try a question, of which the legal result is doubtful, is a good consideration for a promise to pay a sum of money for the abandonment thereof. 1 Pars. on Contracts, ch. 1, § 4, p. 363-'4. It is obvious from the authorities cited that no injustice can be done the plaintiff below by this decision, because, if by the terms of that agreement, anything was to be paid by the defendant to the plaintiff, action would lie upon it.

The defendant has incurred costs in the preparation of his defense; and to end the dispute, and be relieved from further litigation, he consents to lose the costs he has incurred in the preparation of his defense. He would hardly do so if he was liable to be sued again the next day for the same cause, and be subjected to the annoyance and expense a second time for his defense in the same matter of controversy. It seems, therefore, to the court that such a dismission of the suit should be regarded as ending the controversy. So is it held in Kentucky. Bank of Commonwealth v. Hopkins, 2 Dana R. 395. And, as far as our experience and observation goes, 390 it accords with the practice *in Virginia. This is the only instance that we have known in the Virginia courts of a second suit between the same parties for the same cause of action, where the first suit had been dismissed "agreed." Whence we think it may be fairly inferred, that the opinion and practice of the profession has been in accordance with the opinion we have indicated. There is but one instance within our knowledge of a departure from this practice, and that was a suit in the Circuit court of the United States, and is the case of Hoffman v. Porter, 2 Brok. R. 156, cited by the appellee's counsel. In that case Chief Justice Marshall was of opinion that the dismission of a suit agreed was not a retraxit, and could not be pleaded in bar of a subsequent suit between the same parties, for the same cause of action. He believed that in the common practice it was not considered more than a dismission of his suit by the plaintiff. In 2 Tuck. Com., p. 251, it is said: "A retraxit differs from a non-suit in that the one (the latter) is negative, and the other (the former) is positive. The non-suit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again, upon payment of costs; but a retraxit is an open and voluntary renunciation of his suit in court, and by this he forever loses his action." Citing 4 Munf. 207.

The dismission in this case was not in consequence of "the mere default and neglect of the plaintiff," but it was by the agreement of the parties. It is not, therefore, a non-suit. Neither is it a discontinuance. The same commentator says: "A discontinuance is somewhat similar to a non-suit; for when the plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day, and time to time, as he ought to do, the suit is discontinued, 391 *and the defendant is no longer bound to attend; but the plaintiff must begin again by suing out a new original, usually paying costs to his antagonist." This being neither a non-suit nor a discontinuance, what is it? It is "an open voluntary renunciation of his suit in court." It having been done upon the consideration that the suit had been agreed between him and the defendant does not make it less a retraxit, but furnishes rather an additional reason for the consequence of a retraxit, to wit: that the plaintiff by it forever loses his action.

This is a question of practice, and whilst this court has the profoundest respect for the opinions of the chief justice, the case referred to is not binding authority; and we are constrained to differ from his impression as to what has been the common practice at least in Virginia; and we do not deem it well to change the practice as we have understood it to be. The prevention of litigation is not only a sufficient but a highly favored consideration.

The court is therefore of opinion, for the reasons given, that the Circuit court erred in overruling the plea of the defendant, in which he relies on this defense, and that the judgment must be reversed for this cause.

The judgment is as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the dismission of a suit agreed, without any explanation or qualification showing a contrary intention, is at least a prima facie determination of the matters controverted in that suit, and may be pleaded in bar of a subsequent suit for the same cause of action between the same parties; 392 *and that the court below erred in rejecting the defendant's plea setting out such defense, which though it does not describe with accurate precision the character of the suit, which by the judgment of the court had been dismissed agreed, ought

not to have been rejected on that account, it substantially setting out the matter of the defence. Therefore it is considered that the judgment of the Circuit court of Augusta county be reversed and annulled, and that the defendant in error pay to the plaintiff in error his costs in the prosecution of his writ of error here, and the cause is remanded with instructions, that if the defendant again offers his plea, corrected in the particular herein referred to, that it be received. Which is ordered to be certified to the said Circuit court of Augusta county.

Judgment reversed.

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393 *McChesney & al. v. Brown's Heirs.

September Term, 1874, Staunton.

1. **Wife's Separate Estate—Jus Disponendi.***—A married woman is regarded by a court of equity as the owner of her separate estate; and, as a general rule, the *jus disponendi* is an incident to such estate; that is, it is an incident thereto, unless and except so far as it is denied or restrained by the instrument creating the estate.
2. **Same—Subject to Restrictions in Instrument.**—But it is subject to such limitations and restrictions as may be contained in such instrument; which may give it *sub modo* only, or withhold it altogether.
3. **Separate Personal Estate—Rents and Profits of Separate Real Estate—Powers of Alienation.**—In regard to separate personal estate, and the rents and profits of separate real estate, this power of disposition, if it be unrestrained, may be exercised in the same way, by deed, will or otherwise, as if the owner were a feme sole.
4. **Separate Real Estate—Power as to Corpus.**—In regard to the *corpus* of separate real estate, it can be disposed of only in such mode, if any, as may be prescribed by the instrument creating the estate, or, unless prohibited by such instrument, in the mode prescribed by law for the alienation of real estate of married women.
5. **Same—Rents and Profits—Effect of Conversion into Real Estate.**—While the rents and profits of a wife's separate estate remain subject to her power of disposition as personal estate so long as they continue in that form, yet when they are, by the wife, or by her direction, converted into realty, such realty can be disposed of only as other separate real estate of a married woman; that is, in the mode, if any, prescribed by the instrument by which it is conveyed to her or to trustees for her separate use; or, unless prohibited, or except so far as it may be restrained by the instrument, in the mode prescribed by law for the alienation of the real estate of married women. She may have the realty acquired by means of such rents and profits, conveyed for her separate use, subject to any restrictions she may choose to prescribe in regard to the mode of alienation, or, if she prefers it, without any restrictions at all.

394 *By deed bearing date the 21st day of July 1856, and duly recorded in the clerk's office of the County court of Augusta county, Samuel B. Brown, in consideration that his wife, Mary Ann Brown, united with him in conveying a valuable real estate of her own and her dower in his real estate, conveyed to Thomas J. Michie and William H. Harman, a tract of two hundred acres of land in said county, upon trust that the said trustees should permit the said Mary Ann Brown and her assigns to occupy, use and enjoy the said land, for her sole and separate use, free from the control of her said husband or his creditors; or if at any times he should prefer, the said trustees should lease out the same, and pay the rents as collected to her, for her sole and separate use; and on the further trust that said Mary Ann Brown may, by writing under her hand and seal, attested by two witnesses, or acknowledged before a justice of the peace, direct said trustees to sell said tract of land or any part thereof; but said trustees shall invest and hold the proceeds of said tract of land for the sole use and benefit of said Mary Ann Brown; in further trust, that the said trustees shall convey said tract of land or dispose of the proceeds thereof, if it, or any part of it, should be sold during her lifetime, as the said Mary Ann Brown shall direct by will duly executed as if she were a feme sole, or by other writing, attested by at least three witnesses: or if she shall fail to make any such will, or to execute any such writing, then to all such children of said Mary Ann Brown, born of her marriage with the said Samuel B. Brown, as may be then living, and to the descendants of such as may be dead, per stirpes, whether such children be now in esse or hereafter to be born of such marriage; or in case no such issue shall be then in being, to
395 the right *heirs of the said Mary Ann Brown. This deed was executed by Mrs. Brown and the trustees.

Some time before November 1863, an agreement in writing was entered into between John B. Baldwin and M. G. Harman, trustees of the widow and children of John B. Breckenridge, deceased, of the one part, and Thos. J. Michie and William H. Harman, as trustees of Mrs. Brown, by which the trustees of Mrs. Brown agreed to exchange the tract of land conveyed to them for the American Hotel property in Staunton, held in trust by Baldwin and M. G. Harman; upon the terms that the land was to be taken at $12,000, and the American Hotel property at $25,000; and for the difference in value Mrs. Brown executed her bonds, in twenty equal instalments, with interest upon them. This agreement was

*Wife's Separate Estate—Alienation.—See Justis v. English *et als.*, 30 Gratt. 565, and *note*; Ropp v. Minor *et als.*, 33 Gratt. 97, and *note*. The principal case is approved in Burging v. McDowell *et als.*, 30 Gratt. 236; Frank & Adler v. Lilienfeld *et als.*, 33 Gratt. 377; Hawley v. Twyman, Trustee, *et als.*, 29 Gratt. 728; Hughes & Co. v. Hamilton *et als.*, 19 W. Va. 388; Radford v. Carwile *et al.*, 13 W. Va. 669; Patton v. Merchants' Bank, 12 W. Va. 608. In the case of Taylor v. Cussen, 90 Va. 40, 17 S. E. Rep. 721, the court held that a deed of trust executed by a married woman and her trustee on her equitable separate estate in land, her husband not joining in the deed, is void even where no restriction is placed upon, nor mode prescribed for, the alienation of the property.

approved by a decree of the Circuit court, in a case of Breckenridge's creditors against Breckenridge's adm'rs & als., depending in that court; and Baldwin and M. G. Harman and the heirs of Breckenridge were directed to convey the said hotel property to Michie and Wm. H. Harman, trustees of Mary Ann Brown. But they were not to deliver the conveyance until the trustees of Mrs. Brown should execute and deliver to them a deed for the tract of land held in trust by them. It does not appear that these deeds were ever executed; but Mrs. Brown was put into possession of the hotel property, and kept the hotel for several years, and out of the profits paid off several of her bonds, amounting to about $6,500.

In April 1863, Samuel B. Brown and his son-in-law, A. S. Lara, purchased of George W. Persons, a large tract of land in the state of Georgia, containing near two thousand acres, and sixty negroes, for $100,000; the land estimated at $40,000 and the
396 negroes at *$60,000; for which they paid in cash $10,000, and gave their notes, one for $40,000, payable on the 15th of October 1863, and one for $50,000, payable on the 15th of October 1865. On the 22d of June 1863, they paid $20,000 on the first bond. On the 19th of October 1863, they paid $2,411 on the second bond, and on the 3d of March 1865, they paid this bond off in full; and on the same day they received a receipt for $60,000, in full for the sixty negroes, and a conveyance of the land.

In September 1863, A. S. Lara, acting for himself and S. B. Brown, Jr., entered into an agreement, under seal, with William S. McChesney, by which they sold to McChesney the American Hotel property for $30,000; and in April 1864, S. B. Brown, Jr., confirmed the sale. A few days after the sale A. S. Lara and John Brown, as his surety, executed to McChesney a bond in the penalty of $60,000, with condition that Lara and S. J. Brown, Jr., would make him a good title to the said hotel property; and McChesney paid to Lara the purchase money.

The only title which Lara and S. B. Brown, Jr., claimed to this property, was by a gift by parol, with Mrs. Brown's consent, of one-half of it, by Samuel B. Brown to his son, S. B. Brown, Jr., and a like gift of the other half to Lara, except a small amount of personal property which Lara claimed he had let Samuel B. Brown have in part payment for it.

It appears that, in 1863, Samuel B. Brown removed to the State of Georgia; and about the time and after their removal several papers were executed by Mrs. Brown in relation to this hotel property. The first is under seal, and attested by two witnesses, and bears date the 12th of October, 1863. It is addressed to the trustees, Michie and Harman, and requests them to
397 *ratify the sale made by A. S. Lara and John B. Brown, Jr., of the American Hotel property, and to confirm the investment of the proceeds thereof, together with such amount as she has saved from the use of the same, in the purchase of one-half of a plantation and sixty negroes in the county of Crawford, Georgia. The purchase aforesaid having been made by S. B. Brown in her behalf, with A. S. Lara, of George W. Persons.

There is another paper not under seal, without witnesses or date, though it was probably executed about February 1st, 1864, addressed by Mrs. Brown to her trustees, in which she says she is desirous and wishes them to make and convey all right, title and interest to Dr. McChesney in the American Hotel property, as the amount has been invested in land, negroes, &c., in Georgia to her satisfaction and for her benefit.

It appears that these papers were not satisfactory to the trustees, of which they informed Samuel B. Brown; and a third paper was executed by Mrs. Brown, dated November 16th, 1864, directing her trustees to convey to Lara and J. B. Brown, Jr., her life interest in the American Hotel property.

In fact, no settlement of the Georgia property was ever made upon Mrs. Brown; and in December, 1867, she wrote to H. M. Bell, living in Staunton, and says she understands that he has in his possession several papers signed by her, purporting to be her last will, and two or three others purporting to be ratifications by her of the sale of the American Hotel property. As the terms on which all these papers were executed have not been complied with, and no property has been substituted for this property for her benefit, she desires to withdraw these papers. He will, therefore,
398 *deliver them to Mr. A. S. Lara, to return them to her. And Mr. Bell returned them to her.

In 1868 Mrs. Brown died intestate, in the lifetime of her husband, leaving five children. And, in April 1869, John H. Richardson and Sarah A. his wife, who was a daughter of Mrs. Brown, and two other of her children, instituted their suit in equity against Thomas J. Michie, the surviving trustee, Wm. S. McChesney and John Q. A. Nadenbousch, who had been admitted by McChesney into a half share of the American Hotel property, Lara and his wife, S. B. Brown, Jr., Baldwin and M. G. Harman, trustees of the widow and heirs of John B. Breckenridge, deceased, and a number of other persons in whom was the legal title to the property; and in their bill they set out the deed of the 21st of July, 1856, the exchange for the American Hotel property; the payment by Mrs. Brown of a part of her bonds out of the profits of the hotel; and the occupation of the property for some years by McChesney and Nadenbousch, under a contract with Lara and S. B. Brown, Jr. They charge that Mrs. Brown died in 1868, without having done any act whereby her legal and equitable claim to the American hotel property was divested from her and her children, according to the terms of the said deed of trust. They pray that the proper parties may be directed to convey a good title to the said property; that it may be divided among the five chil-

dren of Mrs. Brown; that McChesney and Nadenbousch may account for rents and profits; and for general relief.

McChesney and Nadenbousch answered the bill, and then filed a cross-bill. They say that there was present at the time of the contract entered into between Lara and McChesney, a paper executed by Mrs. Brown recognizing in valid form the right of 399 said Lara and *S. B. Brown, Jr., to sell the American Hotel property; and that the contract was made under the supervision of Mrs. Brown's trustees; and that the proceeds of the sale of the property were taken to the state of Georgia and invested for the benefit of Mrs. Brown; and that the complainants have received their full share of the benefits derived from said investments. And they insist that the Georgia property should be subjected to satisfy them if the sale to them is set aside.

There were other answers to the bill and the cross-bill; but it is unnecessary to state them, further than that Lara denies that the purchase money of the hotel property was invested in the Georgia property. He says he paid S. B. Brown, Jr., his half of it. The facts are as hereinbefore stated.

The cause came on to be heard on the 23d of June 1873, when the court decreed that the three children of Mrs. Brown, plaintiffs, should hold in fee simple and as tenants in common, each one undivided fifth part of the American Hotel property; that Mrs. Lara should hold one undivided fifth part of said property; subject, however, to the life estate therein of her husband A. S. Lara; and McChesney and Nadenbousch should hold Lara's said life estate, and one-fifth of the property in right of S. B. Brown, Jr., in fee simple; and that Lara and said Brown should convey their respective interests to them. And accounts were directed; the account of profits not to go further back than the death of Mrs. Brown. From this decree McChesney and Nadenbousch obtained an appeal to this court.

J. Randolph Tucker and Hanger, for the appellants.

Sheffey & Bumgardner and Echols, Bell & Catlett, for the appellees.

00 *MONCURE, P., delivered the opinion of the court.

The court is of opinion that the following may be laid down as sound and well settled principles of law, and are applicable to this case, viz:

1st. A married woman is regarded by a court of equity, as the owner of her separate estate; and, as a general rule, the jus disponendi is an incident to such estate; that is, it is an incident thereto, unless, and except so far as it is denied or restrained by the instrument creating the estate.

2d. But it is subject to such limitations and restrictions as may be contained in such instrument; which may give it sub modo only, or withhold it altogether.

3d. In regard to separate personal estate, and the rents and profits of separate real estate, this power of disposition, if it be unrestrained, may be exercised in the same way, by deed, will or otherwise, as if the owner were a feme sole. But in regard to the corpus of separate real estate, it can be disposed of only in such mode, if any, as may be prescribed by the instrument creating the estate; or, unless prohibited by such instrument, in the mode prescribed by law for the alienation of real estate by married women.

4th. While the rents and profits of a wife's separate real estate remain subject to her power of disposition as personal estate so long as they continue in that form, yet, when they are, by the wife, or by her direction, converted into realty, such realty can be disposed of only as other separate real estate of a married woman; that is, in the mode, if any, prescribed by the instrument by which it is conveyed to her or to trustees for her separate use; or, unless prohibited, or except so far as it may be restrained by the instrument, in the 401 mode prescribed by law for the *alienation of real estate of married women. She may have the realty, acquired by means of such rents and profits, conveyed for her separate use, subject to any restrictions she may choose to prescribe in regard to the mode of alienation, or, if she prefer it, without restriction at all.

Other principles of law on the subject, no less sound or well settled, might here be laid down, but it is unnecessary for the principles of this case. Nor is it necessary in this case to express any opinion upon the much vexed and yet unsettled question, whether, where the instrument creating the separate estate, prescribes a mode of disposing of the estate, that mode is in exclusion of any other; upon the principle of expressio unius est exclusio alterius. Certainly, the instrument may, either expressly or by plain implication, exclude any other.

The court is further of opinion that in regard to the two hundred acres of land in the county of Augusta, conveyed by the deed of the 21st day of July, 1856, in the proceedings mentioned between Samuel B. Brown of the first part, and Mary Ann Brown, his wife, of the second part, and Thomas J. Michie and Wm. H. Harman of the third part, the said land could be disposed of either by an act to take effect during her lifetime, or by an act to take effect after her death. The only mode by which it could be disposed of, in order that such disposition might take effect during her life was under that trust of the deed which declares that the "said Mary Ann Brown may by writing, under her hand and seal, attested by two witnesses, or acknowledged before a justice of the peace, direct said trustees (Michie and Harman) to sell said tract of land, or any part thereof; but said trustees shall invest and hold the proceeds of said tract of land for the 402 sole use *and benefit of said Mary Ann Brown as aforesaid." The only modes by which it could be disposed of, in

order that such disposition might take effect after her death, was under that trust of the deed which declares that, on the death of the said Mary Ann Brown, the said trustees shall convey said tract of land, or dispose of the proceeds thereof, if it, or any part of it, should be sold during her lifetime, as the said Mary Ann Brown shall direct, by will duly executed as if she were a feme sole, or by other writing attested by at least three witnesses."

The deed expressly provides, that "if she fail to make any such will, or to execute any such writing, then the said trustees shall convey the said tract of land," &c., "to all such children of said Mary Ann Brown born of her marriage with the said Samuel B. Brown, as may be then living, and to the descendants of such as may be dead, per stirpes, whether such children be now in esse or hereafter to be born of such marriage; or, in case no such issue shall be then in being, to the right heirs of the said Mary Ann Brown." She died without having made any such will, or executed any such writing; and under the limitation of the said deed, the corpus of the trust subject devolved on her children then living born of her marriage with the said Samuel B. Brown, of which there were several, there being no descendants then living of any such children as were then dead. The only mode by which she could possibly have defeated the said limitation in favor of the said children, was to dispose of the corpus of the trust subject by will, duly executed, as if she were a feme sole, or by other writing attested by at least three witnesses, as prescribed by the said deed. She had no right to spend the proceeds of sale, or any part thereof, of the corpus of the trust
403 subject, or any *part thereof, if sold in her lifetime; but it was the duty of the trustees to invest and hold the proceeds of any such sale for the uses and purposes declared in said deed.

The court is further of opinion that the exchange in the proceedings mentioned, of the said two hundred acres of land for the American Hotel property was a valid sale of the said two hundred acres of land, and a valid investment of the proceeds of said sale in the said American Hotel property under the trusts and powers created by the said deed, whereby the said American Hotel property, to the extent of the said investment, to wit: the sum of $12,000, the agreed value in said exchange of the said two hundred acres of land, became subject to all the trusts and powers created by the said deed, just as if the said hotel property had been the subject conveyed by the said deed instead of the said two hundred acres of land.

The court is further of opinion that the said American Hotel property, to the extent to which the purchase money thereof was paid by the said Mary Ann Brown out of its profits after the said exchange was made, became also the separate estate of the said Mary Ann Brown. So that the whole of the said hotel property thus became the separate estate of the said Mary Ann Brown, subject, however, to the payment of the balance of the purchase money yet remaining due and unpaid to those who sold the property to her or her trustees.

The court is further of opinion that after the said exchange was made, there was no other sale or investment under the trust and powers created by the said deed; but the said American Hotel property, subject to the lien thereon as aforesaid, having become the separate estate of the said Mary
404 Ann Brown as aforesaid, *and not having been disposed of by her in her lifetime or at her death, belonged, at the latter event, which happened in the year 1868, to her children, who were entitled thereto, either under the limitation contained in the said deed, or as her next of kin, and in the same proportions, whether entitled in one or the other of these two ways.

To the extent that the said property represents or was purchased with the original trust subject, it was, of course, subject to the limitations and restrictions declared by the said deed. To the extent that the purchase money was paid out of the profits of the property after the said exchange was made, it seems also to be subject to the said limitations and restrictions. The profits of the separate estate, whether it be the original subject or that for which it was exchanged, were as they accrued, separate personal estate of Mrs. Brown, and might have been disposed of by her according to her pleasure, as if she had been a feme sole. She had power to spend them, or she had power to invest them in real or other estate, and on such trusts and limitations as she thought proper. She chose to invest them in real estate, to wit: in the American Hotel property. They then ceased to be personal estate, subject to her general right of disposition as of separate personal estate, and became real estate, subject only to such right of disposition as she had, either under the powers created by the original deed, or under the law in regard to the real estate of a feme covert. The case of West v. West's ex'ors, 3 Rand. 373, shows that while the profits of her real estate before they were invested were personal estate, subject to her general jus disponendi, yet so soon as they were invested by her in real estate, they became thenceforward
405 separate real estate, subject *only to such a jus disponendi as belongs to such an estate. Were they invested in the said estate generally, without any limitations or restrictions, or were they invested under any, and if any, what limitations or restrictions? She had the right to consult her pleasure in this respect, and it seems that she intended to invest the said profits in the said real estate, subject to the limitations and restrictions declared by the original deed. There was an exchange of the original trust property for the American Hotel property, and no doubt it was intended that the latter should be held on the same trusts on which the former had been held. No other trusts were declared. There was

no reason for holding a part of the property under those trusts and the residue under other trusts, and if such a different holding had been intended, it is reasonable to believe that the intention would have been declared. It seems that mutual deeds were executed for the property exchanged, but they are not in the record. There is in the record, however, a copy of the decree made in the case of Breckenridge's creditors v. Breckenridge's adm'rs, &c., by which commissioners were appointed to convey to Thomas J. Michie and William H. Harman, trustees of Mary Ann Brown, the "American Hotel property"; thus showing that it was intended that the whole property should be conveyed to the said trustees, subject to the trusts of the deed by which they were created trustees.

But however that may be, the effect is precisely the same, whether that part of the property in which the profits were invested be subject to the limitations and restrictions of the original deed, or be separate real estate free from such limitations and restrictions; and it must, as we have seen, be one or the other. Pre-
406 cisely *the same persons would be entitled to it as the heirs-at-law of Mary Ann Brown, who would be entitled to it under the limitations of the deed. It was converted from personalty into realty; and the surviving husband has no interest in the subject as tenant by the curtesy, as is clearly shown by Judge Carr in the case of West v. West's ex'ors, supra. That case is one of very great importance, has a strong bearing upon this, and, indeed, seems to be conclusive of it. It was decided by four judges, who delivered seriatim opinions, and there was no disagreement among them. It is therefore unnecessary to determine the question, whether the American Hotel property, so far as it represents, or was purchased out of the rents and profits thereof, received or realized by the said Mary Ann Brown as aforesaid, was subject to the limitations and restrictions declared by the said deed, or was her separate real estate, free from said limitations and restrictions.

The court is further of opinion that the appellants purchased the said American Hotel property not of the said Mary Ann Brown, nor of her said trustees, Michie and Harman, or either of them, but of the appellees, A. S. Lara and Samuel B. Brown, Jr., who claimed to have derived it from Samuel B. Brown, Sr.; and the whole amount of the purchase money contracted to be paid by them, to wit: $30,000 in Confederate currency, was paid by the said purchasers to the said Lara, for himself and the said Samuel B. Brown, Jr., on his giving a bond of indemnity with surety; and no part of the said purchase money was paid to the said Mary Ann Brown, or ever enured to her benefit. The acts and conduct of the said Mary Ann Brown, and of her trustees, the said Michie and Harman, after the said purchase was made, and the
407 *purchase money was paid as aforesaid, which are relied on by the appellants as having the effect of confirming their title, and making it good under the trusts and powers of the said deed, can have no such effect. There was no sale and conveyance of the property to them by Mrs. Brown or her said trustees in the mode prescribed by the said deed, or in the mode prescribed by law for the conveyance of the real estate of a feme covert; and there was no contract between her and her said trustees, or any or either of them, and the appellants for the sale and conveyance of the said hotel property, which can be enforced by a court of equity. The deed of trust conveying the two hundred acres of land to Michie and Harman was duly recorded, and was known to the appellants when they became the purchasers of the American Hotel property, and it was known to them that the said property was subject to the trusts of the said deed. They, no doubt, confided in the ability of their vendors to make them a good title, and in the security afforded them by the indemnifying bond; and they chose to run the risk for the sake of the advantages which they hoped to derive from the purchase. Mrs. Brown, being a feme covert, had no power to convey the property nor to contract in regard to it, except in strict pursuance for the powers conferred by the said deed, or at least of the powers conferred by law in regard to the conveyance of real estate of a feme covert; and therefore all her acts, and all instruments signed by her in reference to a transfer of the said property, or any interest therein to the appellants, were utterly null and void. Nor had the trustees any power to sell the property, or to sanction the sale of it to the appellants, except in pursuance of the deed of trust; nor does it appear that they had any intention of doing so; and certainly
408 *the husband, Samuel B. Brown, Sr., had no such power. The deed was intended to secure the property against his power and control, and even against the power and control of his wife, except under the restrictions and limitations declared by the deed. Her acts might be influenced, as they no doubt were, by him; and it was therefore intended to afford her protection even against her own acts, except as aforesaid. If she had no power to convey the property otherwise than as aforesaid to the appellants or their vendors, she had no power to make a contract for such a conveyance, which a court of equity could enforce, much less could any voluntary promise she may have made, without any valuable consideration, to confirm the title of the appellants, be so enforced. But it does not appear that she ever made such a promise, at least until after they had made the purchase of Lara and Samuel B. Brown, Jr., paid the purchase money, and taken a bond of indemnity to secure the title. The children of a marriage, when provided for by a settlement, whether it be ante or post-nuptial, are always regarded as being embraced within the consideration of the settlement; and the rights thereby secured to them cannot be released by the wife by any instrument

however formal. So far from any imperfect act of hers, founded on no valuable consideration flowing to her or to them, being regarded as a defective execution of a power which a court of chancery will help, it would rather be regarded as an abuse or perversion of power on which that court will frown.

The court is further of opinion that it does not sufficiently appear that the said purchase money, or any part thereof, was invested in the purchase made by the said Samuel B. Brown, Sr., and Lara, of land and slaves in Georgia, or was applied 409 to the payment of *the purchase money thereof; and, at all events, that the appellants are entitled to no further relief than has been afforded them by the decree of the Circuit court, in giving them the benefit of the rents of the said American Hotel property after their purchase thereof, and until the death of the said Mary Ann Brown; and also the benefit of the shares and interest of the said Samuel B. Brown, Jr., and A. S. Lara in the said property.

The court is therefore of opinion that there is no error in the decree of the Circuit court, and that it ought to be affirmed.

Decree affirmed.

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410 *Crickard's Ex'or v. Crickard's Legatees.

September Term, 1874, Staunton.

1. **Executor—Administration of Estate—Investment of Funds.**—C died in August 1857, and leaving no children, he by his will gave legacies to several of his relations, and among them he gave to his brother J $3,500 for the use of himself and his family during his life, and after his death for the use and benefit of his children; and his executors were directed so to invest this sum as might in their judgment best conduce to the support and comfort of said J and family, and at his death to distribute the same among his children. B qualified as executor of the will; and in a suit brought by him against the widow and legatees for the administration of the estate, a commissioner reported as due from B, as executor, on the 1st of September 1859, the sum of $9,543.48; and this report was confirmed by the court. B seems to have paid off the legatees who were of age; but it does not appear how he invested the balance of the fund, though he says that the amounts he could not pay over were invested by him according to his best judgment and discretion. In June 1863, upon the petition of B, without notice to the legatees, the court made an order in the cause authorizing B to invest the fund remaining in his hands, $7,078.86, in Confederate bonds.—HELD:

1. **Same—Authority to Invest.**—To authorize investments under the act of March 5th 1863, three conditions must concur: 1st. The money must be in the hands of the fiduciary. 2d. It must have been received in the due exercise of his trust. 3d. For some cause he must be unable to pay it over to the party entitled. If they do not all exist the order of the court is null and the fiduciary is responsible for the money.

2. **Same—Investments in Confederate Money.***—In this case none of these conditions concur. The money received by B in 1859 was gold or its equivalent. The Confederate money he proposed to invest was not received in the due exercise of his trust. And as to those parties who from other causes were not in a condition to receive it, it was his duty to have made investments for them before the war in securities which were safe and valuable. The order of the court 411 authorizing *the investment was illegal and void, and B is responsible for the amount in good money.

3. **Legatees—Petition to Review and Set Aside Order of Court.**—The legatees having filed their petition to the court to set aside the order, and compel the executor to pay their legacies, and a rule having been made upon B the executor to show cause against it, the petition must be treated as a petition to review and set aside the order; and the court may re-hear it and set it aside.

4. **Executor—Waste of Estate.**—If B retained the money in his own hands, paying interest to the parties entitled, he became the debtor of the legatees; and having received gold cannot discharge his debts in a depreciated currency. And if he changed the investment he had made, and and suffered safe and solvent securities to become converted into Confederate money, he committed a devastavit.

5. **Same—Appointment by Will—Court May Appoint Another for Good Cause.**—Though the will appoints the executor trustee for the legatees, a court of equity may for good cause appoint another street for the management of the fund.

This was an appeal by Henderson M. Bell, executor of Peter Crickard, deceased, from a decree of the Circuit court of Augusta county, made on the 22d of November 1872, in a cause in which he was plaintiff and the widow and legatees were defendants. The case is fully stated in the opinion of the court, delivered by Judge Christian.

Sheffey & Bumgardner and Echols, for the appellant.

Fultz, for the appellees.

CHRISTIAN, J. delivered the opinion of the court.

This is an appeal from a decree of the Circuit court of Augusta county. The record discloses the following facts: Peter Crickard, late of said county, departed this life on the 15th day of August, 1857. He left a will, which was duly admitted to probate in the County court of said county, and which disposed of a large estate, real and personal. He appointed as an 412 *executor and executrix Henderson M. Bell and his wife Rose Ann Crick-

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*Investments by Fiduciaries in Confederate Securities.—See Ammon v. Wolfe, 26 Gratt. 621, and cases cited in *note*; Kirby v. Goodykoontz, 26 Gratt. 298, and *note*; Carter v. Dulaney, 30 Gratt. 192, and *note*; Cole v. Cole, 28 Gratt. 365, and *note*. The principal case is cited in the following decisions: Purdie v. Jones, 32 Gratt. 840; Taylor v. Lancaster, 33 Gratt. 21; Dick v. Robinson, 19 W. Va. 160; Knight v. Watts, 26 W. Va. 175.

ard. His wife having renounced the provisions of said will, and also her right to act as executrix, Bell became the sole executor, and proceeded to administer the estate of his testator, and to execute the trusts imposed by said will. The testator directed a sale of the whole of his real and personal estate, except a small portion of his real estate, which was specifically devised. Leaving no issue, he gave numerous legacies to his collateral kindred, and directed that his executors should invest the sum of $6,000 in bank or state stocks, or well secured bonds, for the benefit of his wife. His wife having renounced the provisions of the will made for her, and claiming her dower in the real estate of the testator, negotiations were entered into between her and the executor, by which it was agreed that she would receive her interest in the purchase money, instead of having dower assigned to her in the real estate. The widow, although renouncing the provisions of the will made for her, expressed the desire that her husband's disposition of his estate might be carried out as nearly as possible, notwithstanding her renunciation of the will.

On the 20th July, 1857, the executor, Henderson M. Bell, filed his bill in the Circuit court of Augusta, setting forth, that before the renunciation of the will by the widow they had sold a part of the real estate; but that before the expiration of twelve months after the probate of the will Mrs. Crickard had appeared in open court and renounced the provisions of the will made for her by her husband, and resigned her executorship of said will. He filed with his bill her agreement in writing, by which she stipulated that the said executor should proceed, in execution of the will, to make sale of the real estate directed by said will to 413 be *sold, free from all incumbrance of her dower, upon condition, that the executor's proceedings under said will should be reported to a court of competent jurisdiction, and that she should receive a fair equivalent for her right of dower in the whole real estate, and her distributive share in the personal estate and slaves of said Peter Crickard, deceased. His bill prays, that the court will ascertain and assign to Mrs. Crickard, either in kind or by proper commutation, her dower right in the real estate of her husband, and her distribution in the slaves and other personal property left by him. He also asks that his accounts as executor may be referred to one of the commissioners of the court, who may be directed to state and settle the same; and that said commissioner be also directed to distribute among the several legatees under the will such portions of his estate as may appear to be in the hands of the executor, and also such portions as might be thereafter realized, upon such principles and terms as to the court might seem equitable and proper to direct.

Under certain proceedings in this suit, the commuted cash value of the dower right of Mrs. Crickard was assigned to her, and an account of the transactions of the executor was settled before a commissioner of the court.

This account showed a balance in the hands of the executor of $9,543.48, on the 1st day of September 1859. No further proceedings connected with the matter now in controversy were taken in the cause until the 9th day of June 1863, when the executor filed the following petition: "To Hon. L. P. Thompson, judge. Your petitioner, Henderson M. Bell, executor of Peter Crickard, deceased, respectfully represents to the court, that he holds in his hands, 414 *under the will of said Peter Crickard, certain funds for the benefit of his legatees, as follows;" and then follows a list of the names of the numerous legatees, with the amounts due to each severally, the whole amounting to the sum of $7,078.86; "which he asked the authority of the court to invest in the bonds of the Confederate States, under the act of the general assembly of Virginia in that case made and provided, passed June 9th, 1863." Signed H. W. Bell, executor of Peter Crickard, deceased. Upon the coming in of this petition, on the same day it was presented, to wit: on the 9th day of June 1863, the following order was entered by the said Circuit court: "On the motion of Henderson M. Bell, the executor of Peter Crickard, deceased, who filed his petition praying leave to invest $7,078.86, belonging to the estate of the decedent, or to the legatees mentioned in said petition, leave is granted to him to make the investment according to the prayer of his petition."

In accordance with this order the executor invested in the bonds of the Confederate States, bearing seven per cent. interest, the amount referred to in the petition and order. Whether the parties interested in this petition of the executor had notice of his application, or whether they were present, either in person or by counsel, the record fails to disclose. The presumption is that they had no notice, and were not present or represented by counsel, or the fact would have appeared.

Thus matters stood until after the close of the war, when, on the 10th of January, 1869, an order was entered by the said Circuit court, directing the executor to settle before one of the commissioners of said court an account of his administration of the estate of his testator, Peter Crick- 415 ard. Before any account *was taken under this order, a petition was filed by James Crickard and his children (for whose benefit the testator had directed a certain sum to be invested by his executor), together with other legatees of said Peter Crickard, in which said petition, after setting forth the provisions of the testator's will, the fact that upon a regular settlement of the accounts of the executor made and returned in this cause, and to which no exception was filed, there appeared to be in the hands of the executor for distribution among the legatees on the 1st day of September, 1859, which was to carry interest

from that day, the sum of $9,543.48. And after referring to the order entered upon the motion of the executor in 1863, directing him to make investment in Confederate States bonds, insist that said order was illegal and void, and of no binding force or effect whatever on the petitioners; that the fund received by the executor came into his hands in a sound currency; that having failed either to pay it over, or to invest it, as both the law and the will of the testator required, but retaining it in his own hands, he cannot now discharge his obligation by the worthless securities in which he invested —a currency depreciated at the time of the investment to less than one-tenth of the value of the funds which came into his hands. They further insist that the act of March 1863, under which the order of June 1863 was entered, has no application to such a case; and they pray that the executor may be compelled to account to them for good money, in discharge of the balances ascertained to be due them by the report of the commissioner referred to, with legal interest upon the respective balances from 1st September, 1859; and that the sums ascertained to be due the petitioner, James Crickard and his children, may, under
416 the order of the court, *be loaned out and invested in good real estate securities, in accordance with the trusts and limitations of the will of Peter Crickard, deceased.

They further ask, that if the court deem it necessary or proper for the making up of a more formal issue, that a cross-bill should be filed, then they pray that their petition may be considered, received and read as a cross-bill, and that the said executor may be required to answer its allegations in due form, &c.

On the 6th July 1871, the cause came on to be heard on the papers formerly read and the petition above referred to; and thereupon a rule was awarded against the executor to appear on the first day of the next term to show cause, if any he can, why he should not pay over to the legatees of said Peter Crickard, the balances ascertained to be respectively due to each by Commissioner Hendren's report, No. 2, filed August 13th 1859, and confirmed by a decree entered on the 30th Nov'r 1859. The executor filed his answer to this rule on the first day of the following term. In this answer he avers that he had fully paid off to all the parties entitled to receive from him the amounts ascertained to be due by the report of Commissioner Hendren, referred to in the order of the court, shortly after the confirmation of said report; that the parties to whom he did not so pay were not competent at the time to receive the amounts reported in their favor; that the amounts which he could not pay over were invested by him according to his best judgment and discretion in the management of his trust, and the interest paid over to the parties entitled, or to their use when they could not themselves receive the same; that the war coming on, these investments became, beyond the control of respondent, converted into Confederate money, and on the 9th day of June
417 *1863, respondent being unable to pay over or loan out the money then in his hands, filed his petition in this cause, asking the then judge of the court for leave, under the provisions of the act of assembly passed March 5th, 1863, to invest the funds in the bonds of the Confederate States of America, that being the only investment available. That the leave was granted by the decree entered on the 9th June 1863. Respondent in pursuance of this leave invested the fund then in his hands in the said bonds, which he now has in his possession. Respondent continued to collect and pay over to the parties the interest upon this investment as long as it was available." That "since the close of the war the fund thus invested having been entirely lost, respondent was desirous of making some compromise with these parties. He felt that the loss of the fund was by no fault of his own, but was the result of causes beyond his control; and, although he had lost heavily of his own property, in common with his neighbors, yet he had not lost all. He, therefore, in a spirit of liberality, as he believed, proposed to these parties to divide the loss with them; or in other words, to pay one-half of the amount coming to each of them. That this proposition was accepted by much the larger number of the parties interested (respondent believed by all who were competent to accept), and that respondent has paid over to said parties the full amount coming to them under this arrangement, as he is prepared to show before a commissioner of the court." He expressed his willingness to make the same arrangement with the other parties. After protesting that he is not legally or equitably bound to pay over any portion of the fund which he had invested under the order of the court, he says he is prepared to render such
418 account as the court may *direct.

Upon this answer to the rule awarded at the previous term, the court entered a decree directing one of its commissioners "to take an account of the payments made by H. M. Bell, the executor, to the legatees of Peter Crickard, deceased, and how the funds remaining in his hands were and are invested."

In execution of this order, the commissioner, to whom the matter was referred, returned to the court several alternate statements, showing, according to the principles adopted by the commissioner in making each several statement, different balances due by the executor to the legatees. The one adopted by the court, as ascertaining the correct balances due from the executor to the legatees, and designated in the decree as "the first alternate statement," rejected the investment made by the executive in Confederate States bonds, and holding him bound for the amount found due the legatees by commissioner Hendren's report on the 1st September 1859, to wit: the sum of $9,543.48, gives him credit by the sums paid to the legatees in Confederate money

at its face value (it being for interest and small sums accepted by the parties), and also recognized as a full settlement the compromises which had been made by the parties who were sui juris, reported the balances due to the legatees respectively, which still remained unsettled. The executor excepted to this report, upon the ground that the commissioner failed to credit the executor with the amount invested by him in Confederate bonds. This exception was overruled, and the court entered a decree directing the executor to pay over to the legatees the sums found due to them respectively by said report, except as to James Crickard and his children. For them the testator had made the following provision in his will: "6th. I give and bequeath
419 to my *brother, James Crickard, the house and lot in which he now lives, in the town of Staunton, and the sum of $3,500 in money, which bequest is intended for the use and support of said James Crickard and his family during the natural life of said James, and after his death for the use and benefit of his children; and my executors are directed so to invest the said $3,500 as may in their judgment best conduce to the support and comfort of said James and his family, and at his death to distribute the same among his children."

As to this legacy, the court entered in its decree the following directions: "And James Crickard and his children, who are entitled to the fund created by the sixth clause of the will of Peter Crickard, deceased, having nominated Robert G. Bickle as a suitable person to act as trustee and to take charge of said fund, and the court approving of said nomination, it is therefore further adjudged and decreed that the said H. M. Bell pay to said Robert G. Bickle $3,700.79, with legal interest on $2,561.10, part thereof, from 1st day of June 1872, till paid. But said Robert G. Bickle shall not receive said fund of said Bell until he shall have executed before the clerk of this court bond with good security in the penalty of $9,000, payable to the commonwealth of Virginia, and conditioned for the faithful discharge of his duties in the preservation and management of said fund, according to the trusts imposed by the will of said Peter Crickard, deceased, and subject to all future orders and decrees of this court."

It was from this decree that an appeal was allowed to this court.

The court is of opinion that there is no error in the decree of the Circuit court.

The law makes it the duty of an
420 executor, after he *has paid the debts of his decedent's estate, to pay over the legacies bequeathed by the will to those entitled to receive them within a reasonable time.

If the legatees are so situated, or from any other cause, there is no hand to receive the legacies from the executor, then it is his plain duty to invest the fund in safe interest-bearing securities to await the time when the same can be paid over to the legatee. If the executor fails to do this, and retains the fund in his own hands, he thereby becomes a debtor to the legatee, chargeable with legal interest, and he can no more than any other debtor discharge his debt in a depreciated currency when he received a sound currency, but must pay it in the same currency which came into his hands, or in one of equal value.

In the case before us the executor (according to the report of commissioner Hendren, not excepted to, and confirmed by the court,) had in his hands for distribution among the legatees, the sum of $9,543.48, on the 1st day of September 1859. For nearly two years before the commencement of the war this fund was in his hands. Why was it not paid over before there was any change in the currency? Or if some of the parties were infants, or so situated from other causes as not to be in a condition to receive their legacies, why was not such portion invested for them in some safe interest-bearing securities, which might have prevented loss both to him and to them? But in June 1863, nearly five years after the fund came into his hands, and which was paid to him in gold or its equivalent, he brings into the Circuit court, in Confederate currency, $7,000, and upon an ex parte order, made without notice to the parties interested, leave is obtained from the court to invest that amount in Confederate bonds, for the benefit of the legatees, who
421 *were entitled to receive payment of their legacies in a sound currency. He is thus permitted to pay a debt of $7,000 in currency worth at the time less than $800.

The executor, both in his petition and answer to the rule, says that he asked leave of the court to make this investment under the provisions of the act of assembly passed March 5th, 1863. The act relied upon has no application to such a case as this. It has already received judicial construction by this court more than once. See Campbell's ex'ors v. Campbell's ex'or, 22 Gratt. 649, and Mead v. Jones, supra 347. In the first named case, the president delivering the opinion of the court says, p. 648: "The act expressly provided that whenever a fiduciary had in his hands moneys received in the due execution of his trust, which from the nature of his trust, or any cause whatever, he was unable to pay over to the parties entitled thereto, it should be lawful for him to apply by motion or petition to any judge, &c. The money was required to be in hand, and to have been received in the due exercise of his trust, and he for some cause must be unable to pay it over to the parties entitled." These three conditions must concur. In the case before us none of these conditions concur, but all are wanting. The money he received for the legatees was not in hand; for that was gold or its equivalent. The Confederate money he proposed to invest in Confederate bonds was not received in the due exercise of his trust. The conversion of gold which he received nearly five years before into Confederate currency, was, no matter how converted, an undue and illegal exercise of

his trust, and as to those parties who, from infancy or other causes, were not in a condition to receive it, it was the plain duty of the executor to have made investments
422 *for them before the war, in securities which were safe and valuable. The court is therefore of opinion that the act of March 5th, 1863, did not confer upon the Circuit court any authority to allow the executor in this case to make the investment in Confederate bonds.

But it is argued by the learned counsel for the appellant, that independent of the act of March 5th, 1863, which is wholly relied upon by the executor in answer to the rule, the court had the authority to make the order of investment entered June 9th, 1863. "That," to use the language of the petition for appeal, "either by nature of the inherent powers of courts of chancery, or in accordance with the spirit if not the letter of the 24th section of chapter 132, Code 1860, it appearing to the court from the report filed and its own decree, that the moneys specially mentioned in the petition filed on the 9th June 1863, were in the executor's hands, the court had power and jurisdiction to order said moneys to be paid into court, to be invested or loaned out, or to make any order respecting the same which to such court might seem proper." And it is insisted that the order having been entered in a pending cause, to which the legatees were parties, and having been made by a court of competent jurisdiction, having the parties before it, and having control of the fund, must stand until set aside upon a petition for re-hearing and review, or reversed upon appeal.

The conclusive answer to this position is, that the petition filed by the legatees, which is the foundation of all the proceedings against the executor, must be treated as it is in effect a petition to review and set aside the order of June 9th, 1863. The very object of that petition was to get rid of that
423 order, which alone *stood in the way of recovery against the executor, by showing that it was illegal and void; and the decree of the court appealed from is in effect a review and rescission of that order. The decree of the Circuit court makes special reference to that order, and in effect overrules and sets it aside, when it says: "The court is also of opinion that the said Bell received the assets of his testator's estate in the year 1859; he ought now to account with the legatees for good money, and the alleged investment in Confederate bonds did not release said executor Bell from his responsibility to the legatees of said estate." It is plain, therefore, from the petition and decree, that the object of the one and the effect of the other was a rehearing and rescission of the order of 9th June, 1863. It is equally plain that said order was erroneous and ought to have been set aside. It was entered on a petition ex parte in its character, and without notice to the parties interested. It was confessedly and on its face entered on a petition filed under the act of March 5th, 1863; and the court, in the absence of the real facts, might well presume that the funds which the executor asked leave to invest were such as the act authorized to be invested in Confederate bonds; that is, that they were received in the due exercise of his trust, and that he was unable to pay over to the parties entitled. It is inconceivable to suppose that such an order ever would have been entered if it had been known to the court that the Confederate money which the executor proposed to invest represented a fund which he had received in gold nearly five years before.

We would not do the slightest injustice to the executor, and therefore will not fail to notice any ground upon which he rests his defence. In his answer, he says "that the amounts which he could not pay over
424 *were invested by him according to his best judgment and discretion in the management of his trust, and the interest collected and paid over to the parties entitled or to their use when they could not themselves receive the same; that the war coming on, these investments became, beyond the control of respondent, converted into Confederate money; and on the 9th day of June 1863, respondent being unable to pay over or loan out the money thus in his hands, filed his petition in this cause, asking the then judge of this court for leave, under the provisions of the act of assembly passed March 5th, 1863, to invest the funds in the bonds of the Confederate States of America.

The executor does not inform the court, though required to do so by its order, in what manner he invested the funds in his hands, which he declares in his answer "were invested by him according to his best judgment and discretion in the management of his trust;" nor does he offer any explanation of how "these investments became, beyond his control, converted into Confederate money." One of two things is certainly true; and in either event the executor is equally responsible. He either retained the money in his own hands, paying interest to the parties entitled, and regarded it as an investment in his hands for them; or he loaned it out upon securities of some sort. If he retained it, he became the debtor of the legatees; and having received gold, cannot discharge his debt in a depreciated currency. If he loaned it out he had no right to receive it in Confederate currency, depreciated in June 1863 to one-tenth of its face value. And if he changed the investment he had made, and suffered safe and solvent securities to become "converted into Confederate money," he committed a devastavit, for which the law will hold
425 him responsible. *This has been expressly decided by this court, not only in the case of Campbell's ex'ors v. Campbell's ex'or, 22 Gratt. 649, above referred to; but in a number of cases where appeals have been refused, where the record and petition presented this precise question. In any and every view we can take of the case, the loss consequent upon the investment in

Confederate bonds must fall, not on the legatees, but on the executor, who caused this loss by failing to do that which both the law and the will of his testator required at his hands.

In coming to this conclusion, we do not mean in any manner to impute to the executor any fraudulent purpose or misconduct. His high character and standing, well known to this court, as well as his conduct since the loss occurred, in seeking to repair it, and taking upon himself a part of its burden, all repel any such idea.

We mean only, without reference to the motives or conduct of parties, to fix the responsibility where the law places it, and to lay the burthen of the loss upon him who caused it.

There is one other assignment of error which must be mentioned briefly; and that is, that there is error in the decree in appointing a trustee to receive that portion which was due from the executor to James Crickard and his children. It is objected, that inasmuch as the will appointed the executor trustee for these legatees, the court had no power to remove him and appoint another. The record shows that seven if not all of the parties interested, filed a petition to the court asking that Robert G. Bickle might be appointed a trustee to take charge of and manage for them the trust fund created for their benefit by the sixth clause of Peter Crickard's will. The
426 court *below granted the prayer of their petition and appointed the party whom they nominated as their trustee, requiring of him bond and security for the faithful discharge of his duties.

The court is of opinion that there is no error in this order. A court of chancery having trust funds under its control, may make such orders as may in its opinion be necessary for its safety and proper administration. The manner of doing this must be left in a great degree to the discretion of the court having charge of the fund. If the parties interested desire the appointment of another trustee, and the court thinks it necessary to a proper management of the trust fund, this court will not interfere, although it might think such an order unnecessary. It must be left to the discretion of the court of chancery having control of the fund and charged with its safety and proper administration.

It may be observed, too, that the will did not in terms appoint Bell the trustee; but simply directed him as executor to carry out the provisions of the will in making the investment for James Crickard and his children. So that in point of fact there was no removal of the trustee and appointment of another.

The court is therefore of opinion that there is no error in the decree of the Circuit court of Augusta, and that the same be affirmed.

Decree affirmed.

427 *Kemper v. Ewing & als.

September Term, 1874, Staunton.

Absent, STAPLES, J.

Joint Tenancy—Sale by Some of the Joint Owners without the Concurrence of the Others.—W, and his sisters E, R and M, were the joint owners of a tract of land. In 1863, E and R, without authority from W and M, but believing that they would concur, sold the whole tract to K for $30,000 cash. On the 1st of April, 1863, a writing under seal was prepared, stating the contract, and drawn to be signed by the four owners. E and R and K then signed it, and on that day and the next K paid to G and R $25,509.33. Before the writing was signed, E wrote to W, stating what they proposed to do, and W replied, that he would sell his interest to K for $7,500; K to give his bonds for one-half on demand, and the balance in one and two years, all secured by a lien on the land. This letter was shown to K, who proposed to pay $1,000 cash, and give his bonds for the balance of the purchase money. E objected, that this would not be satisfactory to W, but R agreed to it, and K paid her the $1,000, and executed his bonds to W, which he delivered to R, and R handed to the wife of W the $1,000, and K was then put in possession of the land by E and R, and continued to hold it. In June W returned home on sick leave, and in a brief interview with K he said, you have executed your bonds for the balance of the purchase money, and K said he had, and would like him to go to Mr. C's and sign the contract; which W did. At this time W says in his evidence, he had not seen the bonds, and did not know that K had paid the $1,000. M did not sign the paper, but refused to concur in the sale, though K says he did not know until she filed her answer in his suit that she refused. In 1868 K filed his bill against W, E, R and M, to enforce the contract. HELD:

1. **Same—Same—Validity.**—The arrangement between R and K, as to the interest of W, not having been authorized by him, he was not bound by it.

2. **Same—Same—Ratification.**—But W having after his interview with K signed the contract, K had a right to suppose that W knew what had
428 been done, *and it was W's negligence if he did not know, and he is therefore bound to carry out the contract.

3. **Same—Same—Non-Acquiescence.**—M not having signed the contract, or ever agreed to the sale, she is not bound.

4. **Same—Same—Rights of Purchaser.**—E and R are bound, and it is the privilege of K to take the three-fourths of the land, or to give it up and receive back the purchase money he has paid.

5. **Same—Same—Same.**—K electing to take the land, he must pay to W the scaled value of the bonds at the date of the contract, with interest from that date.

6. **Same—Same—Rights of the Non-Contracting Owners.**—M is entitled to rent on her one-fourth, only from the filing of the bill, with interest.

7. **Same—Same—Rights of the Contracting Owners.**—E and R having received the money for M's part of the land, expecting she would concur in the sale, and K not having relinquished his claim to enforce the contract against M, E and R could not pay it to M, who refused to concur in the sale,

nor return it to K, who had not relinquished his right as against her; and the money not having been used by E and R, but invested in Confederate bonds, which perished in their possession, they will not be required to pay it to K.

William D. Ewing, Rebecca D. Ewing, Elizabeth A. Ewing and Mary A. Ewing were the owners of a tract of land of four hundred acres, in the county of Augusta, called Riverton; each owning one undivided fourth part thereof.

Previous to the 1st of April 1863 Rebecca D. Ewing and Elizabeth A. Ewing contracted to sell the whole of said tract of land to B. F. Kemper for $30,000 cash. They did not profess to have authority from William D. Ewing or Mary A. Ewing, but supposed they would concur in the sale. An agreement, under seal, dated April 1st, 1863, was prepared, purporting to be made by the four, by which they sold the land to Kemper; and this was executed by the two and Kemper; and on the same day Kemper paid $10,500 of the purchase money, 429 for which Rebecca D. *Ewing gave him her receipt. And on the next day he paid $15,009.33, and received another receipt for the amount from Rebecca D. Ewing.

After the agreement was made, and before the execution of the writing, Elizabeth A. Ewing wrote to her brother, who was a surgeon in the Confederate service and stationed at a hospital at Lynchburg, stating what she and her sister had done; and she received from him a reply dated March 28th, 1863, in which he said, "Mr. Kemper can have my share in the Riverton farm for $7,500 in his individual bonds, secured by lien on the land, one-half bearing interest from day of sale, the balance in two payments (equal annual)."

This letter was received after the writing aforesaid was executed; and upon its being shown to Mr. Kemper, he remarked that he had a thousand dollars with him, and if they would receive that, he would execute his bonds for the balance. To this Elizabeth A. Ewing objected, saying her brother would be dissatisfied with it; but Rebecca D. Ewing agreed to take the $1,000, which Kemper paid to her, and executed his three bonds for the balance, payable to William D. Ewing, one for $1,745.33, and two each for $772.66, payable in one and two years.

William D. Ewing returned home on sick leave in June 1863; and after a brief interview with Kemper, he signed the agreement. Mary A. Ewing refused to concur in the sale, and did not sign the agreement; though of this refusal Kemper avers he had no knowledge until her answer was filed in this case. The facts and the evidence are sufficiently stated by Judge Anderson in his opinion.

In September 1868, Kemper filed his bill in the Circuit court of Augusta county, 430 against William D. *Ewing and the three Misses Ewing, to enforce a specific execution of the contract; and the defendants having answered, the cause came on to be finally heard on the 18th of June 1873, when the court decreed in favor of Kemper for three-fourths of the land, being the shares of William D., Rebecca D. and Elizabeth A. Ewing; and commissioners were appointed to divide it; against the plaintiff, in favor of Mary A. Ewing for rents of her one-fourth from the 1st of July 1864; and in favor of William D. Ewing for $2,745.55, with interest on a part of it, being the value of the bonds executed to him by the plaintiff; and against Rebecca D. Ewing and Elizabeth A. Ewing for $1,231.59, with interest on $79.57 from June 1st, 1872, the value of the Confederate currency received by them in excess of the three-fourths of the land sold. From this decree Kemper obtained an appeal to this court.

D. S. Young and William J. Robertson, for the appellant.

G. M. Cochran, for the appellees.

ANDERSON, J. delivered the opinion of the court.

This is a bill in equity to enforce the specific performance of a contract for the sale of land. The plaintiff alleges in his bill that he entered into the contract on the 1st day of April 1863 with William D. Ewing, Rebecca Ewing, Elizabeth and Mary A. Ewing, for the purchase of their tract of four hundred acres of land situate in the county of Augusta. This contract, which is exhibited with the bill, is signed and sealed by only three of the vendors above named.

Mary A. Ewing in her answer avers 431 that the contract *was not signed by her, or by any one professing to act for her, and is therefore not in any manner her contract. She denies that she made said contract, or authorized any one to make it for her, and declines to perform it, or to allow any one to perform it for her. The statute requires contracts for the sale of land not only to be in writing, but to be signed by the party to be charged therewith, or by some one thereunto lawfully authorized. In this case the contract is not signed by the party sought to be charged, nor by any person for her, whether lawfully authorized or not.

But in the argument it was urged with great ingenuity and ability, that though she is not bound by the written contract, there is evidence of a parol contract between her and the appellant through her agents, under which contract he paid the purchase money, and was let into the possession, which he has held ever since the 1st of July 1863, with the knowledge and acquiescence of the said Mary, until the filing of her answer in this cause on the 15th of June 1870; and that such part performance takes the case out of the Statute of Frauds.

The bill does not allege such a parol agreement. It sets out the written contract, and relies upon that as binding upon the

said Mary, upon the ground of her acquiescence, and that she is bound by the act of her joint tenants. Her answer is fully responsive to, and positively denies the allegations in the bill. And she being entitled to one undivided fourth part of the tract of land, the court is of opinion that she could not be divested thereof without her consent, not even by the act of her coparceners. But is there proof of such a parol agreement on the part of Mary A. Ewing, as it alleged in argument?

The appellant testifies that he made
432 the contract *with Rebecca and Elizabeth Ewing; that neither William nor Mary were present when the contract was made, written and signed by the said Rebecca and Elizabeth; but that they represented that they were authorized to sell the shares of William and Mary Ewing, and that they did sell to him the entire farm.

Elizabeth Ewing testifies that she did not positively undertake to sell the interests of William and Mary Ewing. She supposed that her brother and sister would be willing to accede to whatever they did under the circumstances, as they were very much annoyed, and very unpleasantly situated, and probably so represented to the appellant. But she says she referred the appellant to her sister, who was in Rockingham, and wrote to her brother, who was then acting as surgeon in the Confederate service in the Way Hospital at Lynchburg. And the proof is, that she placed his letter in reply in the hands of the appellant a few days after the contract was signed, and before its execution was completed. She says she had no positive written or verbal authority to receive money for either her brother or sister Mary, and received it at her own risk. Her testimony is strongly corroborated by the written contract, in which they only undertook to act for themselves, as they did not sign it for the absent, which seems to imply that they had no authority to do so.

But if they represented that they had authority to sell their absent brother and sister's interests, and had no such authority, it could not bind them. Mary Ewing positively denies that she made the contract alleged in the bill, or authorized any one to make it for her, and refers to the paper itself, as showing that it was prepared upon the idea that she had a right to act for herself and would act for herself. Eliz-
433 abeth *says that Mary objected to the contract the first time she saw her after it was written, which was a considerable time; but she heard that she had objected to it all the while. Daniel B. Ewing testifies that Mary, as far as he knew, never did consent to the sale, but that she has persistently and constantly, at all times, refused to ratify the transaction. The onus of proving the authority rests upon the appellant. The record is barren of any such proof. But it is contended that there was an acquiescence on the part of Mary from which the authority of her sisters to sell her interest may be inferred. The proof does not show acquiescence, but persistent and constant refusal, at all times, to ratify the contract. But she did not notify the appellant of her non-acquiescence. The paper was not signed by her, which he knew; what further notice did he need? He alleges in his bill, that during the further continuance of the Confederate government matters stood as they were; the parties not calling for any further payments, but rather avoiding the receipt of any more money; and that soon after the break down of the Confederate government, he learned, to his surprise, that they did not intend, if they could avoid it, to execute their contract. And in his first deposition he testifies that he had information, several months after the downfall of the Confederate government, that they did not intend to comply with the contract. And yet it is alleged, that he was not informed that Mary Ewing would not confirm the contract until after the filing of her answer; which was not until the 15th of June 1870. He knew, two or three months after the contract was written, that she had not signed it; and he believed the contract was not complete without her signature. It is strange that after the close of the war, when he was informed
434 that *the parties did not intend to comply with their contract, he had not enquired whether Mary Ewing had signed it, if he had not known that she repudiated it.

Mary Ewing does not seem to have made any concealment of her determination not to unite in the contract; and if he wished more explicit information as to what her determination was, it was his place to inquire. If he considered himself entitled to her signature, and that it was important that he should have it, he should have called on her to sign it, after he knew she had not signed it. She had never had any communication with him on the subject of a sale, and had never authorized any one to enter into a contract with him for the sale of her interest; and no such contract had been made for her, although a paper had been drawn for her to sign, if she was willing to do so, and thereby to become a party to the contract; which she did not sign. She may well have considered that her not signing it was sufficient notice to him that she was unwilling to unite in the contract. It did not devolve upon her to look him up to give him further notice of her determination; and he had no right to presume her ratification, because she had not done so. The court is of opinion that there is no sufficient proof of a parol authority to Rebecca and Elizabeth Ewing from their sister Mary to bind her by any contract of sale they may have made with the appellant, or indeed to show that they made a contract of sale on her behalf. And if there was no contract on her part, there could have been no part performance for her. Her sisters admit that they had no authority from her to receive the purchase money, and she denies that she had anything to do with placing the appellant in possession, who, in fact,

testifies that he got possession from Rebecca and Elizabeth.

435 *The allegation of the bill, that William D. Ewing entered into the contract on the 1st of April 1863, is not sustained by the proof. He was not present. And it appears from the evidence in the record, that Rebecca and Elizabeth Ewing, at the date of the contract, had no authority to sell his interest. The contract, signed by Rebecca and Elizabeth for themselves respectively, does not import an authority to them from their brother. One of them, Elizabeth, after negotiation had commenced with the appellant, wrote to him to know whether he would unite in the sale. This cotemporaneous act is confirmatory of what the written contract imports, and of the positive testimony of both Elizabeth and Rebecca, that at the time that contract was written and signed by them they had no authority to sell his interest in the land. This conclusion is put beyond all question by the letter itself, which they received in reply. It is in these words: "Mr. Kemper can have my share in the Riverton farm for $7,500, in his individual bonds, secured by lien on the land, one-half bearing interest from day of sale, the balance in two payments (equal annual)." This letter was not received until after the contract had been written, signed and sealed by the two sisters, and by Mr. Kemper, and most of the purchase money had been paid. The price agreed upon was $30,000 cash; and on the same day that the contract was signed as aforesaid, Mr. Kemper paid $10,500, and the next day, the 2d of April, he paid $15,009.33, as appears from the receipts signed by Rebecca D. Ewing. These payments were made in Confederate money. On the 7th of April he paid $1,000 in Confederate money, and gave his bonds for $3,490.67 in full of the Riverton farm; that is, one for $1,745.33 on demand, being one-half, and two others, one for $872.66⅔

436 in twelve *months, and the other for $872.66 in two years from the date of the contract. The bonds are payable to William D. Ewing. This last payment was made, and bonds executed after William D. Ewing's letter was received and placed in the appellant's hands and read by him. It is true, the appellant says that he does not remember to have read the letter; but both Rebecca and Elizabeth Ewing testify that it was placed in his hands to read, and that he opened it, and Elizabeth says he read it, and after meditating a while said it was more than he could give; and then after a while said: "I will tell you what I will do, I have a thousand dollars with me, and if you will take that, I will execute my bonds for the balance." She says her sister Rebecca refused to touch it, because she knew her brother would be dissatisfied. "I consented to take the thousand dollars myself." She says Mr. Kemper then wrote the bonds, signed them, and handed them to her. "My sister did not look at them at all, and I did not have legal knowledge to know anything about their nature." Rebecca testifies, "that when Mr. Kemper came, I saw my sister place the said letter in his hands." He seemed to read it, then remarked, "I have one thousand dollars with me, if you will receive that I will execute my bonds for the balance." I remarked that I would not do it, for when my brother hears his requirements were not complied with he will be very much dissatisfied. "My sister said she would be responsible for the thousand dollars, and received it. The bonds were then prepared, signed and handed over." Her testimony supports the testimony of Elizabeth; and both are corroborated by the fact that the written contract was changed, which required the whole $30,000 should be paid in cash, and the appel-

437 lant paid only $1,000 in *Confederate money of the balance due, and executed his bonds for the residue in exact compliance with the requirements of Dr. Ewing's letter to that extent. He made the bonds payable to him. We think these facts tend strongly to show that he had read the letter, and to confirm the positive testimony of Rebecca and Elizabeth Ewing. The positive testimony of two unimpeached witnesses must outweigh the negative testimony of one witness, however respectable, that he don't recollect, especially when the positive testimony is concurrent with the facts and circumstances of the case. The positive testimony of the two witnesses in this case is also against their own interest. We are therefore obliged to conclude that appellant made the payment of $1,000, and executed his bonds payable to William D. Ewing, knowing that it was contrary to the instructions he had given to his sisters, and not in accordance with the terms upon which he was willing to sell his interest; and if the case rested here, we could not hesitate to refuse the enforcement of the contract against William D. Ewing.

But it is asserted that he afterwards ratified what had been done and signed the contract. That he signed it is not disputed. But he alleges in his answer that he signed it under the impression and with the belief that the terms he prescribed had been complied with. And that he never received, or saw or got the benefit of any Confederate or other money paid by the complainant, or authorized any one to receive it for him. In his deposition, taken and filed October 29, 1872, he testifies to the allegations thus made in his answer; and, unless invalidated, fully sustains the allegations. But it is attempted to invalidate it by showing that it is contradicted and disproved by himself in a subsequent deposition which he gave in the cause a few months afterwards.

438 *The contradiction is alleged to be in his answer to this question: "In a former deposition by you in this cause, you stated, and in your answer you also said, that you had received no part of the money paid by Mr. Kemper, on account of the land in controversy. Your sister, Miss Elizabeth A. Ewing, has testified to-day that she paid over to your wife $1,000 of

Confederate money, received of Mr. Kemper while you were absent in the army. Please say when you first heard of that thousand dollars?"

He answers: "I never heard of it until after the war; I never saw the bonds of Mr. Kemper until after the war. I was under the impression from what I had heard, that I had Mr. Kemper's bonds for $4,000," &c.

On the 1st and 2d of April the appellant had paid $25,509.33, of the $30,000 he was to give for the land, leaving a balance of $4,490.67; and the subject of three depositions which had been given just before Ewing's said deposition was taken was chiefly in relation to that balance; how it was settled, &c. Elizabeth Ewing has just deposed—the same day—that Mr. Kemper handed to her $1,000 of it in Confederate money and his bonds for $3,490.67, amounting together to $4,490.67, the balance due for the Riverton farm; which she immediately handed to the wife of her brother. And it was now the point of inquiry, was not Ewing aware of this payment to his wife? His answer is that he was under the impression he had Mr. Kemper's bonds for the whole amount which he designated $4,000; though the exact amount was $4,490.67; and adds, "it was upon that impression that I signed the contract. After the war, when I came to examine these bonds, for the first time, being after this suit was brought, I discovered there
439 were *only $3,500 of bonds." That is over the amount. There were only $3,490.67. It is evident he mentions these sums only for designation, not professing to give the exact amounts.

He was testifying in relation to the balance, which was the subject of previous depositions, for which he said he supposed he had Mr. Kemper's bonds; and when, after the war, he found he had his bonds for only $3,500 ($3,490.67) he inquired where the other money was, and says, "for the first time I ascertained that my wife had received $1,000, which I never saw." The two depositions do not point to the same thing. The first was in relation to the consideration which he received for his interest in the land, which he was under the impression and belief was $7,500 in appellant's bonds. The second was in relation to the sum which was unpaid when the bonds were executed—whether $1,000 of it was paid in money, and bonds executed only for the balance. His answer is, substantially, that he was not until after the war, and after this suit was brought. He was under the impression that he had the appellant's bonds for the whole amount of it and not merely for $3,490.67. He says he expected to find bonds for the whole of that amount—but does not say what he expected for his entire interest in the land; that he had said in a previous deposition. The subject of this inquiry did not call for such an answer.

There is no contradiction. He does not say that he expected to find bonds for only $4,000 and no more. His meaning evidently is that he expected to find bonds for the whole of this balance, which he designates as $4,000, and not for only a part of it. That was the matter of inquiry, whether he knew that a part of this balance
440 of $4,490.67, to wit, one thousand *dollars, had been paid in money. His answer is he did not until after the war. He believed he had bonds for the whole of it; but he does not say, nor mean to say, that was all for which he believed he had appellant's bonds. He had shortly before said in his answer, and testified in his deposition, that he believed he had his bonds for $7,500. He did not mean to contradict that solemn asseveration, twice made just a few months before, in the same cause, and we do not think that he has contradicted it in this deposition. His attention was not called to the seeming discrepancy and an opportunity given him to explain. And we think it would be harsh and unjust upon such grounds to conclude that one of high character and respectability, a tribute paid by the appellant in his bill to all the appellees, had wilfully and deliberately sworn falsely.

The court is therefore of opinion that the most just and reasonable conclusion is that William D. Ewing signed the contract, as he alleges in his answer, and testifies, under the impression and belief that the appellant had executed his bonds to him, according to the terms he required in his letter of instructions to his sisters.

But conceding that he signed the contract under a mistake, as he alleges, is it equitable that he should rely upon it under the circumstances of this case? He signed the contract, and thereby ratified the act of his sisters, who were acting for him, when they accepted the execution of the contract for his benefit, though not in strict compliance with the terms of his instructions. Undoubtedly the appellant regarded it as a complete ratification, and, so regarding it, he acted upon it. Relying upon this ratification by Ewing, he was induced to abide the contract, although it had not been signed by Mary; removed to the farm; was
441 put *in full possession by Rebecca and Elizabeth, doubtless with the knowledge and consent of their brother, and has continued in the possession to this day. He did not take possession until after the contract was signed by Ewing. It may be fairly presumed that it was the turning point with him. If the contract had not been signed by Ewing, he had an election to hold on to the contract for so much of the land as he could get, or to surrender it, as he could not get all that was contemplated by his contract, get back his money, and make another investment of it. By this act of Ewing he was induced to take possession, which shows an election to abide the contract, and thus surrender his right to recall the money he had paid for it, and lost the opportunity of making other advantageous investments; and was most probably induced to believe that as he had signed the contract, Mary, his sister, would also sign

it, and thus was induced not to recall the money he had paid for her interest. By that act of Ewing, he was, in a word, induced to adhere to the contract, and not to abandon it, and to incur all the hopes he may have sustained by that choice, and to forego all the advantages which he might have derived by its early abandonment.

But the plea of Ewing is, that he signed the contract under a mistake as to the facts. He does not pretend that he was led into that mistake by the appellant. Appellant had reason to believe that Ewing was fully informed as to the facts when he signed the contract. They had but one brief interview, after the contract had been closed with Ewing's sisters, when he approached him in a way to impress him with the belief that he had been fully informed as to what had been done. "You have executed your bonds for the balance of the purchase
442 money," he said; appellant *replied he had, and asked him to sign the contract, which he promised to do. There is not a single circumstance tending to show that Ewing was misled or deceived by appellant, or that the latter had any reason even to suspect that he had not been accurately informed as to what had been done. And if Ewing had used ordinary diligence and precaution, he could easily have known what had been done, and need not have been mistaken. He had only to have inquired of his sisters, one of whom was with him at Winchester, and traveled with him to his home in Harrisonburg, and they would doubtless have informed him of all that had been done before he signed the contract. And the appellant, it is fair to presume, believed that he had been fully and accurately informed by his sisters of what had been done, and that his signing the contract was done with his full consent, with an understanding of all the facts, and was an unqualified ratification of whatever departure there had been, by his sisters from his instructions in accepting the terms which he proposed. Under these circumstances the court is of opinion that it would be inequitable to allow this defence of Dr. Ewing, and that he is bound by his solemn act of signing and sealing the written contract, for the sale of his interest in the Riverton farm to the appellant.

How is it with regard to Rebecca and Elizabeth Ewing?

They entered into the contract for themselves, with their eyes open. And although they did so with the expectation that their sister would unite in it, we are clearly of opinion that they are bound—although she has refused to execute it and is not bound—if the appellant chooses to hold them to it.

And as the appellant entered into the
443 contract and paid his money *with the expectation of getting the whole farm, but is disappointed in getting the whole, by the refusal of Mary A. Ewing to sign the contract, he has the option to take three-fourths of the whole, or to get back his money which he paid for it at its scaled value.

But as to the money he paid Rebecca or Elizabeth over their and their brother's shares, viz: $7,500, whether he is entitled to a decree against them for that, is not so clear. It is a total loss, and the question is upon whom it should fall? It was paid for the interest of Mary A. Ewing, provided, of course, that she united in the contract.

This payment by the appellant before the contract was signed by her was spontaneous and voluntary on his part. It does not appear that Rebecca or Elizabeth required it. And they both testify, against their own interest, that they had no authority from her to receive it.

They did not profess, in the written contract of sale, to act for her. The sale is not made by them as agents for their brother and sister, but it purports to be a sale made by each one in person for himself. Not having assumed authority to sell their sister's interest, they can hardly be held to have assumed authority from her to receive the money which was paid for her interest. The receipt is given by Rebecca in her own name for the money, and not as agent. The appellant in paying the money to her upon her receipt, reposes in her a personal trust, that she would properly apply it. Would she have been justified in paying the money to Mary before she signed the contract? And was she bound to have notified the appellant of what he was already informed, that Mary had not signed the contract?

Mary had not signed when the money
444 was paid; and was it for *Rebecca to determine how long the appellant should wait for her signing before she should return the money to him? She had no right to return the money to him as long as he held that Mary was bound by the contract of sale, which he holds to this day; and she had no right to pay the money to Mary until she had signed the contract, without his consent or direction.

It was incumbent on the appellant to call on Mary to sign the contract after he knew that she had not signed it. It no where appears that Rebecca or Elizabeth undertook to get her signature to it. Mr. Daniel Ewing was going to Harrisonburg, where she lived, and as a matter of favor, as much to appellant at least as to his sisters, agreed to take the contract with him to get Mary's signature, and was instructed by appellant to leave it with Mr. Craig of Harrisonburg, showing that he claimed the right to its possession. But Mr. Ewing assumed no obligation to have it signed; nor does it appear that the sisters, or either of them, assumed such an obligation. If it was necessary to have her signature to it; it was for the appellant to obtain it. If she refused to sign it, and he did not hold her bound, then it was incumbent on him to notify Rebecca, that he did not or could not hold Mary bound by the contract, and request her to return the money to him which he had paid for her interest; and if she had failed to do so it would have been at her risk, and would have been her loss. It was not for Rebecca to determine whether the

appellant held Mary bound by the contract, and until he notified her that he did not, she was not warranted in paying it back to him. She did not hold the money, it is true, as agent for her sister, but she stood, as it were, a stake-holder between the parties, awaiting the action of the appellant (and he still holding her sister bound), 445 before any notice *from him that he did not hold her bound, and request made to return the money to him, it was not proper that she should do so. She had no right to return the money paid to her for Mary's interest, while the appellant held that Mary was bound by the contract of sale; and indeed he made no request of her to do so. The money lay invested with her own, awaiting the action of the appellant, and perished without fault on part of herself, or her sister Elizabeth. It was invested just as hundreds of our most prudent and judicious citizens and the courts of justice invested funds, and precisely as she and her sister Elizabeth invested their own, and was certainly as secure as the Confederate treasury notes she received from the appellant, if she had retained them. It was not their money; and we have held that it was not the money of their sister Mary. It was then lost—the money of the appellant; and we think it would be inequitable to throw the loss upon Rebecca and Elizabeth Ewing, or either of them.

This case being one of great hardship, in whatever way decided, the court has given the most anxious consideration to the subject, satisfied that both parties to the transaction have acted with perfect good faith, but improvidently and under mistake. We regret that such a loss should fall on any one. We can only announce our conclusions as to the responsibilities of the parties under the law. In this case, we think the law, as we construe it, throws the loss where the hardship is less than if it had fallen upon Rebecca and Elizabeth Ewing. Their inheritance in the land is a total loss, whilst appellant holds it in place of the Confederate money which he gave for it. He has something valuable for his Confederate money, even with this loss falling on him, whilst if it fell on them they would be losers not only of their inheritance, but would 446 have *a large debt to pay, for which they have not and never did receive any sort of consideration; and this ruin brought upon them by a transaction in which, though they acted mistakenly, the court is well satisfied they acted with perfect good faith.

Upon the whole case, the court is of opinion that the appellant should get three-fourths of the land in value, William D., Rebecca and Elizabeth Ewing's interests, and that Mary A. Ewing should get the other fourth part, and recover from the appellant the rental value of the same from the date of filing the bill in this cause, with interest on the annual arrearages of rent until paid: Under all the circumstances of this case, the court being of opinion that it would be inequitable to hold the appellant liable for the rents of her share prior to the commencement of the litigation in relation to it. And the court is further of opinion, that William D. Ewing should recover from the appellant the scaled value of the bonds he executed to him at the date of the contract, with interest therefrom. And that the decree of the Circuit court be reversed so far as it is not in conformity with this opinion, and in all other respects be affirmed. And the cause is remanded, &c.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is error in the said decree of the said Circuit court, in holding Rebecca D. Ewing and Elizabeth A. Ewing liable to the appellant for the value of the Confederate currency received by them in excess of three-fourths of the purchase money of the land in controversy, and in decreeing against them for the same; and also in allowing Mary A. Ewing rents for her 447 share of the *land prior to the institution of this suit. It is therefore decreed and ordered that so much of the decree of the said Circuit court as gives to the appellant a recovery against Rebecca D. Ewing and Elizabeth A. Ewing of the value of the Confederate currency received by them in excess of the three-fourths of the purchase money of the land aforesaid, and as gives to Mary A. Ewing a recovery for the rents and profits of her one-fourth of the said tract of land prior to the institution of this suit in the said Circuit court, be reversed and annulled and that in all other respects it be affirmed. And the appellees being the parties substantially prevailing, it is further decreed and ordered that the appellant do pay to the said appellees their costs by them about their defense here in this behalf expended. And this cause is remanded to the said Circuit court for further proceedings to be had therein to a final decree in conformity with the foregoing opinion and decree; which is ordered to be certified to the said Circuit court of Augusta county.

Decree reversed.

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448 *McClintic v. Wise's Adm'ors & als.

September Term, 1874, Staunton.

[18 Am. Rep. 694.]

I. Sale of Land—Retention of Title—Bonds—Suit on by Administrators of Vendor.—W sold land to M, retaining the title, for $4,100, cash $1,000, and three bonds payable January 1st, 1858, 1859 and 1860. The first was paid to W. He transferred the bond due January 1st, 1860, to S in May 1859, who assigned it to H. W died in possession of the bond due January 1859. His administrators sued M in equity, to subject the land to pay the bond held by W at his death, without making S or H a party, and the land was sold by a commissioner to J for $2,000, and the sale was confirmed, and the commissioner was directed to collect the money and pay the plaintiffs. H, upon his petition, is made a defendant in the suit, and files his answer, claiming that his bond is still unpaid, and that he is entitled to

priority of payment out of the land. The administrators file an answer, insisting that H had lost his right to subject the land by his *laches* in not suing M, who had in the meantime become insolvent. The decree gives priority to the plaintiffs over H, and he appeals—HELD:

1. **Same—Same—Same—Assignment—Priorities.**—The bond held by H having been transferred by W in his lifetime, though due after the bond retained by him, is to be first paid out of the proceeds of the sale of the land.
2. **Judicial Sale.**—H was a necessary party to the suit, and it was error to decree a sale of the land without first having him made a party, and the question of priority settled between him and the plaintiffs.
3. **Same—Rights of Purchaser.**—The purchaser at the sale, made under the decree of the court, is interested in the decision of the question of priority between the plaintiffs and H, and ought to be heard in opposition to any order affecting his interest. And a rule, if desired by the plaintiffs, should be awarded by the court below against said purchaser, to show cause why said sale should not be set aside.
4. **Same—Prerequisites to Setting Aside Old and Ordering New Sale.**—But in no event is said sale to be set aside and a resale ordered, unless the plaintiffs, or some one for them, shall give bond with proper security before said court for a substantial advance upon the price for which the property heretofore sold.

449 *5. **Same—Resale.**—If no resale is made, the fund arising from the sale already made, being the proceeds of the sale of the land, is to be applied, or so much of it as may be necessary, to the satisfaction of H's debt, and the residue, if any, to that of the plaintiffs.

II. **Mortgages, Deeds of Trust and Vendor's Liens—Effect of Assignment of Debts Secured by Them.***—In deeds of trust and mortgages, when the debt is assigned, the deed of trust or mortgage is assigned or transferred along with it. And the same principles apply to the vendor's lien, resulting from the retention of the legal title.

III. **Same—Same—Priorities.**†—In such cases, where there are several debts secured, and there are successive assignments of them, the first assigned carries with it the assignment of so much of the lien as is necessary to pay it; unless it is expressly provided otherwise.

IV. **Same—Same—Remedy of Assignee.**—In such a case, the assignee, though he may have lost his remedy against his assignor, by want of due diligence in suing the debtor, does not thereby lose his remedy against the land.

V. **Same—Same—Same—Ejectment.**—If a vendor of land, retaining the title, assigns one of the bonds given for the purchase money, and then brings ejectment against the vendee, and recovers possession of the land, he recovers and holds in subordination to the rights of the assignee. The assignee having by the assignment acquired the benefit of the lien, whatever it may be, is entitled to all the remedies of the vendor to enforce it: and he cannot be deprived of these remedies by any act of the vendor.

In the year 1857, David G. Wise sold to Alexander G. McChesney certain real estate in the county of Bath, at the price of $4,100; of which $1,000 was paid in hand, and for the residue three bonds of the purchaser were given, viz: for $1,000, payable January 1st, 1858; for $1,100, payable January 1st, 1859; and for $1,000, payable January 1st, 1860. The vendor executed to the purchaser a title bond binding himself to make a good title to the land upon the payment of all the purchase money. The first of these bonds was paid to Wise in his lifetime, and the third, due January 1st, 1860, was assigned by Wise to W. W. Shields, in May 1859, and by him assigned in 450 September 1866 *to H. D. McClintic, and on the 10th of the same month assigned by him to W. H. McClintic.

After the death of David G. Wise, his administrators instituted a suit in equity in the Circuit court of Bath against Alexander G. McChesney and the heirs of Wise, setting out the fact of the sale by Wise to McChesney as above stated, and the retention of the title. That the first bond was paid; that the second was retained by Wise and had not been paid; and that the third had been traded off by Wise several years before his death, and where it now is and whether it has been paid they are uninformed. The prayer of the bill is that the land may be sold and their debt paid; and for general relief.

The bill was taken for confessed as to all the defendants, except an infant heir, for whom an answer was filed by his guardian ad litem; and the court made a decree that unless McChesney paid the plaintiff's debt within sixty days, John Clark, the sheriff of the county, who was appointed a commissioner for the purpose, should sell the lands in the bill mentioned upon the terms of cash to cover costs of suit and expenses, and for the balance, on a credit of six, twelve and eighteen months.

Under this decree the commissioner proceeded to sell the property, when Joseph W. Warren and Thomas C. Chandler became the purchasers, at the price of $2,000. And on the 18th day of May 1870 the court made another decree confirming the sale, and directing Clark, as commissioner, to collect and apply the proceeds of the sale, or so much as might be necessary, to the payment of the plaintiffs' debt.

At the October term 1870 of the court, William H. McClintic filed his petition to

*Mortgages, Deeds of Trusts and Vendor's Liens—Effect of Assignment of Debts Secured by Them.—It is well settled that the assignment of a secured debt carries with it the security, without formal transfer or delivery. Gregg v. Sloan, 76 Va. 499; Stimpson v. Bishop, 82 Va. 200; Grubbs v. Wysors, 32 Gratt. 127, 131; Machir v. Sehon, 14 W. Va. 784; Camden v. Alkire, 24 W. Va. 680; Tingle v. Fisher, 20 W. Va. 506; James v. Burbridge, 33 W. Va. 276, 10 S. E. Rep. 397; Gwathmeys v. Ragland, 1 Rand. 466.

†Assignment of Secured Debts—Priorities.—The proposition laid down in the principal case that where there are several secured debts and successive assignments of the same, the first assignment takes priority, unless, of course, it is expressly stipulated otherwise. See Gordon v. Fitzhugh, 27 Gratt. 835, and *note*.

be admitted as a defendant in the cause; and a rule was made against the 451 *plaintiffs to show cause why the preceding decrees should not be corrected, &c. And the commissioner was directed to pay no money to the plaintiffs under the decree of the 8th of May 1870, until the further order of the court.

McClintic in his answer stated that he was the owner, through several assignments, of the bond falling due January 1st, 1860, for $1,000; and he exhibits it with his answer; and he claims that he is entitled to priority of payment out of the proceeds of the land sold, on the ground that Wise had disposed of this bond in his lifetime whilst he had retained that in the possession of his administrators; and that the lien on the land passed with the bond when Wise sold it to Shields.

The administrators treating McClintic's petition and answer in the nature of a cross-bill, filed their answer to it. They admit that McClintic's bond was given for the last instalment of the purchase money of the land; and that it was assigned by Wise to William W. Shields on the 17th of May 1859. They say that at that time McChesney was entirely solvent, and continued so for four or five years; and in all that time Shields took no steps to enforce the payment of the amount due upon the bond. And they insist that by his laches he and his assignees lost their recourse against the estate of the respondents' intestate, and also all right to participate in any manner in the fund arising from the sale of the land under the decree in this suit, except to the surplus after satisfying the debt of the plaintiffs.

The cause came on to be finally heard on the 11th of May 1872, when the court held that McClintic was not entitled to preference in the distribution of the fund in this cause by virtue of his assignment; he by 452 *his laches having lost his recourse against the plaintiffs' intestate; but that the bonds constituting a lien on the house and lot in the bill, &c. mentioned, must be paid in the order in which they mature, &c. And it was decreed that the commissioner proceed to collect the bonds for the purchase money, as before directed, and to pay the plaintiffs their debt; and the residue, if any, pay to McClintic on his claim. And thereupon McClintic applied to this court for an appeal; which was allowed.

George W. Cochran, for the appellant.

Field & Gray, for the appellees.

STAPLES, J. delivered the opinion of the court.

In this case, the vendor of a tract of land having taken two bonds for a balance of unpaid purchase money, made an assignment of the one last falling due, retaining the first in his own possession. The land is insufficient to satisfy both bonds, and the question before us is, which is entitled to priority of payment.

The representatives of the vendor or assignor, as he may be termed, insist that inasmuch as the bond retained first matured, it is, by the terms of the contract, to be first paid; and this affords a sufficient ground for precedence of satisfaction out of the fund provided as security for the debt.

In support of this pretension much reliance is placed upon the case of Gwathmeys v. Ragland, 1 Rand. 466. In that case a deed of trust had been given to secure the payment of the debt. The obligee made an assignment of the second note. He afterwards assigned the third and last note to another person, and with it the deed 453 of trust. This court held *that the assignee of the second note had the preferable right to satisfaction out of the proceeds of sale over the third note. The deed of trust followed the notes into the hands of the several holders, and it was not competent to the obligee, by an assignment of the deed to the holders of the third note, to deprive the first assignee of his priority of right to demand a sale of the trust property in the order of payment expressly directed by the deed.

I do not understand the court in that case as deciding that the maturity of the notes gave priority, but that the first assignee had by the act of assignment acquired rights which could not be defeated by any act of the assignor. One of these was the right to subject the proceeds of sale of the land to the satisfaction of his debt in the manner directed by the deed. The first assignee being the holder of the note first due had the preference, as well by priority of assignment as by the express directions of the deed.

In the present case, the written agreement contains no stipulation whatever in regard to the time or mode of payment. One of the bonds is payable 1st of January 1859, and it is therein stated to be for the second payment of the purchase money. The other bond is payable the 1st of January 1860, and is stated to be for the third and last payment. Obligations of this sort, to pay in successive instalments, are usually, if not universally, made for the accommodation of the debtor. No one ever supposes the effect of such an arrangement is to give priority of satisfaction to the first instalments out of a common fund equally bound for the whole and every part of the debt.

The rule is well settled, that both deeds of trust and mortgages are regarded in equity as mere securities for the debt, and whenever the debt is assigned, the 454 *deed of trust or mortgage is assigned or transferred along with it. Leading Cases in Equity, vol. ii, part 2, page 236. The same principles apply to the vendor's lien, resulting from the retention of the legal title. 1 Lomax's Digest 220. The assignment or transfer of the note given for the purchase money operates as an assignment or transfer of the lien as effectually as it existed in the vendor. There is no controversy upon this point. The difficulty is in regard to the rights

arising out of successive assignments of different debts, and the fund is insufficient to discharge all of them, who has the better title to the security afforded by the lien? In such case, it seems to me the assignment of the bond carries with it the assignment of so much of the lien as is necessary to pay the bond. If the vendor means to restrict or qualify the effect of the assignment, he should do so by express reservation. In the absence of such reservation, or some stipulation qualifying the rights of the parties, the assignee may justly regard the assignment as securing to him the benefit of the lien, so far as it is necessary to his protection or indemnity.

This question has been the subject of judicial consideration in other states. In some of them it has been held that the rights of the assignor and assignee to the benefit of the incumbrance are equal, and the fund must be divided between them according to their several proportions. In none of them has it been held, so far as my reading extends, that the assignor is entitled to the preference merely by reason of his having retained the bonds first maturing. In Griggsby v. Hair, 25 Alab. R. 327, the very reverse was held. It is there decided, that where several notes taken for the purchase money of land are assigned at different times, the assignment of each note is pro tanto an assignment
455 *of the vendor's lien, unless expressly waived, and the liens of the several assignees are to be preferred according to the priority of their assignments, without reference to the maturity of the notes. See also Bank of Mobile v. Plant. M. Bank of Mobile, 9 Alab. R. 645; Cullum v. Erwin, 4 Alab. R. 492.

In his Commentaries, 1 vol. 353, Judge Tucker takes substantially the same view. He thus lays down the rule: "It is said if several bonds be secured by mortgage, and the fund prove insufficient to pay all, and the bonds be assigned to different persons, who shall have priority? I should conceive that he should have preference who was first assignee; for by the assignment he at once acquired a preference over his assignor, who then remained the holder of the other bonds; and this preference would not be taken away by subsequent assignments." It will be perceived that, according to Judge Tucker's opinion, the priority of the parties depends not upon the maturity of the bonds, but upon the date of the assignment. In this view of the case he is strongly supported by the case of Taylor's adm'r v. Spindle, 2 Gratt. 44, 71. In that case Glass had sold to Baker a tract of land for which Baker paid in cash, fifteen hundred dollars, and executed his four bonds for the deferred instalments, payable respectively in 1816, 1817, 1818 and 1819. It did not appear what had become of the two first bonds; it was alleged they had been paid. They were not, however, the subject of controversy. The bond due in 1818 was assigned to Basye and by him to Spindle. That due in 1819 was assigned to Norman and by him to Rixey. This latter assignment was made in 1815; the date of the other does not appear. The purchaser of the land claimed an abatement of the purchase money on account of a deficiency in the number
456 of acres; *and one of the questions in the case was as to the application of this abatement. Judge Standard, speaking for the court said, "If the assignment to Basye was prior to that of Rixey then the title to credit for the abatement would act first on the bond assigned to Rixey, and the bond assigned to Basye would be subject to credit for only the surplus, if any, of the abatement beyond the principal and interest of the bond assigned to Rixey."

Clearly, according to Judge Standard's opinion, the right of the parties was to be determined, not with reference to the time of the maturity of the bonds, but the date of the assignment. There would seem to be no substantial distinction between the case of a deficiency of the fund, arising from the mere depreciation of the property, and a deficiency resulting from an abatement of the purchase money. If the first assignee is entitled to throw upon the second the whole burden of the abatement of the purchase money, he may with equal reason, require him to bear the loss arising from the depreciation of the property, or from any other cause.

The same principles apply to the case of several purchasers at different times, of several parcels of land, subject to the lien of a mortgage or deed of trust. It is well settled that the last purchasers can not call upon the first for contribution; but they, the former, must sustain the whole burden of the incumbrance to the extent of their purchase. In such case, as the alienor cannot call upon the purchaser for contribution to the relief of the land reserved by him, his subsequent alienee, standing in his place, can occupy no higher ground. Conrad v. Harrison, 3 Leigh 532; McClung v. Beirne, 10 Leigh 394.

The decisions I have cited relate to
457 controversies *between successive assignees or alienees. Here the contest is between an assignor and an assignee: an assignor attempting to compete with his own assignee for preference of payment out of the common fund. The ground taken in the court below for this assumed preference is, that the assignee, by his want of due diligence against the obligor, has lost his right of recourse against the estate of the assignor. I do not think the right of the assignee to subject the land fund results at all from the personal liability of the assignor, or that the failure to pursue the obligor affects the right to enforce the lien upon the land.

The assignee, in the case supposed, has three remedies: An absolute right to resort to the debtor himself; 2d, to the lien upon the land; and 3d, contingently to the assignor himself. The loss of the latter remedy, by the want of due diligence, can no more affect the right of recourse to the land than it can affect the right of reverting to

the debtor himself. The assignment of the bond is, ipso facto, an assignment of the lien. Having once vested by the assignment, that lien is not divested by the failure to sue the debtor. The assignee having two remedies, both absolute and undoubted, may resort to either. The case of Rippordon v. Cogine, 8 B. Mon. R. 465, is a direct authority upon this point. The court say, the fact that the assignee had no recourse upon the assignor, did not sever the lien from the note; but as he (the assignee) acquired the equitable right to the note itself, he acquired with it the equitable right to all remedies for its enforcement. The continued substance of the lien in his (the assignee's) favor, or for his benefit, does not depend upon the subsistence or continuance of a personal liability of
458 the assignor to him, nor upon *there being a written transfer of the note passing the legal title.

In the present case, the charge of laches equally applies to the assignor as to the assignee. At the time of the assignment the first bond had been due several months; the second was not due until the first of January thereafter. So that the assignor had nearly a year the advantage of the assignee in prosecuting a suit against the common debtor. But he wholly failed to take any step to enforce this liability. Under the circumstances, the assignee had the right to suppose the first bond had been paid, or at any rate that it would constitute no obstacle in his way. During all the succeeding years it does not appear he had the slightest intimation the debt had not been paid, or that the assignor claimed the right to appropriate to his exclusive use the benefit of a security he had already transferred to the assignee. Under these circumstances, it seems to me the assignee has the superior equity; and if a loss is to ensue from the partial failure of the security, it ought not to be imposed upon him.

It only remains to notice one other ground taken by the counsel of the appellee—it is, that the vendor reserving the legal title may, upon default in the payment of the purchase money, bring his ejectment against the purchaser, and recover and hold possession of the premises; and he cannot be required to convey the title or surrender the advantage until his purchase money is paid. The argument proves too much. It is conceded that if the vendor assigns the bond first due, the assignee has the preferable right to subject the land; and yet, in that case, the vendor having the legal title may recover in ejectment, and it might be contended with equal reason he could
459 not be compelled *to surrender this advantage, or make a conveyance until the amount of the second bond is paid him. The answer to all this reasoning is, that if the vendor having assigned one of the bonds given for the purchase money, brings his ejectment against the purchaser, and recovers the possession, he recovers in subordination to the rights of the assignee. The assignee having by the assignment acquired the benefit of the lien, whatever it may be, is entitled to all the remedies of the vendor to enforce it. He cannot be deprived of these remedies by any act of the vendor. If the bond in the hands of the assignee is not paid, he may go into a court of equity to enforce the lien. The land being sold under the decree of the court, a commissioner may convey the title to the purchaser. Whether the vendor is or is not satisfied his debt, the sale is effectual to divest him of all interest in or control over the land thus sold under a decree of the court.

I cannot perceive, therefore, how in a contest between the vendor and his assignee the former can derive any advantage from his retention of the legal title, or from the fact that he may recover in ejectment against the purchaser who may be in default. If, as I have attempted to show, the assignee has the preferable right to the land fund, all the rights of the vendor as against the vendee must be held to be in subordination to that right. Upon the whole, whether we consider the case upon general principles, or with reference to the peculiar circumstances attending it, I think the assignee has the superior equity. The decree of the Circuit court must therefore be reversed with costs.

A question arises, however, as to the extent of the reversal. At the time the
460 decree of the Circuit *court was rendered ordering a sale of the land the assignee was not a party to the suit. This was clearly erroneous; no decision ought to have been made adjudicating the question of priority or directing a sale, until the vendor and the assignee, or their representatives, were before the court. Each was directly interested in making the land bring a sum sufficient to satisfy the respective debts. The assignee was, therefore, an indispensable party, and if he and the representatives of the vendor were alone concerned in the subject matter, there would be no difficulty as to the decree to be entered here. But in the meantime a purchaser has intervened; all the purchase money may have been paid, a deed executed, and other valuable rights accrued, which cannot be disregarded by the courts. Now while it is true that a purchaser at a judicial sale must see to it at his peril that all persons who are interested in the title are before the court, this court is not in possession of sufficient information to determine whether this rule can be justly applied to the persons who may be in possession of the land under said decree. The purchaser ought to have an opportunity of being heard. The cause must therefore be remanded to the Circuit court, and if the appellees desire it, a rule awarded against the purchaser to show cause why the sale should not be set aside, and such proceedings thereupon had as the case may require. But in no event is the sale to be set aside and the land resold except at an upset price; and the appellees will be required to give bond with proper security for a substantial advance upon the price stipulated for by the present purchaser.

MONCURE, P., dissented.

461 *The decree was as follows:

This day came again the parties by their attorneys, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the appellant, William H. McClintic, has the preferable right to satisfaction of the bond in his hands out of the proceeds of the sale over the bond retained by the vendor; and that the Circuit court erred in holding that said bonds must be paid in the order in which they matured. It is therefore adjudged, ordered and decreed, that the decree of the Circuit court, of the 14th day of May 1872, be reversed and annulled, and that the appellees pay to the appellant his costs by him expended in the prosecution of his appeal here.

The court is further of opinion that the said Circuit court erred in decreeing a sale of the land until the said William McClintic was, by some proper proceeding, brought before the court, and the question of priority settled between the conflicting claimants. And this court would for said error now reverse the decree of the 16th day of October 1869, and set aside the sale thereunder, but that the purchasers at that sale are interested in the decision of that question, and ought to have an opportunity of being heard in opposition to any order affecting their interest. The court doth therefore order that this cause be remanded to the Circuit court, and that a rule, if desired by the appellees, be awarded by that court against said purchasers, to show cause why said sale shall not be set aside, and the said tract of land be resold; and thereupon the said court shall render such decree in the premises as may be just and proper under
462 all the circumstances. *In no event, however, is said sale to be set aside and a resale ordered, unless the appellees, or some one for them, shall give bond with proper security before said court, for a substantial advance upon the price for which said property heretofore sold. And it is further ajdudged and ordered, that in the event no such resale shall be made, the fund now under the control of the court, the proceeds of the sale of the land is to be applied, or so much of it as is necessary, to the satisfaction of the appellant's debt, and the residue, if any, to that of the appellees. Which is ordered to be certified to the said Circuit court of Bath county.

Decree reversed.

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463 *Brumbaugh v. Wissler's Ex'or.

September Term, 1873, Staunton.

1. **Judgments — Finality — Circuit Courts — Appeal.***—When a Circuit court, upon appeal, reverses the final judgment of the County court and retains cause for a new trial, the judgment of the Circuit court is such a final judgment as is the subject of a writ of error.

2. **Motion for New Trial—Bills of Exceptions—Evidence.†**—Where, upon a motion for a new trial because the verdict is contrary to the evidence, the motion is overruled, if the bill of exception states, not the facts proved but the evidence, and this is conflicting, all the evidence of the party excepting, in conflict with that of the other side, must be disregarded in the appellate court.

This case was decided at the September term 1873 of the court, but was not then directed to be reported. It is now reported by request of counsel, and the direction of the judges.

This was an action of assumpsit in the County court of Shenandoah, brought in May 1868, by J. Brumbaugh against John Wissler, to recover compensation for care and attention to his property at Columbia furnace during the war. It appears that Wissler was a Union man, and in 1862 left the state and made an arrangement with Brumbaugh to attend to and take care of his property. On the trial the jury found a verdict in favor of the plaintiff for $700, with interest from June 1st, 1865. The defendant thereupon moved the court to grant him a new trial, on the ground that the damages were excessive, and that the verdict was contrary to the evidence. But
464 the court *overruled the motion, and rendered a judgment according to the verdict; and the defendant excepted.

The exception contains a statement of the testimony given by the witnesses for the plaintiff and for the defendant; but it is not necessary to state it.

Wissler obtained a supersedeas to the judgment from the judge of the Circuit court; and when the case came on to b heard the Circuit court reversed the judgment of the County court, set aside the verdict, and directed a new trial; and the cause was retained in the Circuit court for further proceedings.

The cause was continued generally in the Circuit court for three terms, and then Brumbaugh applied to this court for a writ of error; which was awarded.

Williams & Williams, for the appellant.

Jno. T. Harris, for the appellee.

BOULDIN, J., delivered the judgment of the court.

This day came again the parties by their attorneys, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments

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***Judgment of Circuit Court Reversing Final Judgment of County Court.**—The rule laid down in the principal case in the first headnote is followed in Crawford v. The Valley R. R. Co., 25 Gratt. 467; Commonwealth v. Lewis, 25 Gratt. 940; Morgan v. Ohio R. R. Co., 39 W. Va. 24, 19 S. E. Rep. 588; The Board of Education of Union District, Kanawha Co. v. Crawford, 14 W. Va. 794.

†**Bills of Exceptions.**—See monographic *note* on "Bills of Exceptions" appended to Stoneman v. Commonwealth, 25 Gratt. 887.

of counsel, is of opinion that the objection taken at the bar, that the judgment appealed from in this case was not a final judgment, and that the writ of error was therefore improvidently awarded, is untenable. The court is of opinion that the judgment was such a final judgment as is the subject of a writ of error. The judgment of the County court, reviewed by the Circuit court, was certainly a final judgment; and it has more than once been held by this court, that such finality is imparted to the judgment of the Circuit court acting as an appellate tribunal, notwithstanding the judgment of the 465 County court may *be reversed by the Circuit court, and the cause be ordered to be retained therein for further proceedings. No such proceedings having been had in the Circuit court in this case, except mere continuances, the judgment of the Circuit court was final, and the writ of error was not improvidently awarded.

The court is further of opinion that the bill of exceptions taken by the defendant in the County court to the judgment of that court, overruling his motion to set aside the verdict of the jury and award him a new trial, upon the ground that the verdict was contrary to the evidence, is not well taken. It evidently contains a certificate, not of the facts proved in the cause, but of all the evidence adduced; and that evidence is conflicting. In such case, it is well established by numerous decisions of this court, that all evidence of the party excepting, in conflict with that of the other side, must be disregarded in the appellate tribunal. The result in this case is fatal to the pretensions of the defendant in the County court. This court cannot say that the evidence adduced by the plaintiff in that court, if uncontradicted, did not justify, or, at the least, tend strongly to the conclusion reached by the jury; and the verdict having been approved by the court of trial, it would be in violation of the uniform and well considered decisions of this court to interfere with it under such circumstances. For these reasons, the court is of opinion that the Circuit court erred in reversing the judgment of the County court, and that the judgment of the latter court should be affirmed. It is therefore considered by this court that the judgment aforesaid of said Circuit court be reversed and annulled, and that the defendant in error, as executor of John Wissler, deceased, out of the assets of his tes- 466 tator, in his hands *to be administered, do pay to the plaintiff in error his costs by him about the prosecution of his writ of error in this court expended.

And this court proceeding to enter such judgment as should have been rendered by said Circuit court, it is further considered that the judgment of the County court be affirmed, and that said Franklin H. Wissler, as executor of John Wissler, deceased, out of the assets of his testator, in his hands to be administered, do pay to the said Joseph Brumbaugh his costs by him about his defense in said Circuit court expended, and damages according to law. All which is ordered to be certified to said Circuit court of Shenandoah county.

Judgment of the Circuit court reversed.

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467 *Crawford v. The Valley R. R. Co.

September Term, 1874, Staunton.

1. **Judgments—Finality—Circuit Court—Appeal.**—When a Circuit court, upon appeal, reverses the final judgment of the County court and retains the cause for a new trial, the judgment of the Circuit court is such a final judgment as is the subject of a writ of error.
2. **Taking of Private Property—Damages—Commissioners' Report.**—Upon the application of a railroad company the County court appoints commissioners to ascertain the damages which will be sustained by C by the passage of the road through his land. The commissioners make their report, which is excepted to by the Company. The report of the commissioners, if no illegality or irregularity appears upon its face, is *prima facie* correct, and the *onus* is upon the Company to show that the damages are excessive.

In May 1872 the Valley Railroad Company moved the County court of Augusta to appoint commissioners to ascertain a just compensation for the lands of William Crawford, wanted by said company for its purposes, in the county of Augusta; and thereupon commissioners were appointed for the purpose. These commissioners proceeded to act, and on the 28th of May they made their return to the court, allowing to said Crawford for the land taken and the damages done to his farm the sum of $5,046.

When the report was returned to the court, the Valley Railroad Company filed exceptions to it, on the grounds that the allowance of $5,046 was excessive, and that the commissioners had included in their estimate speculative and consequential damages.

The case came on to be heard in 468 September 1872, *when the court confirmed the report of the commissioners and rendered a judgment against the Valley Railroad Company, in favor of Crawford for the said sum of $5,046, and his costs. To this opinion and judgment of the court, the Valley Railroad Company excepted; and the evidence was spread upon the record. The Valley Railroad Company had introduced on the trial a number of witnesses who expressed the opinion that the allowance was excessive; and they estimated the damages at from $2,500 to $3,000. On the other hand, Crawford introduced a greater number, none of whom estimated the damages at less than the amount fixed by the commissioners, and several estimated them at a greater sum.

The Valley Railroad Company obtained a supersedeas to the judgment, and the cause came on to be heard in the Circuit court on the 20th of June 1873, when the court reversed the judgment of the County court; and retaining the cause for further proceedings, appointed commissioners to ascertain

the compensation to which Crawford was entitled for his land taken by the company, &c., and make report to the court. And thereupon Crawford applied to this court for a writ of error; which was awarded.

G. M. Cochran and William J. Robertson, for the appellant.

Sheffey & Bumgardner, for the appellee.

BOULDIN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of Augusta county, reversing and annulling a judgment of the County court of said county, by which the sum of $5,046 was awarded the appellant against the appellee, as compensation for land 469 of the *appellant taken by the appellee in the construction of its road, and for damages to the residue of his tract, and the costs of the proceeding.

A preliminary question has been raised by the appellee's counsel in this court. It is insisted that the writ of error should be dismissed as improvidently awarded, because the case on reversal by the Circuit court was retained in that court for further proceedings, and no judgment finally disposing of the case has yet been rendered by said Circuit court.

There can be no doubt about the finality of the judgment of the County court. That judgment was for the amount of compensation and damages awarded by the commissioners, and for costs; it was appealed from by the appellee as a final judgment, and we are of opinion, as above stated, that about its finality there can be no doubt.

When such final judgment has been reversed by the Circuit court and the cause is retained for further proceedings, is it necessary for the judgment creditor in the County court to await the ulterior proceedings in the Circuit court; or may he not at once seek to secure the benefit of his final judgment in the County court, by appealing from the judgment of the Circuit court reversing it?

This question we think is no longer an open one in this court. In the most recent case on the subject, the case of Brumbaugh v. Wissler, decided at September term 1873, and not yet reported, it was held by all the judges that when a final judgment of a County court had been reversed on appeal by the Circuit court, and the cause retained for further proceedings, without acquiescence in such further proceedings by the appellee in the Circuit court, the judgment of reversal was proper subject of ap- 470 peal. The finality of the *judgment of the County court was, for the purpose of appeal, imparted to the judgment of the Circuit court. We think this rule of practice alike reasonable, economical and convenient; and we reaffirm it. Our opinion is, that the writ of error was not improvidently awarded, and the objection is overruled.

On the merits: The appellant insists that the judgment of the Circuit court should be reversed, and that of the County court affirmed, because there was nothing in the record showing that the damages ascertained by the commissioners, and awarded by the judgment of the County court, were excessive, or based on erroneous principles, or were the result of misconduct or mistake on the part of the commissioners.

The appellee, on the other hand, insists that the damages awarded were based on illegal and erroneous estimates, and were exorbitantly excessive.

Without considering the very interesting question which has been so earnestly and so ably discussed at the bar, as to the functions of the commissioners in cases like the present, the capacity in which they act, and the weight and effect in general of their report, we hold it to be clear and unquestionable, under the plain mandate as well as the spirit of the statute, that the report of the commissioners, ascertaining the amount of compensation and damages to be paid to the land owner, must be confirmed by the court, and judgment entered for the amount reported, unless, in the words of the statute, "good cause be shown against it." This makes the commissioner's report, if no illegality nor irregularity appear on its face, at least prima facie evidence of the propriety and correctness of the award of compensation and damages; and that award must therefore stand as the 471 judgment of the *court, or rather, the judgment of the court must accord therewith, unless some sufficient matter be established to vary or arrest it. The land owner may be passive, and the entire onus of showing such sufficient cause is thrown on the objector.

Was good and sufficient cause to alter the report shown in this case? It was attempted; but we concur with the County court in the opinion that the appellee has wholly failed to show "that the commissioners in the discharge of their duties demeaned themselves otherwise than with the strictest propriety; or that they proceeded on other than correct legal principles in making up their appraisement of damages; or that in their estimates of the defendant's damages, as agreed on and reported to the court, they, according to a reasonable probability even, much less plainly and palpably, exceeded the just and proper measure of the defendant's claim to compensation in this case." So far, indeed, from showing palpable error, or any error in the commissioner's report, we are of opinion on the contrary, without undertaking to analyze or to comment in detail on the evidence in the cause, that it abundantly sustains the estimate of the commissioners and the judgment of the County court. In fact, the estimates of a very large majority of the witnesses examined, as intelligent and as well qualified to form a correct judgment as any in the cause, greatly exceed the estimate of the commissioners. We are therefore of opinion that the judgment of the Circuit court reversing that of the County court is erroneous, and

should be reversed and annulled, and the judgment of the County court should be affirmed with costs to the appellant, Crawford, in both courts.

472 *The judgment of the court was as follows:

This day came again the parties by their attorneys, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said judgment of the said Circuit court is erroneous, and that there is no error in the said judgment of the said County court. Therefore it is considered that the said judgment of the said Circuit court be reversed and annulled, and that the plaintiff in error recover against the defendant in error his costs by him expended in the prosecution of his supersedeas aforesaid here; and this court, proceeding to render such judgment as the said Circuit court ought to have rendered, it is further considered that the said judgment of the said County court be affirmed, and that the defendant recover against the plaintiff damages according to law, and his costs by him about his defense in the said Circuit court expended. Which is ordered to be certified to the said Circuit court of Augusta county.

Judgment of the Circuit court reversed.

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473 *Lavell v. Gold's Adm'r.*

September Term, 1874, Staunton.

1. **Chancery Practice—Issue Out of Chancery.**—In a chancery cause, the court directs an issue to be tried at its bar. This issue is tried on the common law side of the court and the verdict is certified to the chancery side of the court; and there is a motion to set it aside and for a new trial. The court sets aside the verdict and directs a new trial of the issue as amended by him; he being the same judge who presided at the trial of the issue. —HELD:

1. **Same—Same—Verdict—Dissatisfaction of Judge.**—It is not necessary for the judge sitting on the common law side of the court to certify to himself on the chancery side, that he is dissatisfied with the verdict; but he may set it aside without such certificate.

2. **Same—Same—Same.**—Another judge holding a subsequent term cannot set aside the order of the judge at the previous term and reinstate the verdict.

3. **Same—Same—Same—Exceptions.**—If the party objecting to set aside the verdict is dissatisfied with the order, he should except to it, and have the fact proved on trial, or the evidence spread upon the record, and thus the order may be reviewed.

This was a suit in equity in the Circuit court of Rockbridge county, instituted in June 1859 by Abraham Lavell against William M. Gold's administrator, to set up and recover the amount of a bond for $1,701, which the plaintiff alleged William M. Gold had executed to him on the 5th of September, 1856, and which he had lost in October 1858; and upon which there was endorsed a credit for $400, and another for $200.

474 Gold's administrator answered, and admitting that *possibly the plaintiff held the bond of his intestate, on which a small balance might be due, he believes said bond was not lost, but the loss was feigned, in order to gain more than the face and the endorsements on the bond would give him.

An immense amount of testimony was taken in the case; and on the 23d of April 1868 the court made an order, that a jury be empanelled at the bar of this court, and sworn to try the following issues:

1st. Did William M. Gold, in his lifetime, execute and deliver to plaintiff, A. Lavell, a writing obligatory, or a note in writing, binding the said William M. Gold to pay the plaintiff the sum of one thousand seven hundred and one dollars; if so, when and what sums, if any, were paid on said obligation or note in writing by said William M. Gold, and at what dates. 2d. If such bond or note was so executed and delivered, has the same been lost or casually destroyed.

The issue came on to be tried in December 1868, at a special term of the court, when the jury found that William M. Gold in his lifetime did not execute and deliver to the plaintiff, A. Lavell, a writing obligatory, or a note in writing, binding said Gold to pay the plaintiff the sum of $1,701; and that no such bond or note in writing has been lost or casually destroyed. All which was ordered to be certified, with the costs of both parties on the trial of the issues, to the chancery side of this court.

Whereupon, the plaintiff moved the court to set aside the verdict of the jury, and to grant him a new trial. And on the 17th of December 1868 "the cause came on to be further heard upon the papers formerly read, and upon the verdict of the jury upon the issues directed to be tried at the bar of this court, and upon the motion of the

475 plaintiff for a new trial upon *said issues: On consideration whereof, the court, not being satisfied with the verdict, doth set the same aside, and doth order and decree that the former order directing an issue be amended, so as to omit the second issue; the matter therein directed to be enquired of by the jury being proper for the consideration of the court, and there being evidence enough in the record to enable this court to decide the question suggested in said second issue upon the decision of the questions involved in the first." It was therefore, for reasons stated, ordered that the first named issue be certified for trial at the bar of the Circuit court of Bath county, &c. And liberty was given the parties to take further testimony.

At the April term of the court for 1869, on the 17th of April, the order made in the cause on the 17th of December 1868 was set aside. And on the 21st of July 1871 the

*For monographic note on Issue Out of Chancery, see end of case.

cause came on to be heard upon the papers formerly read, and the order of the court of April 1869, setting aside the order of December 1868, and the cause now standing upon the verdict of the jury, and the court seeing no reason to set aside said verdict, confirmed the same; and made a decree that the bill be dismissed with costs. And, thereupon, A. Lavell applied to a judge of this court for an appeal; which was allowed.

Sheffey & Bumgardner, Letcher and Pendleton, for the appellant.

Tucker & Christian, for the appellee.

ANDERSON, J. delivered the opinion of the court.

Where an issue out of chancery was directed to be tried at the bar of the
476 common law court, it was a *well established rule of practice, before the common law and chancery jurisdictions were united in the same judge, that the verdict of the jury should be certified by the judge before whom the issue was tried to the chancellor; and that a motion to set aside the verdict, and to direct a new trial, could not be entertained by the common law court, but must be made in the chancery court. But if the judge of the common law court, certified to the chancellor that the verdict was against evidence, it was the duty of the chancellor, at least, if there had not been more than one trial, to set aside the verdict and award a new trial. In Grigsby v. Weaver, 5 Leigh 197, the judge before whom the issue was tried, certified not only that the verdict was against evidence, but also the facts proved. The chancellor not only refused to direct a new trial, but entered a decree, founded upon the verdict, dismissing the bill. And the Court of Appeals—only three judges sitting—affirmed the decree; Brockenbrough, J., dissenting. Judge Carr, referring to Pleasants & als. v. Ross, 1 Wash. 156, and Southall v. McKeand, 1 Wash. 336, says, the farthest they go, is to hold, that as a general rule the chancellor ought not to be satisfied, where the certificate is against the verdict; admitting at the same time that the rule only holds where there is no circumstance appearing to vary the case. Brooke, J., says, that "if the judge had certified the verdict was contrary to the evidence, and no more," he (the chancellor) would have been bound to direct a new trial. Judge Brockenbrough did not think it clear that the judge had no other evidence than what he certified. And he thought the chancellor erred in confirming the verdict and decreeing upon it. He says no case has been produced, in which after a single trial, the certificate of
477 the judge *against the verdict has been entirely disregarded. In that case all the judges concurred in the general rule, that where the judge before whom the issue is tried certifies to the chancellor against the verdict, it is the duty of the chancellor to set it aside, unless it appears from the evidence certified, or circumstances varying the case, that the verdict was wrong.

Since the union of the two jurisdictions of law and chancery in Virginia, although it is the policy of the law, that the distinctive character of the two jurisdictions shall be preserved in the exercise of their respective functions, yet, as prior to the union of the two jurisdictions, the issue might be tried at the bar of either, it cannot now be a matter of any consideration whether it is tried on the common law or the chancery side of the court. Nor can it be material, as the issue is to be tried before the same judge, whether tried on the common law or chancery side of the court, to require the verdict to be certified to the same judge who presided at the trial. Though it might be well to observe this formality, it would be going too far to hold, that the order made by the judge, on the chancery side of his court, in the cause there depending, setting aside the verdict, which he thought contrary to the evidence, should be reversed, because he had not observed the formality of certifying to himself that it was against evidence. The court is therefore of opinion that there was no error in the decretal order made in this cause on the 17th day of September 1868, setting aside the verdict and directing a new trial of the issue, as altered and modified in said order; being of opinion that section 15 of ch. 177, Code of 1860, p. 733, was never designed to take from a court of chancery the power to direct a new trial of an issue in a cause depending therein.

478 *The court is further of opinion that the subsequent order made in the cause, on the 17th of April 1869, setting aside the decretal order of 1868, is unwarranted by anything appearing on the face of the record. We have seen that said decretal order was valid; that it rendered null and void the verdict, and directed a new trial of the issue. If the defendant had felt himself aggrieved by the order setting aside the verdict, he might have excepted to the ruling of the court, and had the facts proved at the trial, or the evidence spread upon the record, and thus said order might be reviewed. But that was not done, and there is nothing in the record to show that said order was erroneous. That decretal order could only be rescinded, and the verdict which it annulled revived, for cause appearing upon the face of the record. No such cause appears, and nothing even assigned as cause for its rescission. It could not have been set aside at a subsequent term, by the arbitrary order of the same judge who made it, much less by another judge who did not preside at the trial of the issue, and who was not informed, so far as this record shows, of what was proved on the trial of the issue. If, when the courts were separate, it was error for the chancellor, not knowing what had been proved on the trial, to ratify the verdict, which had been certified by the judge who presided at the trial to be against evidence, much more would it be error for a judge who had not

presided at the trial, nor been informed as to what was proved, to rescind at a subsequent term the decretal order of the judge who had presided at the trial, setting aside the verdict, and directing a new trial. It does not appear that the judge who set aside the decretal order of 1868, and restored the verdict, was informed as to what was 479 proved on the trial of the *issue, or that he was the same judge who had at a previous term set aside the verdict. It is a fact that he was not the same judge, which may be judicially known, though not appearing upon this record, being evidenced by the public records of the country.

The court is further of opinion that the final decree in this cause being founded upon the aforesaid erroneous order and abrogated verdict, is likewise erroneous.

The court is therefore of opinion, without looking into the merits of this case, or indicating any opinion thereon, to reverse said decree with costs, to set aside and annul the order of April 17th, 1869, which sets aside the decretal order of December 17th, 1868, and to remand the cause for further proceedings to be had therein in conformity with this opinion.

The decree was as follows:

The court is of opinion, for reasons stated in writing, and filed with the record, that there is no error in the decretal order of the 17th day of December 1868, setting aside the verdict of the jury, and directing a new trial on the issue as amended; and that the order of April 17th, 1869, setting aside said decretal order is erroneous, and should be set aside and annulled; and consequently that the decree of July 21st, 1871, founded upon said verdict, is erroneous. It is therefore ordered and decreed that the said last mentioned decree, and the said order of April 17th, 1869, be reversed and annulled; and that the appellee, out of the estate of his intestate, pay to the appellant his costs expended in the prosecution of his appeal aforesaid here; and the cause is remanded to the said Circuit court of Rockbridge county, for further proceedings to be had therein in conformity with this de- 480 cree, *without prejudice to the right of said Circuit court to make any change in the decretal order of December 1868, as to the court at whose bar the issue shall be tried, as may be deemed proper under the circumstances as they may then appear. Which is ordered to be certified to the said Circuit court of Rockbridge county.

Decree reversed.

ISSUE OUT OF CHANCERY.

I. When an Issue Is Proper.
II. Evidence on Trial of Issue.
III. Certificate of Verdict on Trial of Issue.
IV. Issue of *Devisavit Vel Non*.
V. Proceedings in the Appellate Court.

I. WHEN AN ISSUE IS PROPER.

Object of Issue.—The object of directing an issue out of chancery is to satisfy the conscience of the chancellor. Pleasants & Co. v. Ross, 1 Wash. [156] 197; Douglass v. McChesney, 2 Rand. 109; Whitworth v. Adams, 5 Rand. 397; Moseley v. Brown *et als.*, 76 Va. 419; Keagy *et als.* v. Trout, 85 Va. 390, 7 S. E. Rep. 329; Steptoe v. Flood's Adm'r, 31 Gratt. 323; Nease v. Capehart, 15 W. Va. 300.

Court May Direct Issue Ex Miro Motu.—When the evidence in the depositions is conflicting the court may of its own motion direct an issue out of chancery. Meek v. Spracher, 87 Va. 162, 12 S. E. Rep. 397.

Issue Discretionary.—No court of equity is bound to direct an issue, on the mere ground that the evidence is contradictory; but it may judge of the weight of evidence and, if its conscience is satisfied, decide without a jury. Hord's Adm'r v. Colbert, 28 Gratt. 60; Nice v. Purcell, 1 H. & M. 372; Rohrer v. Travers, 11 W. Va. 146; Arnold v. Arnold, 11 W. Va. 449; Anderson v. Cranmer, 11 W. Va. 562; Jarrett v. Jarrett, 11 W. Va. 584; Nease v. Capehart, 15 W. Va. 299; Setzer v. Beale, 19 W. Va. 289; Miller v. Wills, 95 Va. 350, 28 S. E. Rep. 337; Robinson v. Allen, 85 Va. 721, 8 S. E. Rep. 835; Hull v. Watts, 95 Va. 10, 27 S. E. Rep. 829.

When the facts are disputed, the directing of an issue is discretionary with the court. Crebs v. Jones, 79 Va. 381; Carter v. Campbell, Gilmer 170; Williams v. Blakey, 76 Va. 254; Foushee v. Lea, 4 Call 279; Fishburne v. Ferguson, 84 Va. 102, 4 S. E. Rep. 575; Rowton v. Rowton, 1 H. & M. 92; Hord's Adm'r v. Colbert *et al.*, 28 Gratt. 49, and *note*; Wise v. Lamb, 9 Gratt. 294; Robinson v. Allen, 85 Va. 725, 8 S. E. Rep. 835; Stannard v. Graves, 2 Call 310 [369]; Pairo v. Bethell, 75 Va. 825; Beverly v. Rhodes, 86 Va. 419, 10 S. E. Rep. 572; Rohrer v. Travers, 11 W. Va. 147; Setzer v. Beale, 19 W. Va. 289; Samuel v. Marshall, 3 Leigh 567.

This direction is, however, judicial and a mistake in its exercise is a just cause for appeal. Carter v. Carter, 82 Va. 686; Miller v. Wills, 95 Va. 351, 28 S. E. Rep. 337; Beverley v. Walden, 20 Gratt. 154; Stannard v. Graves, 2 Call 310 [369]; Jarrett v. Jarrett, 11 W. Va. 584; Anderson v. Cranmer, 11 W. Va. 562; Setzer v. Beale, 19 W. Va. 289; Reed v. Cline's Heirs, 9 Gratt. 136; Tompkins' Ex'or v. Stephens, 10 W. Va. 156; Powell v. Batson, 4 W. Va. 610; Mahnke v. Neale, 23 W. Va. 58.

Fraud—Conflict of Testimony.—When a deed is charged to be fraudulent and the answer does not confess the fraud, if the testimony be conflicting and unsatisfactory, an issue should be directed. Hooe v. Marquess, 4 Call 416; Chapman v. Chapman, 4 Call 480; Bullock v. Gordon, 4 Munf. 450; Knibb's Ex'or v. Dixon, 1 Rand. 249; West's Ex'or v. Logwood, 6 Munf. 491; Marshall v. Thompson, 2 Munf. 412.

Damages.—When the quantum of damages is uncertain it is proper for the chancellor to direct an issue to try the same. Nagle v. Newton, 22 Gratt. 814; Isler v. Grove, 8 Gratt. 257; Braxton v. Willing, 4 Call 288.

Injunction.—On a bill of injunction to prevent the sale of chattels if defendant alleges adverse possession, for five years and the evidence on this point is doubtful, an issue should be directed to ascertain the truth of the allegation. Galt v. Carter, 6 Munf. 245; Marshall v. Thompson, 2 Munf. 412.

Evidence Conflicting—Witness Impeached.—"As a general rule, where the credit and accuracy of the witnesses are impeached, or where the evidence is conflicting, rendering it necessary to weigh the character and credibility of witnesses, or where the evidence is so equally balanced on both sides that it becomes doubtful which scale preponderates, an issue ought properly to be directed." McCully v. Mc-

Cully, 78 Va. 159; Meek v. Spracher, 87 Va. 171, 12 S. E. Rep. 397; Brent v. Dold, Gilmer 211; Boyd v. Hamilton's Heirs, 6 Munf. 459; Williams v. Blakey, 76 Va. 259; Anderson v. Cranmer, 11 W. Va. 562; Setzer v. Beale, 19 W. Va. 289; Magill v. Manson, 20 Gratt. 527; Snouffer's Adm'r v. Hansbrough, 79 Va. 166; Marshall v. Thompson, 2 Munf. 412; Bullock v. Gordon, 4 Munf. 450; Mettert's Adm'r v. Hagan, 18 Gratt. 231; Nelson's Adm'r v. Armstrong, 5 Gratt. 354; Beale v. Digges, 6 Gratt. 582; Powell v. Batson, 4 W. Va. 610; Nease v. Capehart, 8 W. Va. 95; Cocke v. Upshaw, 6 Munf. 464.

Issue Tried in Equity Court.—When a court of equity has jurisdiction of a case, and it is a case proper for specific performance, such court may, as ancillary to specific performance, decree compensation or damages, and where the ascertainment of damage is asserted in the case before it, the court ought not to send the parties to another forum to litigate their rights but should refer the matter to one of its commissioners, or direct an issue *quantum damnificatus* to be tried at its own bar. Nagle v. Newton, 22 Gratt. 814; Campbell v. Rust, 85 Va. 666, 8 S. E. Rep. 664; Witz, Beidler & Co. v. Mullin, 90 Va. 806, 20 S. E. Rep. 783; Ewing v. Litchfield, 91 Va. 580, 22 S. E. Rep. 362; Ayres v. Robins, 30 Gratt. 118.

Issue Improper.—When the merits of the cause are clear, there being no occasion for an issue, none should be directed. Pryor v. Adams, 1 Call [382] 332; Paynes v. Coles, 1 Munf. 373; Samuel v. Marshall, 3 Leigh 567; Reed v. Cline's Heirs, 9 Gratt. 136; Wise v. Lamb, 9 Gratt. 294; Greer v. Greers, 9 Gratt. 332-333; Love v. Braxton, 5 Call 537; Smith's Adm'r v. Betty, 11 Gratt. 752; Kraker v. Shields, 20 Gratt. 377; Setzer v. Beale, 19 W. Va. 289; Nice v. Purcell, 1 H. & M. 372; Arnold v. Arnold *et al.*, 11 W. Va. 449; Anderson v. Cranmer, 11 W. Va. 562; Jarrett v. Jarrett, 11 W. Va. 584; Watkins v. Young, 31 Gratt. 84; Beverly v. Rhodes, 86 Va. 419, 10 S. E. Rep. 572; Jones v. Christian, 86 Va. 1017, 11 S. E. Rep. 984; Keagy v. Trout, 85 Va. 390, 7 S. E. Rep. 329; Loftus v. Maloney, 89 Va. 576, 16 S. E. Rep. 749; McFarland v. Douglass, 11 W. Va. 637; Hurley v. Oakley Land Co. (Va.), 24 S. E. Rep. 237.

On a bill in equity charging fraud, if the answer positively denies fraud, no issue should be directed unless the plaintiff, by the testimony of two witnesses or of one witness and strong corroborating circumstances, throws the burden of proof on the defendant. Beverley v. Walden, 20 Gratt. 147; Carter v. Carter, 82 Va. 624; Keagy v. Trout *et al.*, 85 Va. 390, 7 S. E. Rep. 329; Smith's Adm'r v. Betty, 11 Gratt. 752; Pryor v. Adams, 1 Call 382; Wise v. Lamb, 9 Gratt. 294; Grigsby v. Weaver, 5 Leigh 197; Vangilder v. Hoffman, 22 W. Va. 8; Sands v. Beardsley, 32 W. Va. 594, 9 S. E. Rep. 925; DeVaughn v. Hustead, 27 W. Va. 773.

In a chancery cause, if upon the state of the proofs at the time the issue is directed, the bill should be dismissed, it is error to direct it; and although the issue is found in favor of the plaintiff, the bill should, notwithstanding, be dismissed at the hearing. Smith v. Betty, 11 Gratt. 752; Jarrett v. Jarrett, 11 W. Va. 584; Vangilder v. Hoffman, 22 W. Va. 8; Mahnke v. Neale, 23 W. Va. 58; Collins v. Jones, 6 Leigh 530; Pryor v. Adams, 1 Call 382; Wise v. Lamb, 9 Gratt. 310; Hudson v. Kline, 9 Gratt. 384; McFarland, Adm'r v. Douglass, 11 W. Va. 637.

Award.—An issue out of chancery, which, by agreement of parties is submitted to arbitrators and decided must be considered an award to be treated accordingly. Pleasants & Co. v. Ross, 1 Wash. [156] 197.

II. EVIDENCE ON TRIAL OF ISSUE.

If, on an issue out of chancery to try the validity of a will, the court gives no directions as to the reading of papers filed in the cause, the omission to read such documents on the trial of the issue when no exception was taken will not be a ground for reversing the proceedings, on refusal of the chancellor to grant a new trial. Ford v. Gardner, 1 H. & M. 72; Paul v. Paul, 2 H. & M. 533; Fant v. Miller, 17 Gratt. 227.

On trial of an issue out of chancery the plaintiff in the issue relies upon a receipt to which there is an attesting witness, but both the witness and the principal are dead. The plaintiff having proved the handwriting of the witness, the defendant may introduce testimony to show that the name of the principal to the receipt is not in his handwriting. Steptoe v. Flood's Adm'r, 31 Gratt. 323.

On the trial of an issue out of chancery any papers may be read which were read at the hearing of the cause. McCall v. Graham (1806), 1 H. & M. 13.

Depositions cannot be regularly read on the trial of an issue directed by the chancellor, unless by his special order. Powell v. Manson, 22 Gratt. 177; Joslyn v. Bank, 86 Va. 289, 10 S. E. Rep. 166; Paul v. Paul, 2 H. & M. 525; (1808). See monographic *note* on "Depositions" appended to Field v. Brown, 24 Gratt. 74. See monographic *note* on "Answers in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

III. CERTIFICATE OF VERDICT ON TRIAL OF ISSUE.

If the court which tries the issue is dissatisfied with the verdict it should be so certified on the record. If the trial court deems the verdict just, counsel may have a bill of exceptions; but no affidavit of counsel will supply the place of this bill. Stannard v. Graves, 2 Call 310 [369]; Nease v. Capehart, 15 W. Va. 300; Fitzhugh's Ex'ors v. Fitzhugh, 11 Gratt. 210; Lee's Ex'or v. Boak, 11 Gratt. 182; Ayres v. Robins, 30 Gratt. 119; Joslyn v. Bank, 86 Va. 289, 10 S. E. Rep. 166; Paul v. Paul, 2 H. & M. 525; Lamberts v. Cooper's Ex'or, 29 Gratt. 65.

Certificate of Exceptions Unnecessary.—If the court certifies the verdict it is not necessary to expressly certify the exceptions. Watkins v. Carlton, 10 Leigh 560; Lamberts v. Cooper's Ex'or, 29 Gratt. 65.

Verdict Contrary to the Evidence.—On issue out of chancery, if the judge before whom the issue is tried certifies that the verdict is contrary to the facts, the chancellor ought not *usually* to be satisfied with it. Southall v. McKeand, 1 Wash. 437 [338]; Pleasants & Co. v. Ross, 1 Wash. 197 [156]; Fishburne v. Ferguson, 84 Va. 101, 4 S. E. Rep. 575; Love v. Braxton, 5 Call 542.

New Trial Discretionary.—But the chancellor is not bound to direct a new trial in such case. He may use his discretion subject to reversal in the appellate court. If the chancellor's conscience is satisfied, he may refuse a new trial. Miller v. Wills, 95 Va. 337, 28 S. E. Rep. 337; Snouffer's Adm'r v. Hansbrough, 79 Va. 166; Ross v. Pynes, 3 Call 490 [568]; Grigsby v. Weaver, 5 Leigh 212 [197]; Lavell v. Gold's Adm'r, 25 Gratt. 476.

After two concurring verdicts on an issue directed he may have large discretion to refuse a new trial though the judges who tried the issue certify the decisions to be contrary to the evidence. McRae's Ex'ors v. Woods' Ex'or, 1 H. & M. 548.

Certificate in Favor of the Verdict.—When the judge before whom the issue is tried certifies in favor of the verdict, no new trial ought to be granted. In

determining the weight of the evidence it should be remembered that *viva voce* testimony as well as written was admissible in the trial of the issue, and though the verdict be against the documentary testimony it may not be contrary to the weight of the evidence. Paul v. Paul, 2 H. & M. 533; Ford v. Gardner, 1 H. & M. 72.

Verdict Conclusive.—When an issue is properly directed and regularly tried the verdict of the jury is conclusive on the conscience of the chancellor unless some real ground exist for setting it aside. Pleasants v. Ross, 1 Wash. 156; Paul v. Paul, 2 H. & M. 525; Nease v. Capehart, 15 W. Va. 299; McCully v. McCully, 78 Va. 159; Fishburne v. Ferguson, 84 Va. 102, 4 S. E. Rep. 575; Carter v. Campbell, Gilmer 159; Marshall v. Marshall, 18 W. Va. 395; Southall v. McKeand, 1 Wash. 434 [336].

If, however, the verdict is not responsive to the issue, it must be set aside and a new trial granted. Marshall v. Marshall, 18 W. Va. 395; Com. v. Mister, 79 Va. 5.

IV. ISSUE OF DEVISAVIT VEL NON.

When the issue directed is *devisavit vel non*, it is the sole object and not a mere incident of the suit, and the chancery court is bound to decree according to the verdict unless for good cause shown. Lamberts v. Cooper's Ex'or, 29 Gratt. 61; Malone's Adm'r v. Hobbs, 1 Rob. 367; Almond v. Wilson, 75 Va. 613-626; Reed v. Axtell, 84 Va. 236, 4 S. E. Rep. 587.

The court trying such issue may itself grant a new trial without referring the cause back to the chancery court. Lamberts v. Cooper's Ex'or, 29 Gratt. 61.

Trial at Bar of Chancery Court.—The chancery court may direct the issue of *devisavit vel non* to be tried at its own bar by a jury under the direction of the court. Coalter's Ex'or v. Bryan, 1 Gratt. 18.

In the trial of this issue the court acts merely as a court of probate and should not decide other questions not connected with the issue. Coalter v. Bryan, 1 Gratt. 18; Malone's Adm'r v. Hobbs, 1 Rob. 346; Connolly v. Connolly, 32 Gratt. 657; Kincheloe v. Kincheloe, 11 Leigh 399; Hartman v. Strickler, 82 Va. 229; Lamberts v. Cooper, 29 Gratt. 62; Kirby v. Kirby, 84 Va. 629, 5 S. E. Rep. 539.

Exceptions on Trial of Devisavit Vel Non.—On trial of an issue *devisavit vel non*, if one of the parties object to the admission of a person to testify or object to the admission of evidence, and the objections are overruled, if the objector takes no exception and does not signify his intention to except before the verdict is rendered, he will be considered as waiving such objection. Lamberts v. Cooper, 29 Gratt. 61; Peery's Adm'r v. Peery, 26 Gratt. 324; Montague v. Allan's Ex'or, 78 Va. 592; See Va. Code 1887, § 2542; Pollard's Supp. 1900, § 3381.

V. PROCEEDINGS IN THE APPELLATE COURT.

Issue Improperly Directed.—If a court of chancery directs an issue to be taken in an improper manner and evidence not regularly taken is introduced, the appellate court will set aside the issues and order a new trial. Watkins v. Carlton, 10 Leigh 560-573.

Proceedings When Evidence Is Certified.—On a motion for a new trial of an issue out of chancery, if the motion is overruled and the *evidence* certified the appellate court will consider, on review of the whole case, whether further investigation is necessary to attain the ends of justice. Steptoe v. Pollard, 30 Gratt. 705; Powell & Wife v. Manson, 22 Gratt. 177; Lamberts v. Cooper's Ex'or, 29 Gratt. 66; Snouffer v. Hansbrough, 79 Va. 166; Burwell v. Corbin, 1 Rand. 153; Barnum v. Barnum, 83 Va. 365, 5 S. E. Rep. 372; George v. Pilcher, 28 Gratt. 299.

This is true though there have been two new trials of the issue in the lower court. Ruffners v. Barrett, 6 Munf. 207; Ross v. Pynes, 3 Call 568; M'Rae's Ex'ors v. Woods, 1 H. & M. 548.

Appeal from an Interlocutory Decree.—Though a decree be interlocutory the court of appeals has jurisdiction by statute to entertain an appeal, if the decree adjudicates the principles of the cause. Elder's Ex'ors v. Harris, 75 Va. 68; Reed v. Cline's Heirs, 9 Gratt. 136; Alexander v. Byrd, 85 Va. 696, 8 S. E. Rep. 577.

Rule of Decision When Verdict is Contrary to the Evidence.—On exception for refusal to grant a new trial because the verdict is contrary to the evidence, the decision of the lower court should be affirmed unless plainly wrong. Patteson v. Ford, 2 Gratt. 18; Grayson's Case, 6 Gratt. 712; Kates' Case, 17 Gratt. 561; Oneale's Case, 17 Gratt. 582; Kemp's Case, 18 Gratt. 977; Blosser v. Harshbarger, 21 Gratt. 216; Nicholas' Case, 91 Va. 741, 21 S. E. Rep. 364; Hilb v. Peyton, 22 Gratt. 550; Blair v. Wilson, 28 Gratt. 175; Pryor's Case, 27 Gratt. 1009; Steptoe v. Flood, 31 Gratt. 342.

The Old Rule.—Where in such case the evidence is certified the *old rule* was that the appellate court would not reverse the lower court unless, on rejecting all the *parol* evidence of the party excepting, and giving full faith to the evidence of the adverse party, the judgment still appears to be wrong. Bank v. Hambrick, 82 Va. 135; Farley v. Tillar, 81 Va. 275; Daingerfield v. Thompson, 33 Gratt. 136; Danville Bank v. Waddill's Adm'r, 31 Gratt. 469; Brumbaugh v. Wissler's Ex'or, 25 Gratt. 463; Gimmi v. Cullen, 20 Gratt 439; Carrington v. Goddin, 13 Gratt. 587; Pasley v. English, 5 Gratt. 141; Hartman v. Strickler, 82 Va. 225.

Rule by Statute.—Va. Code 1887, § 3484, made the rule that in such case the appellate court should consider the decision "as on demurrer to the evidence by the party excepting." Tucker v. Sandidge, 85 Va. 546, 8 S. E. Rep. 650; Ice Co. v. King, 86 Va. 97, 9 S. E. Rep. 506; So. W. Imp. Co. v. Smith's Adm'r, 85 Va. 306, 7 S. E. Rep. 365; Sutton v. Com., 85 Va. 128, 7 S. E. Rep. 323; Mears & Lewis v. Dexter, 86 Va. 828, 11 S. E. Rep. 538; Stearns v. City of Richmond, 88 Va. 992, 14 S. E. Rep. 847; Tucker v. Com., 88 Va. 20, 13 S. E. Rep. 298; N. & W. R. Co. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. Rep. 454; Bell v. Com., 88 Va. 365, 13 S. E. Rep. 742; Lyles v. Com., 88 Va. 396, 13 S. E. Rep. 802; Ins. Co. v. Buck, 88 Va. 517, 13 S. E. Rep. 973; R. & D. R. Co. v. Burnett, 88 Va. 538, 14 S. E. Rep. 372; Gaines v. Com., 88 Va. 682, 14 S. E. Rep. 375.

Rule by Amended Statute.—But when there have been two trials in the lower court the rule of decision is for the appellate court to look first to the *evidence* and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial, it shall set aside and annul all proceedings subsequent to the said verdict and enter judgment thereon. Mears v. Dexter, 86 Va. 828, 11 S. E. Rep. 538; Stearns v. City of Richmond, 88 Va. 992, 14 S. E. Rep. 847; Pollard's Supp. 1900, § 3484.

Demurrer to Evidence.—The rule of decision in case of demurrer to evidence is that demurrant admits the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and waives *all* his own evidence, whether oral or documentary, which conflicts with that of his adversary, and all inferences from his own evi-

dence (though not in conflict with his adversary's) which do not *necessarily* result therefrom. Whittington v. Christian, 2 Rand. 357; Green v. Judith, 5 Rand. 1; Hansbrough's Ex'ors v. Thom. 3 Leigh 147; R. Co. v. Miles, 76 Va. 773; R. & D. R. Co. v. Anderson, 31 Gratt. 819-820; Rudd's Adm'r v. R. & D. R. Co., 80 Va. 546; Creekmur v. Creekmur, 75 Va. 482; Johnson's Adm'r v. C. & O. Ry. Co., 91 Va. 171, 21 S. E. Rep. 238; Va. Imp. Co. v. Hoover, 82 Va. 449; Jones v. Cotton Mills, 82 Va. 140; Farley's Adm'r v. R. & D. R. Co., 81 Va. 783.

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481 *Burnett & Wife v. Hawpe's Ex'or.

September Term, 1874, Staunton.

I. **Married Women—Equitable Separate Estate.**—A married woman, as to property settled to her separate use, is to be regarded as a feme sole, and has a right to dispose of all her separate personal estate and the rents and profits of her separate real estate in the same manner as if she were a feme sole; unless her power of alienation is restrained by the instrument creating the estate.

II. **Same—Same—Jus Disponendi.***—As incident to this *jus disponendi* a feme covert may charge the separate estate with the payment of her debts. She may charge it as principal or surety, for her own benefit, or that of another. She may appropriate it to the payment of her husband's debts. She may even give it to him if she pleases, no improper influence being exerted over her.

III. **Same—Same—Same—Trustee.**—Although the separate estate is conveyed to a trustee, his assent is not necessary to a valid alienation or charge by the wife, unless it is required expressly, or by strong implication, in the instrument under which the property is derived.

IV. **Same—Same—Same—Intention.**—It is not enough that the wife has the separate estate; it must also appear that it was her intention to charge it with the debt in question.

V. **Same—Same—Same—Same.**—If a wife contracts a debt for herself, or for her husband, or jointly with him, the instrument executed by her is sufficient to charge her separate estate without any proof of a positive intention to do so, or even a reference to such estate, contained in the writing.

VI. **Same—Same—Creation.**—Testator gives to his daughter S real and personal estate, for her own separate use, free from the control and debts of her husband; and in like manner gives her the rents and profits of another farm for her life. And he provides that the trustee shall control all the said real and personal estate, to carry out the provisions of the will, so as not to give any control of the real and personal estate to the husband, or be subject to his debts or liabilities. And he appoints his executor the trustee. A slave belonging to the testator was in the possession
482 *of S and her husband at the death of the testator, and the executor requires them to surrender the slave, that she may be sold, or to purchase her. The husband agrees to purchase the slave, but the executor is not willing to take his bond unless S will join in it. She expresses her unwillingness to sign the bond, but being told by her husband that she must do it, or the slave must be given up, she signs it—HELD:

1. **Same—Same—Same.**—The chief object of the testator was to deprive the husband of all control over the property; and the consent of the trustee is not made necessary to the alienation of the property by the wife.
2. **Same—Same—Trustee.**—The trustee having, as executor, sold the slave and taken the bond, his assent, if necessary, was given.
3. **Same—Same—Same—Liabilities.**—The concurrence of the trustee not being necessary to enable the wife to dispose of, or charge the estate, he cannot be held liable for any improper alienation of it on her part.
4. **Same—Same—Charging with Debts.**—If the wife may charge her estate with the payment of her husband's debts, without the consent of the trustee, the mere fact that he was a party to the transaction, giving his consent, cannot impose upon him any additional responsibility.
5. **Same—Same—Undue Influence.**—What was said to the wife is not sufficient to show the exercise of any improper influence on the part of her husband or of the executor.
6. **Same—Same—Same.**—In this class of trusts the wife may execute a bond to the trustee, if it is founded on a valid consideration, and free from the imputation of fraud and undue influence.
7. **Same—Same—Equity Jurisdiction.**—S having sold her interest in the rents and profits, given to her for life, and having received some five-sixths of the purchase money, and recovered a judgment for the balance, a court of equity may subject that debt to the payment of her bond to the executor.

Henry Hawpe, of the county of Augusta, died in March or April 1859, leaving a will which was duly admitted to probate in the County court. He left two daughters, M. A. McKee and Elizabeth Steele, and he appointed David Blackwood his executor, and also trustee to carry out the wishes of his will.

483 *By the third clause of his will he devised to his daughter, Mrs. Steele, a farm on which she lived, called the "Brown" farm, for her sole use, and free from the control, debts or liabilities of her husband, J. H. Steele, and at her death then to go in remainder to her children in fee simple, in equal parts.

By the fifth clause of his will he gave to Mrs. McKee and Mrs. Steele, in equal shares, certain specified personal property, and directed how it should be divided between them; his said daughters to have full control over said property, free from the control, debts or liabilities of either of their husbands.

By the seventh clause he directs that the farm upon which William J. McKee lives shall fall into the hands of a trustee hereafter named, to have cropped, and the proceeds of such lands, after keeping up all necessary repairs to the building, to be paid over annually to his daughter, Mrs. Steele, for her sole and separate use as long

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***Wife's Equitable Separate Estate—Jus Disponendi.**—Practically all the cases on this subject are collected in annotations to Darnall & Wife v. Smith, 26 Gratt. 878; Garland v. Pamplin, 32 Gratt. 305; Irvine v. Greever, 32 Gratt. 411; Justis v. English, 30 Gratt. 565; Ropp v. Minor, 33 Gratt. 97; Frank v. Lilienfeld, 33 Gratt. 377.

as she lives; and at her death then to the children of Mrs. McKee.

By the eighth clause he directs that his executor shall sell his servants, letting them choose their masters or mistresses, his horses, &c., and the trustees aftermentioned shall take the proceeds of such sale as well as all moneys on hand, bonds and accounts, put the same out at interest, properly secured, and the interest annually collected and loaned out, and so kept at interest for the benefit of the children of his daughters, Mrs. McKee and Mrs. Steele, and paid out to each of them in equal parts as they arrive at age; the said trustee controlling all his said real and personal estate as to carry out the provisions of his will, so as not to give any control of real or personal estate to either of the husbands of his said daughters or to be subject to their debts or liabilities.

484 *At the time of the death of the testator, Hawpe, Mr. and Mrs. Steele had in their possession a negro girl belonging to Hawpe; and after his death Blackwood, the executor, insisted that the girl should be given up to him to be sold, or that Steele should buy her. Steele thereupon agreed to buy her, and he executed to the executor for the price of the girl two bonds, one for $230, and the other for $166.75, both payable in nine months. These bonds were signed by Steele and James Allen as his surety. They then requested Mrs. Steele to sign them, but she rather refused and said she did not want to sign them; but Steele said if she did not go on the bond the negro would have to be sold, as she could not keep her unless she did; and she then executed the bond.

Steele having died insolvent, Blackwood proceeded against Allen to recover the amount of the said two bonds; but the judgments recovered against Allen proved unavailing, and a short time after their recovery he died insolvent. Blackwood then instituted a suit in equity in the County court of Augusta, against Samuel M. Burnett and his wife, who was Mrs. Steele, and had intermarried with Burnett in 1871, and William J. McKee; and in his bill he set out the will of his testator and the execution of the bonds by Mr. Steele and his wife, and the insolvency and death of Steele and Allen. He says that Mrs. Burnett was still in possession of the Brown farm, and the principal portion of the personal estate bequeathed to her separate use. That since the death of J. H. Steele, Mrs. Steele had sold the interest devised to her in the farm upon which Mrs. McKee lived to William J. McKee, the husband of Mrs. M. McKee; that a portion if not all of the purchase money remains unpaid, and particularly one bond of $600 still exists, upon which Mrs.

485 *Steele has recently instituted suit.

The prayer of the bill is that the separate estate of Mrs. Burnett may be subjected for the payment of said bonds, and for general relief.

Burnett and his wife demurred to the bill, and also answered. They insist that the plaintiff, who was the trustee appointed by her testator to protect her interests, had prevailed on the female respondent, ignorant of such transactions and of her legal rights and liabilities, to unite with her husband and sign the bonds taken for the slave sold to him. They insist further, that she being under the disability of coverture could not make a contract or execute a valid obligation; and the will of her father, creating the trust, did not give any such power.

McKee answered, admitting the facts stated in the bill, so far as they related to him, were true; and that Burnett and his wife had recovered a judgment against him; for the amount of which he is willing that a decree may be made against him.

The cause came on to be heard in March 1873, when the court held that the plaintiff was entitled in equity to subject the personal estate and the rents and profits of the real estate of Mrs. Burnett, to the satisfaction of the said bonds, and that he was entitled to resort to the judgment recovered in the court, of Burnett & wife v. McKee. And having enjoined Burnett and wife from proceeding to collect said judgment, it was decreed that William J. McKee should pay to the plaintiff the amount of said judgment, viz: $507.68, with interest from the 15th of June 1872, and $4.57 costs, in satisfaction, pro tanto, of the claim of the plaintiff against the separate estate of the defendant E. D. Burnett. And a commissioner was directed to take an account, first, of the personal estate to which

486 *Mrs. Burnett is entitled as her separate property; second, an account of the real estate to which she is entitled, and the annual rental value thereof. Burnett and wife thereupon obtained an appeal to the Circuit court of Augusta, where the decree was affirmed. And then they applied to this court for an appeal; which was allowed.

Fultz, for the appellants.

Sheffey & Bumgardner, for the appellee.

STAPLES, J., delivered the opinion of the court.

It is the established doctrine of this court, that a married woman, as to property settled to her separate use, is to be regarded as a feme sole, and has the right to dispose of all her separate personal estate, and the rents and profits of her separate real estate, in the same manner as if she were a feme sole, unless her power of alienation be restrained by the instrument creating the estate. West v. West's ex'ors, 3 Rand. 373; Vizonneau v. Pegram et als., 2 Leigh 183; Woodson, trustee, v. Perkins, 5 Gratt. 346.

As incident to this jus disponendi, a feme covert may charge the separate estate with the payment of her debts. She may charge it as principal or as surety for her own benefit, or that of another. She may appropriate it to the payment of her husband's debts. She may even give it to him if she pleases, no improper influence being exerted over

her. Penn v. Whitehead, 17 Gratt. 503; Muller v. Bailey, 21 Gratt. 521; Hill on Trustees 424; Schouler's Domestic Rel. 219, 225; 1 Bishop on the Law of Married Women, sec. 848. And although the separate estate is conveyed to a trustee, his assent is not necessary to a valid
487 alienation *or charge by the wife, unless it is required expressly or by strong implication in the instrument under which the property is derived.

In Hulme v. Tenant & wife, 1 Bro. Ch. R. 16, the estates of the wife had been conveyed to trustees upon the trust to receive and pay the rents and profits to the wife for her separate use. Lord Thurlow said the mere appointment of trustees is not sufficient to deprive the wife of the authority to bind her separate estate, unless their consent is made essential; and he decreed the payment of a bond executed by the husband and wife out of the rents and profits of her separate real estate.

In Vizonneau v. Pegram, already referred to, the settlement provided that the separate estate should be held by a trustee for the use of the wife: notwithstanding, this court said she must be regarded as the absolute owner, and should be permitted any disposition that she might desire to make. It was decreed that the entire fund should be taken from the trustee and paid to her. If other authority upon this point were needed, it may be found in Essex v. Atkins, 14 Ves. R. 542; Tawney v. Ward, 1 Beav. R. 563; Baker v. Newton, 2 Beav. R. 112; 2 Bright's husband and wife 220; Schouler's Domestic Rel. 219 to 225.

But it is not enough that the wife has the separate estate; it must also appear that it was her intention to charge it with the debt in question. In some of the cases it is held that when the debt is not for the benefit of the wife herself but for another person—for example, when she executes the obligation merely as surety—it is essential that the writing shall contain some reference to the separate estate indicating a purpose to create the charge.

In other cases, it has been decided
488 that if the wife *execute a bond or note as principal or as surety, she must be presumed to have intended a charge on her estate, since in no other way can the instrument be made effectual. And this is the prevailing opinion, supported by a great weight of authority. So that it must be taken as the settled rule, that if the wife contract a debt as principal or as surety for herself, or for her husband, or jointly with him, the instrument executed by her is sufficient to charge her separate estate without any proof of a positive intention to do so, or even a reference to such estate contained in the writing. 2 Story's Eq. Jur., sec. 1400; Schouler's Domestic Rel. 230.

It is with reference to these principles the present case must be decided. The bond in controversy was given by Steele, the husband, with his wife as surety, for a slave purchased from the executor of the estate, in which the wife was interested as legatee and devisee. The executor was not willing to take the husband's bond unless Mrs. Steele would also join in its execution. It is very clear, that Mrs. Steele was well aware that in signing the bond she was creating a charge upon her separate estate, and that in the end her property might be taken to satisfy the debt. And although she consented with some reluctance to sign the bond, she was willing to incur the hazard rather than surrender the slave to the executor.

But apart from the peculiar circumstances attending this transaction, the bond itself under the rule already mentioned, must be considered as satisfactory evidence of a purpose on the part of Mrs. Steele in signing it as surety to charge her separate property with the payment of the debt.

The next question to be considered is, had she the power to create such charge
489 under the will of her *father. By the third clause of the will the "Brown farm" is given to her for her sole and separate use, free from the control and management and debts of her husband; and at her death to go in remainder to her children.

By the fifth clause she is given full control of the personal property therein bequeathed to her, free from the liabilities or debts of her husband. By the seventh clause it is directed that the farm upon which William J. McKee resides, shall pass into the hands of a trustee, and be managed by him, and the net proceeds to be paid over annually to Mrs. Steele, for her sole and separate use, as long as she lives, and at her death to go in remainder to the children of Mrs. McKee in fee simple in equal parts.

And in the eighth clause it is provided that the trustee shall control all the said real and personal estate to carry out the provisions of the will, so as not to give any control of the real and personal estate to the husband, or to be subject to his liabilities. It will be perceived that the chief object of the testator in thus disposing of his property was to deprive the husband of all manner of control of the estate given to the wife, and to protect it against any liability for his debts. It will be also observed, that the concurrence of the trustee is not made necessary to the wife's alienation of the property given to her. It is true that the estate is subject to the control of the trustee, but the manifest intention was not to interfere with the dominion of the wife, but with that of the husband. The testator, in effect, so declares in the eighth clause of the will. But if it be conceded that by the terms of the settlement, the assent of the trustee was necessary, that was expressly given; he, in his character
490 *of executor having made the sale and taken the bond in controversy.

The learned counsel insists, however, that the trustee in becoming a party to such a transaction committed a breach of trust; that it was his duty to protect the separate estate against the improvidence of the wife and the influence of the husband. If, as I

have attempted to show, the concurrence of the trustee was not necessary to enable the wife to dispose of or create a charge upon the separate estate, it is clear he cannot be held liable for any improper alienation of it on her part. If the wife may charge the estate with the payment of her husband's debts, without the consent of the trustee, the mere fact that he was a party to the transaction, giving his consent, cannot impose upon him any additional responsibility.

It is very certain there is nothing in the transaction itself incompatible with the obligations and duties of the trustee.

It was incumbent upon him as executor to make sale of the slave in the possession of Mr. and Mrs. Steele, a family servant belonging to the estate of the testator. As I have before stated, they were anxious to retain the slave, and it was finally agreed that Steele should purchase her. There were also other articles of personal property, of no great value, belonging to the estate, which Steele seems to have been anxious to buy. He was, however, unable to give the necessary security, unless Mrs. Steele would join in the bond. And she was informed, unless she would do so, the slave would have to be given up to the executor. This was the extent of the argument used to induce her to join in the execution of the bond. It certainly is not sufficient to show the exercise of any 491 improper influence *on the part of the husband or of the executor. The latter manifestly derived no benefit from the purchase. It is impossible, therefore, to attribute any improper motive to him. His evident purpose was to discharge his duty to the estate, and at the same time to gratify the wishes of Mr. and Mrs. Steele. It is true that Steele appears to have been an improvident man, and embarrassed in his pecuniary matters. But this is not sufficient to vacate the contract, if, in other respects, valid as to the wife. If she may charge the separate estate with the payment of her husband's debts, she may exercise that power in his behalf, whatever may be his pecuniary condition. The validity of her obligation does not depend upon his solvency. The courts will closely scrutinize transactions of this character between husband and wife; but if no undue influence appears, there is no alternative but to sustain them.

The same is true with reference to the trustee in this class of trusts. There is no reason why the wife may not execute a bond to him if founded upon a valid consideration, and free from the imputation of fraud and undue influence. In Duncan v. Gardner, Lord Hardwicke said, "that if the wife sell her separate estate to her trustee for an adequate consideration, and the transaction be bona fide, the sale will be sustained."

In Parkes v. White, 11 Ves. R. 210, 222, Lord Eldon said, "the wife had the right to dispose of the estate as a feme sole, and that 'White' being a mere trustee to preserve contingent remainders, and to pay the rents to the wife's separate use, was not such a trustee to whom the doctrine of the courts in regard to trustees buying trust property applied."

In Essex v. Atkins, 14 Ves. R. 542, 492 Sir William *Grant declared, "that if upon the whole evidence the wife was a free agent, and understood what she did, the court had no choice, but must give effect to her contract." See also Grigsby v. Cox, 1 Ves. Sen. R. 517.

Applying these plain tests to the case before us, it is difficult to escape the conclusion, that the separate estate is chargeable with the debt in question. Subsequent events show that the purchase of the slave was unwise; but the court can only look at the transaction as it occurred, and not by the light of subsequent events. So regarding it, we have no choice but to enforce the debt out of the separate property by a decree against the personal estate, and the rents and profits of her real estate.

The record discloses the fact, that Mrs. Steele, after the death of her first husband, sold and conveyed her interest in the McKee tract, mentioned in the seventh clause of the will, and that all the purchase money has been paid, except the sum of $507.68, for which a judgment was recovered against the purchaser. The Circuit court rendered a decree for this sum in favor of the plaintiff in this suit, requiring the judgment debtor to pay the amount to him. It is insisted that this is erroneous, because it is an appropriation of the principal of the fund, whereas the plaintiff is only entitled to the interest as a substitute for the rents and profits of the tract.

It does not distinctly appear what was the price paid, or stipulated to be paid, by the purchaser. It may be fairly inferred it was about $1,250, in instalments of $208.33 each. The amount decreed by the Circuit court would about equal one of these instalments, and a part of another with their accruing interest—rather more than one-sixth of the purchase money—Mrs. Steele having, by her alienation of this 493 *tract, withdrawn the rents from the control of the court, and placed them beyond the reach of the creditor, the court may justly subject so much of the principal money, by way of substitution, as will constitute a just compensation for the rents and profits. The amount thus appropriated by the decree does not exceed what might have been derived from the land itself had it continued in the possession of Mrs. Steele. No injury is done Mrs. Steele by this application of the purchase money, because the effect is to relieve pro tanto the remaining separate estate in her possession. Upon the whole, I think there is no error in the decree, and it must therefore be affirmed.

In arriving at this conclusion, I must be permitted to say for myself, that if the question was res integra, it would be a matter of grave consideration whether it would not better accord with justice, humanity and the intention of the parties to hold with Chancellor Kent, that the right of a married woman to dispose of or encum-

ber her separate estate is not absolute, but only sub modo, to the extent of the power given her by the instrument creating the estate. The doctrine of the courts as now expounded, while protecting the wife against the debts of her husband, leaves her helpless and exposed not only to her generous impulses in his favor, but to his secret influences, as difficult to be resisted as they are to be detected. The law upon this subject is, however, too firmly established, in this state at least, to be now called in question. And it must be admitted there is great force in the idea that the courts having once established that a married woman may hold separate estate as a feme sole, the jus disponendi necessarily followed as an incident to the estate. Restrictions upon the power of alienating or charging the estate are modifications of the 494 right of *property, and can, of course, only exist when found in the instrument under which the estate is derived. Besides, as has been said by Chief Justice Gibson, considerations of this sort are better addressed to those who frame settlements than to those who interpret them. If they have not chosen to do it; if they have made the use in the married woman general, employing the broad term and no restraining words, why should a judge who may think differently from them of what is expedient undertake to alter what they have provided. Thomas v. Folwell, 2 Wharton R. 11. The remedy is not in the courts, but with those who create the estates.

Decree affirmed.

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495 *Hansbrough & Wife v. Stinnett.

September Term, 1874, Staunton.

1. **Slander—Actionable Words.**—In an action for slander at common law, the words charged are, "D killed my beef." There being no colloquium, the words not necessarily importing a felony, they cannot be extended in their meaning by the innuendo.

2. **Same—Same.**—In such case, the words themselves not being actionable at common law, unless the averment of extrinsic facts and the colloquium concerning them show that the defendant in speaking the words laid, imputed the crime of felony, they are not actionable.

3. **Same—Practice—Amendment of Declaration.***—After all the evidence has been introduced on the trial of an action at law, the plaintiff is not to be permitted to add another count to his declaration: the amendment being material to the merits, and therefore not allowable.

4. **Same—Evidence—Damages.**—When the words laid in the declaration have been proved—and not before—proof of the speaking of like words as those laid, either before or after they were spoken, is admissible to affect the measure of damages.

5. **Same—Depositions.**—A deposition which has been read to the jury may be taken with them in their retirement, if what is objectionable in it has been erased.

6. **Practice—On Appeal—Amendment of Declaration.**—There is a demurrer to a declaration, which is overruled: but upon appeal the judgment is reversed. When the case goes back, the plaintiff may be allowed to amend his declaration.

This was an action for slander, brought in June 1866 in the Circuit court of Botetourt county, by Richard Stinnett against Ann S. Gorgas. Pending the action in the Circuit court, the defendant married Hiram Hansbrough, and he was made a defendant. The declaration contained seven 496 counts, charging the *slander to have been uttered in February 1864. The defendants demurred to the declaration and each count thereof. But the court overruled the demurrer. They also pleaded "not guilty," on which issue was joined; and they filed a plea of the statute of limitations of one year. To this plea the plaintiff replied that by the laws of the state in force at the time of the committing of the grievances complained of in the declaration, and at the time the action was brought, it was not necessary to bring said action within one year after the committing of said grievances, &c. To this replication the defendants demurred; but the court overruled the demurrer.

After all the evidence had been introduced, and the parties announced that the case was closed, the plaintiff moved the court to be permitted to add another count to his declaration; which was objected to by the defendants; but the court overruled the objection, and permitted the count to be filed; and the defendants excepted.

On the trial the deposition of a witness was introduced by the plaintiff, a part of which was objected to by the defendants, and was stricken out by the court. And when the jury was about to retire the plaintiff asked that they might be permitted to take the deposition with them. To this the defendants objected; but the court permitted the jury to take it; and the defendants again excepted.

There were other exceptions taken by the defendants; but it is unnecessary to state them. The different counts in the declaration are sufficiently set out in the opinion of Judge Anderson.

There was a verdict in favor of the plaintiff for $500, of which the plaintiff released five dollars. To this release the de- 497 fendants objected; but the court *overruled the objection and rendered a judgment for $495. And to this ruling the defendants again excepted. And thereupon they applied to this court for a supersedeas; which was allowed.

***Slander—Actionable Words—Amendment of Declaration.**—The principal case is *distinguished* in Harman v. Cundiff, 82 Va. 245, in that in the latter case the amendment of the declaration inserting the actionable words was for an immaterial variance, while in the principal case the amendment was material to the merits. For other citations of the principal case, see Johnson v. Brown, 13 W. Va. 96; Welch v. Insurance Co., 23 W. Va. 308. See also, Moseley v. Moss, 6 Gratt. 548.

Hansbrough and John William Johnston, for the appellants.

Pendleton, for the appellee.

ANDERSON, J., delivered the opinion of the court.

This is an action of slander at common law, and not under the statute, and must therefore be governed by common law rules. It lies for words which are actionable in themselves, or for those which, though not actionable in themselves, have caused some actual consequential damage, which must be alleged and proved. Words of the first description must impute guilt of some offence, for which the plaintiff, if guilty, might be indicted in the temporal courts, and punished as for an infamous crime, at least punishable with imprisonment. 2 Chit. Black., book iii, c. 8, top p. 95, side 123, note 14, and cases cited.

The words themselves may not import an imputation of crime, but spoken with reference to pre-existing or extrinsic facts, as shown by the conversation or discourse of the defendant, at the time the words were spoken, do impute crime. But to be actionable, they must be shown by the averment of the extrinsic facts, and by the colloquium referring to them to impute crime, or some high misdemeanor punishable ignominiously by the temporal courts.

In Holt v. Scholefield, 6 T. R. 691, Lord C. J. Kennyon said, "Either the words themselves must be such as can only be understood in a criminal sense, or it 498 *must be shown by a colloquium in the introductory part that they have that meaning, otherwise they are not actionable." The words must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanor. Onslow v. Horne, 3 Wils. R. 177. And it is necessary to set forth precisely the words spoken. It has been held by some that it is sufficient to set out the words in substance. But the weight of authority is contra. Mr. Robinson, in his valuable work, says the rule is now well established that the words themselves must be set out. 4 Rob. Prac., p. 688, citing Parsons v. Bellows, 6 Newh. R. 289; Haselton v. Weare, 8 Verm. R. 480. And it has been held, that the same strictness in setting out the words spoken is required in civil as in criminal proceedings, the action being ex delicto. Ibid, citing Cook v. Cox, 3 Maule and Sel. 110.

Let us apply these principles to the case in hand. In the first four counts the words are laid without a colloquium. In the first count they are, "Dick Stinnett killed my beef." Innuendo, "meaning thereby that the plaintiff had killed and carried off feloniously a beef, which some person or persons had shortly before that killed and stolen from the field of the defendant." In the second count they are, "he (meaning the plaintiff) killed the beef," "meaning that the plaintiff had clandestinely and feloniously killed and carried off a beef belonging to her the said Ann."

The office of the innuendo is only to give the meaning of the words spoken. It cannot extend or enlarge the meaning of the words, or introduce new matter. Rex v. Howe, Cowp. R. 672; Moseley v. Moss, 6 Gratt. 534; Holt v. Scholefield, 6 T. R. 691; 4 Rob. Prac. 694-5. An innuendo cannot be given to words which they do not necessarily import, either of themselves 499 *independently of any other circumstances, or with necessary reference to some other circumstances occurring at the time of the accusation. 2 Chit. Bla., B. iii, c. 8, top p. 95, side 123, note 14, and cases cited. In Van Vechten v. Hopkins, 5 Johns. R. 211, 219, Van Ness, J. says, "An innuendo is explanatory of the subject matter, sufficiently expressed before, and it is explanatory of such matter only; for it cannot extend the sense of the words beyond their own meaning, unless something is put upon the record for it to explain." That can only be put upon the record by the averment and the colloquium.

It is clear that the words laid in these two counts do not of themselves import an accusation of felony. "He feloniously killed and carried away my beef," is not the necessary or natural import of the words, "He killed my beef." It is clear that these counts are fatally defective and demurrable. And the third and fourth are obnoxious to the same objection.

The fifth count sets out a colloquium in these words: "On the day and year aforesaid, in the county, &c., in a certain other discourse, which the said Ann, wife of the said Hansbrough, had with divers other persons, of and concerning the said Richard, and of and concerning a certain steer or beef, the property of said Ann, which had shortly theretofore been by some person or persons, to the plaintiff unknown, feloniously killed, taken and carried away from a field belonging to the said Ann, she, the said Ann, spoke and published, in the presence and hearing of said persons, these false, malicious, scandalous and defamatory words of and concerning the plaintiff: 'Dick Stinnett killed my beef;' innuendo, (meaning thereby that the plaintiff had feloniously killed the steer or beef aforesaid, belonging to the said Ann, in her field). 'He 500 *killed the beef;' innuendo, (meaning thereby that the plaintiff had feloniously killed the beef or steer aforesaid, belonging to the said Ann, in the field, and carried the same away)." The question is, do these innuendos give the necessary or natural meaning of the words laid, taken in connection with the extrinsic facts averred, and the colloquium? And does it appear upon the face of this count, clearly and unequivocally, that the defendant imputed to the plaintiff felony, by the words which she is alleged to have spoken? The words themselves not being actionable at common law, unless the averment of extrinsic facts, and the colloquium concerning them, show that the de-

fendant, in speaking the words laid, imputed the crime of felony, they are not actionable, and consequently, the defendant was not bound to answer; and the demurrer should have been sustained.

To say that one "killed my beef," without an allusion to any circumstances connected with the killing, could not be construed to be a charge of feloniously killing. And it may be that the beef had been feloniously killed and taken away a short time before the words were spoken, as is averred in this count, but if nothing was said about it at the time the words were spoken, or it be not averred that she had notice of the felonious killing and taking away, or that it was so reported in the community, and known to her when she spoke the words, it would by no means be a natural or necessary conclusion, that she meant to accuse the plaintiff of felony, by merely saying "he killed the beef," or "my beef." It is averred that the beef had been "feloniously killed and carried away," but it is not averred that there was any colloquium about the felonious killing, or that the defendant knew that it had been feloniously killed and taken away, or that
501 it *was so reported in the community, and that she knew that it was so reported at the time of the speaking of the words laid in this count of the declaration.

If the accusation is not made by the words spoken, taken in connection with the colloquium and averments, it cannot be supplied by the innuendo. For it is a clear rule of law, that the innuendo cannot introduce a meaning broader than that which the words, taken in connection with the averments and the colloquium, will naturally bear. Nothing, says Lord Chief Justice Ellenborough, can be more clear than the rule laid down in the books, and which has been constantly adopted in practice, not only where the words spoken do not in themselves, naturally convey the meaning imputed by the innuendo, but also where they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable, it must not only be predicated that such matter existed, but also that the words were spoken of and concerning that matter. Hawkes v. Hawkey, 8 East's R. 427. In that case there was an averment that the defendant had put in his answer on oath, to a bill filed against him in the exchequer; and the words laid were, "I have no doubt you (meaning the plaintiff's servant) will forswear yourself, as your master (the plaintiff) has done before you." There was no colloquium that the words were spoken with reference to that answer. But there was an innuendo that the plaintiff had perjured himself in what he had sworn in the aforesaid answer. The chief justice said, "the prefatory allegation that the plaintiff had put in his answer on oath to a bill filed against him in the exchequer is right, but whether the words were spoken with relation to that answer, does not appear, unless after verdict it must be
502 taken that they were so *spoken." After careful deliberation the court held, that the innuendo could not supply the want of a colloquium, even after verdict, on a motion in arrest of judgment. And this is reasonable. The averments and colloquium, if material to impute criminality, must be proved. But the innuendo, being a mere explanation of antecedent words, need not be proved; and would tend to mislead the jury if it extends the meaning of the words further than they will naturally bear, even when read in connection with the averments, and the colloquium. Indeed, if the innuendo be allowed to enlarge the meaning of the words, a party may be held legally responsible for words spoken, which by the law are not actionable, and for which he is not legally responsible.

In this case the defendant's beef may have been killed by the plaintiff without any participation by him in taking and carrying it away. It might have been killed by him by accident, or it might have been shot by him by design as a trespasser, and others may have feloniously taken it away. The defendant may have had good reason to believe that he killed it, whilst she had no reason to believe that he killed it animo furandi. And she only charged him with the killing. She never said that he took and carried it away, or that he feloniously killed it, so far as it appears from this declaration. Is it right to hold her responsible for words which she did not utter, or for imputing a crime to the plaintiff which the words spoken do not import? Surely not, unless it clearly appears from matter extrinsic averred, or from her discourse at the time, that the words spoken by her in that connection imputed to the plaintiff the crime. And that such imputation was made by the words spoken should clearly
503 appear upon the record, otherwise, *the words spoken not being actionable in themselves, she is not bound to deny that she spoke them, or to justify. She is not bound to answer. The declaration is demurrable, because it does not show a right of action in the plaintiff. It was rightly said by Baldwin, J. in Moseley v. Moss, supra, "When the ground of defamation is, that the words imputed to the plaintiff a criminal offence (the case here) it must be made to appear so, clearly and unequivocally, either by the words themselves, or, if they do not express that meaning clearly, by proper averments as to the subject-matter of the discourse." "The meaning cannot be supplied by an innuendo."

The sixth count is liable to all the objections mentioned to the fifth count. The words laid are, "We have no idea that Leighton killed the beef. Mr. Garland says that Stinnett (meaning the plaintiff) came out there in the field the day before waving a stick about, and he killed the beef." The allegation in this count is, not that the defendant made any accusation against the plaintiff, but that she said, Mr. Garland says, &c. And the innuendo from these words is, an accusation by the defendant "that the plaintiff had been seen waving

his walking stick in the field, in which the beef was killed, the day before the killing occurred, and that the said plaintiff had feloniously killed, taken and carried away the said beef, the property of the said Ann." The words laid in this count do not justify the inference.

The seventh count sets out the colloquium, and the averment as in the two preceding counts, and then adds, "she, the said Ann, in order to cause the said plaintiff to be falsely suspected of committing the said felonious killing and carrying away," spoke, &c. The declaration must show, 504 either by the words themselves, *or by extrinsic matter in reference to which they were spoken, that an offence was imputed by the defendant to the plaintiff, which would constitute slander at common law. And all the facts which are necessary, to show that the words are actionable, and to make out a case of grievance, for which the defendant is responsible to the plaintiff in an action at law, should be set out in the record, otherwise the defendant is not bound to answer. In Rex v. Horne, Chief Justice De Grey said, "In all cases those facts which are descriptive of the crime must be introduced on the record by averments, in opposition to argument and inference." The objection to the clause in question is, that it is an inference; and that the facts put upon the record, by the averments and colloquium, do not justify it. If the facts averred, and the colloquium had justified the inference, the count would have been good.

After the evidence on both sides had been closed, the court allowed the plaintiff to amend his declaration by adding an eighth count. We are of opinion that the amendment was material to the merits, and therefore not allowable at that stage of the proceedings by the statute. Code of 1873, c. 173, p. 1119, sec. 7. But if it had been properly allowed, it is liable to the objections made to the fifth count.

It is proper to say that the declaration appears to have been skilfully drawn, and the defect seems to have been not in the pleader, but in the facts of the plaintiff's case. But as it does not appear from the record that all the evidence has been certified, it may be a case for amendment upon the decision of the demurrer, and in conformity to precedents established by this court, the cause will have to be re- 505 manded, that *the plaintiff may have an opportunity to amend if he desires it.

Other errors have been assigned. We will notice only such as raises questions which may arise again upon another trial of the cause. As to evidence of the speaking of like words, antecedent or subsequent to the words laid in the declaration, it has been held that it is admissible upon the question of damages, but not until the words laid have been proved. Before that is done, it seems to be contrary, both to reason and authority, to admit such evidence, as it can be admitted only to affect the measure of damages.

The court can perceive no reason why a deposition, which has been read to the jury, may not be given to the jury in their retirement, if what is objectionable in it has been erased.

This court cannot review the ruling of the court of trial, upon the motion to set aside the verdict and grant a new trial, as the facts are not certified.

It does not appear from the record that the action was barred by the statute of limitations which was pleaded.

The only remaining assignment of error which we deem it necessary to notice, is that the words spoken were privileged communications, or were spoken under circumstances which rebut the imputation of malice. It is essential to all defamation, that it should be malicious. But it is an implication of law that all unauthorized defamation is malicious. There are, however, cases in which this inference of law does not arise, and where communications which would otherwise be defamatory, are justified by the occasion on which they are made. In such cases express proof of malice is necessary to render the communication defamatory. Such is the law with re- 506 gard to conditionally *privileged communications. Mr. Starkie describes them to comprehend all cases, where the author of the alleged grievance acted in the discharge of any public or private duty, whether legal or moral, which the ordinary exigencies of society, or his own private interest, or even that of another, called upon him to perform.

But, it not being certified that the record contains all the evidence in this cause, it is not in the power of this court to decide whether the circumstances under which the words were spoken, in this case, rebuts the implication of malice.

The judgment of the court below must be reversed, with costs, and the verdict set aside; the demurrer to the declaration sustained, with leave to the plaintiff, if he desires it, to amend his declaration.

The judgment was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the judgment of the court below, overruling the demurrer to the original and amended declarations, is erroneous. It is therefore considered that the judgment of the Circuit court of Botetourt county be reversed and annulled, and that the defendant in error do pay to the plaintiffs in error their costs expended in the prosecution of their writ of error here; and that the cause be remanded, with instructions to the said Circuit court to give the plaintiff leave to withdraw his joinder in the demurrer, and to amend his declaration if he desires to do so, and if he does not wish for such leave, to give judgment upon the demurrer. Which is ordered to be certified to the said Circuit court of Botetourt county.

Judgment reversed.

507 *Williams' Adm'rs v. Skinker & Wife.

September Term, 1874, Staunton.

1. **Wills—Personal Representative—Duties and Liabilities—Receiving Confederate Money.***—In June 1858 H sold his farm of 700 acres to his two sons, J and M, for $45 per acre, one-eighth payable the first of January 1859, and one-eighth annually until one moiety of the purchase money was paid: and after the death of his wife one-eighth was to be paid annually until the whole was paid, interest to be paid upon the whole debt annually; and then a deed was to be made to them. H made his will in November 1858, and died in 1859. By his will, after setting apart $5,000 for his wife, who was in a lunatic asylum, he gave the whole residue of his estate to his son M and his daughters, Mrs. S and Mrs. B, and made M a trustee for Mrs. B. He appointed W his executor; and he authorized him after his wife's death to convey the land to the purchasers. In 1859 J and M divided the land, each to pay one-half of the debt; and in November 1862, J wishing to sell his land, and M, for himself and as trustee for Mrs. B, and Mrs. B having consented to take Confederate money for their shares of the debt due from J, J sold to C the land for $19,284.12, and J and W, the executor, conveyed it to C. From the money so received W paid to M his and Mrs. B's shares of the debt of J. Although Mr. and Mrs. S had been written to before the sale to C was made, to know whether they would take Confederate money for their share of said debt, they were not heard from on the subject, and though they heard of the sale as early as the date of the deed to C, they at no time expressed to the executor or to C either their assent to it or dissent from it. The executor, not hearing from them, invested the whole balance of the purchase money in seven *per cent.* Confederate bonds, J consenting that he should retain it and pay the whole amount to Mrs. S if she required it.—HELD: That the debt due from J, being an ante-war debt, well secured on real estate, and it not being necessary for the payment of the debts of the estate, W, the executor, though he acted in good faith, yet exceeded his powers, and committed a *devastavit* in receiving Confederate money in November 1862, in payment of the debt of J, without the consent of Mrs. S, and he is liable to her for the amount of her interest so received by him.

508 *2. **Same—Same—Same—Same.**—There may be many cases in which an executor will be held justified in receiving Confederate money, greatly depreciated, for a debt payable in a sound currency; as where the necessities of the state required it; where it could be used in payment of the debts of the testator; or (where there being no debts) the parties entitled to distribution consent to receive it; or where the security for the debt has become doubtful, and the estate would be benefited by receiving even a depreciated currency.

3. **Same—Same—Same—Same.**—It is difficult to lay down any general rules applicable to all cases which arise out of dealings by executors during the war. Each case must depend upon its facts and the circumstances at the time surrounding the executor.

4. **Same—Same—Same—Same.**—It seems, that where the exigencies of the estate do not require the collection of a debt which rests upon undoubted security, and especially when the only object of the collection is for distribution among the legatees, and the collection is made without their consent, the executor must be held personally liable when he permits the debtor to discharge his debt in a depreciated currency; and he will not be permitted to shift the responsibility, and cast the burden of loss upon the legatee. An executor who receives a depreciated currency under such circumstances commits a *devastavit*, for which the law casts upon him a personal responsibility.

This was a suit in equity in the Circuit court of Frederick county, instituted in February 1866, by Thomas J. Skinker and Ann Eliza his wife, who before her marriage was Ann Eliza Hite, against Philip Williams, executor of James M. Hite, Sr., deceased, and others, to recover the amount due to Mrs. Skinker under the will of her father, the said James M. Hite, deceased. The defendants having answered the bill, Williams filed a cross-bill in the cause against Skinker and wife; which they answered.

The defendant dying in the progress of the cause, it was revived against his administrators with the will annexed, and came on to be heard on the 26th of November 1868, when the court, reserving all other questions, decreed that Williams' administrators should, out of the assets of 509 their testator in their hands, pay *to Skinker and wife the sum of $4,989.55, with interest thereon from the 24th of November 1862. From this decree Williams' administrators obtained an appeal to this court. The facts in relation to the question decided by the court below are stated in the opinion of Christian, J.

William J. Robertson and John J. Williams, for the appellants.

R. Y. Conrad & Son and R. Parker, for the appellees.

CHRISTIAN, J. This cause is before us upon an appeal allowed to a decree of the Circuit court of Frederick county. A statement of the following facts is necessary to a proper understanding of the case, and the application of the principles of law which must govern it.

On the 2d day of June 1858, James M. Hite, Sr., sold to his two sons, J. Irvine Hite and J. Madison Hite, his farm, lying in Clarke county, containing about seven hundred acres, for the sum of $45 per acre. One-eighth of the purchase money was to be paid on the 1st day of January 1859, and one-eighth annually thereafter, until one moiety should be paid; one-eighth of the other moiety was to be paid at the death of the wife of the said James M. Hite, Sr.; and one-eighth annually thereafter, until the whole should be paid, when the pur-

*Liability of Personal Representatives Receiving Confederate Money.—For a collection of the authorities on this subject, see Carter v. Dulaney, 30 Gratt. 192, and *note*; Mills v. Mills, 28 Gratt. 442, and *note*.

chasers were to have a deed for the land; the interest on the whole amount to be paid annually, from the 1st day of January 1859.

Hite died in the latter part of the year 1859, having made and published his last will and testament, which was duly admitted to probate and record in the County court of Frederick county. By this will the sum of five thousand dollars was directed 510 to be applied to the *support of the testator's wife (then and now an inmate of the Lunatic Asylum at Staunton), and subject to this provision—all of his property was to be divided equally between three of his children, viz: J. Madison Hite, Ann Eliza Skinker, wife of T. J. Skinker, and Caroline, wife of Alexander Baker, whose share was devised in trust to her brother, the said J. Madison Hite, and the executor was authorized to make a deed to his sons, the purchasers of the said land, after the death of the testator's wife, and when the entire purchase money should have been paid. Philip Williams, of Winchester, a lawyer of eminence and large experience, was constituted the executor of this will.

In November 1859, the two sons of the testator, who had become the joint owners of the land under the purchase referred to, by agreement between themselves, appointed certain persons to make an equal division of the land between them, and, in January 1860, executed a deed of partition, whereby they conveyed in severalty to each other the portions which had been respectively allotted to them in said division.

At the death of the testator between two and three thousand dollars had been paid on account of the purchase money for the land. The whole balance amounting, at the death of the testator, to the sum of nearly thirty thousand dollars, remained unpaid, and for that balance the land stood as security for its payment; for, by the terms of the contract of sale, the title was to be withheld until the whole of the purchase money was paid. The debts of the estate were so inconsiderable that it was not necessary to collect any part of this fund for the payment of the testator's debts.

The great bulk, if not the whole of the testator's estate, consisted of this fund 511 in the hands of his two *sons, due on account of the land, and for which the land was bound as security for its payment. By the provisions of the will of James M. Hite, Sr., this fund was to be equally divided between J. Madison Hite, Caroline Baker and Ann Eliza Skinker, three of the children, and the sole devisees of the testator.

In October or November of the year 1862, Irvine Hite having received what he considered an advantageous offer for the portion of the land allotted to him, in the division between himself and his brother, applied to the executor to know whether he would receive Confederate money for the debt due from him to his father's estate.

The executor, after communicating with James M. Hite, and obtaining his assent in his own right, and as trustee for Mrs. Baker, to receive that currency in payment of their legacies, and after making an ineffectual attempt to obtain the assent of Skinker and wife, agreed with Irvine Hite that he would receive Confederate money in payment of the debt he owed to his father's estate. Accordingly, on the 24th day of November 1862, the sum of $19,234.12 (that being the price agreed upon between Irvine Hite and Wood, the purchaser of the land), was paid to the executor in Confederate treasury notes, and a deed executed on that day by Hite and wife, and the executor, Williams, was delivered to Wood.

Out of this fund, thus received, the executor paid over to J. Madison Hite, in his own right and as trustee for Mrs. Baker, the respective proportions due them as the devisees and legatees of his testator. The proportion due to Mrs. Skinker remained in his hands, and failing to hear from Skinker, who was in the army, or Mrs. Skinker, who was in a distant part of the state, and for a long time within the lines of the 512 *Federal army, the executor invested the fund in seven per cent. Confederate bonds. Whether this investment was made in the name of the executor, or in the name of Skinker and wife, does not appear, nor, in my view of the case, is it material to be known.

Thus matters stood until after the close of the war, when, in February 1866, Skinker and wife filed their bill in the Circuit court of Frederick against the executor and legatees of James M. Hite, Sr., Irvine Hite, and the purchaser of the land from him, in which they claim that they are entitled to one-third of the estate of James M. Hite, after payment of his debts; that this legacy to Mrs. Skinker was secured by a lien upon valuable real estate; that they have never received any part of that legacy thus secured; that they had never executed any transfer, release or acquittance for the same, or any part thereof; nor given any consent or sanction, or done any other act tending to impair their right to the legacy, or any lien for the same; and they ask for such decree as may be necessary for payment of whatever sum may be justly due them, and for enforcing the same by sale of the lands or otherwise.

To this bill the defendants all answered. The only answer necessary to be noticed is that of the executor, Williams, which will be more particularly referred to presently. After the answers of all the defendants were in the cause, the executor filed a cross-bill by leave of the court, which he denominates a cross-bill for discovery, in which he charges that Skinker and wife knew of the sale made by Irvine Hite to Charles Wood as early as 1863, and neither of them informed said Williams, the executor, of their dissent or opposition to said sale; that said Thomas J. Skinker passed through Winchester, where executor resided, 513 sometime *in 1863, and never called upon him, or gave him any information as to his objecting to said sale; and

calls upon them to answer when they or either of them were informed of the sale made by Hite to Wood for Confederate money; and whether they or either of them ever informed the executor that they objected to the sale or the terms thereof; whether Thomas J. Skinker passed through Winchester in the year 1863; and when, and whether he made any communication of any kind in relation to said sale until after the surrender of General Lee's army.

To this cross-bill Skinker and wife answered, that Mrs. Skinker heard of the sale from Irvine Hite to Wood as early as November 1862, but had no communication with Mr. Williams, the executor, on the subject; that Thomas Skinker heard of the sale at the same time, but was in the federal lines, and could make no answer to Mr. Williams' letter on the subject for want of mail facilities; that Thomas J. Skinker was a prisoner in Washington for some time in the spring of 1863, and was in a very critical state of health during the greater part of the war from a serious wound and other causes; that he did pass through Winchester just after the battle of Gettysburg, under military orders not to leave the ranks, and a few days thereafter returned from Williamsport through Winchester on the Sabbath, prostrated from sickness, and was ordered immediately to a hospital at Staunton. Such was the nature of the cross-bill and the answer thereto.

Depositions of numerous witnesses were taken to show that at the period when the land was sold by Irvine Hite, and at the time the Confederate money was received by the executor, that currency was the only currency in circulation, and that it 514 was received *in payment of debts generally, and that land was bought and sold for that currency.

In September, 1868, the case came on to be heard upon the bill and answers, the cross-bill for discovery and answer thereto, and the depositions of witnesses, and the court reserving certain questions for future adjudication, decreed "that the defendants, John J. and James H. Williams, administrators with the will annexed of Philip Williams, deceased, out of the assets of said testator, in their hands, do pay to the complainants (Skinker and wife) the sum of four thousand nine hundred and eighty-nine dollars and fifty-five cents, with interest thereon at the rate of six per centum per annum, from the 24th day of November, 1862, until paid, and when paid, to be a credit pro tanto upon the executorial account of James M. Hite's estate." It is from this decree that an appeal has been allowed to this court.

The grave and important questions arising in this case (in the form in which they are presented here) are now before this court for the first time. In the numerous and multifarious cases growing out of dealings in Confederate currency, and contracts made with reference to that currency, the question has not yet been definitely adjudicated as to how far or under what circumstances an executor may be excused or justified in receiving a depreciated currency for a gold debt, well secured, without incurring a liability for a devastavit. This question we have to meet for the first time in this case. I do not deem it necessary, for the purpose of my conclusions, to refer to matters put in issue by the pleadings, or to the disputed facts. I shall ground my opinion upon the conceded facts in the cause, and upon those only. What are those facts? It must be conceded—1st. That Mrs. Skinker is 515 entitled, *under the will of James M. Hite, Sr., to one-third part of his whole estate, subject, first, to the payment of his debts, and to the appropriation of $5,000 for the support of his insane wife. 2d. That the legacy to Mrs. Skinker was secured by a lien upon valuable real estate. 3d. That Skinker and wife have never executed any release, transfer or acquittance for this legacy, and have never given their assent or sanction, or done any other act tending to impair their right to their legacy, or any lien existing to secure its payment. 4th. That they have never, through themselves or their agents, received one dollar of this legacy, and never authorized the executor or any one else to receive for them any portion of the same in Confederate treasury notes, or to make an investment for them in Confederate bonds. 5th. That it was not necessary to collect the debt due from Irvine Hite to the estate of James M. Hite, for the purpose of paying debts of the estate, for no such debts were outstanding against the estate, all had been paid, and Irvine Hite's debt was in fact due to the legatees: they were entitled to receive it through the hands of the executor, and he had no occasion to collect the fund except for the purpose of paying it over to them.

These are the undisputed and conceded facts in the cause; and the question arises upon these facts, whether the executor receiving this debt, well secured upon real estate, in a currency depreciated to nearly one-half its nominal value, without the consent of the legatee to whom it was to be paid, has incurred a responsibility for which he is personally liable; in other words, whether to the extent of receiving the proportion of the debt due to Mrs. Skinker, without her consent, he has committed a devastavit. It must be conceded also that no man knew better than Mr. 516 *Williams, the executor, that he had no authority as executor, to collect the debt due from Irvine Hite in Confederate currency, unless (there being no debts of the estate) the heirs and legatees would agree to receive it from him. He was a lawyer of large experience and eminent in his profession, and must be presumed to understand his duties and liabilities as an executor. But the following letter, filed in the record, shows that he well knew and fully understood his obligations to the estate and to the legatees. It is addressed to James M. Hite, himself one of the legatees, and is in the following words: "Irvine can make sale of his land in Confederate money

to Charles Wood for a sum sufficient to pay all that is due from him to the estate. But as I am acting only as executor it would not be proper for me to receive Confederate money unless the heirs will take it from me. I would advise them to take it. Will you be good enough to let me know whether you will receive Mrs. Baker's share in Confederate money. It will be well, I think, to invest it in Confederate bonds. Let me know immediately, as it is important to the estate and to you that the sale should be made."

The result of this communication was that the executor obtained the consent of two of the legatees to receive their proportion of the legacies due them in Confederate money. But he never did obtain the consent of Skinker and wife; and after waiting for some time and making ineffectual attempts to get their consent, he deliberately took upon himself the responsibility of receiving it without their consent. He knew that in doing this he was incurring the risk of a refusal upon the part of Skinker and wife, and he sought to protect himself against that risk (in receiving Confederate money for them without their consent) by
517 taking *as indemnity from Hite the sum of upwards of four thousand dollars over and above their share of the fund collected. In making this statement I only give the executor's own account of the transaction. Let him speak for himself. In his answer he says (after stating that he obtained the consent of two of the legatees to a sale of the land in Confederate money): "The complainant, Thomas J. Skinker was then in the Confederate army, and after waiting for a time to see or hear from him or his wife, but without success, said J. I. Hite, was so anxious to conclude the sale with Wood and pay off his debt, stating, as well as respondent recollects, that he could never pay the debt without selling, and if he did not sell then, that the interest accruing might so increase the debt that the land would not pay it, an opinion in which respondent concurred, that if he would unite in the deed to Wood, and receive the Confederate money in payment of his debt, that he would leave an excess of $4,100 or $4,200 in the hands of respondent to indemnify him; and if Skinker and wife require it, to pay so much or all of that excess to them over and above their equal share. He expressed the confident opinion that complainant would assent, in which respondent concurred; and said Hite agreed that he would endeavor to see complainants as soon as possible and get their consent to the arrangement; and respondent said he would also endeavor to communicate with them to obtain their written consent. Under these facts respondent agreed to receive the money and unite in the deed as executor, &c."

It is manifest, therefore, both from the answer of the executor, as well as from the letter addressed to James M. Hite, above quoted, that he was convinced that, in his own language, "it was not proper for
518 him to receive *as executor the Confederate money, unless the heirs would consent to receive it from him." Two of them having received it, he no doubt believed that the third (Mrs. Skinker) would also receive it. But he deliberately took upon himself the responsibility of receiving her share without her consent, feeling, it is evident, at the time satisfied that he would be fully indemnified for any risk he might assume in having in his possession upwards of four thousand dollars more than her share of the fund. Can he now be relieved of a responsibility which he deliberately assumed, and throw the loss upon the legatees, whose assent to these transactions the executor himself thought necessary, but vainly sought to obtain? I think not. I think it is clear that without imputing any mala fides, or intentional fraud to the executor, he has committed a devastavit to the extent of the amount which he received in Confederate money, without the consent of the legatees who were entitled to receive it.

It is not necessary, in order to subject an executor to personal liability, to show that he acted fraudulently. He is subjected by law to liability, personally, for various acts of misconduct, amounting to a violation or neglect of duty, and which is called in law a devastavit, or wasting of the assets. An executor may commit a devastavit by such acts of negligence or careless administration as defeats the rights of creditors, or legatees, or parties entitled to distribution. 2 Lomax's ex'ors 475–77–485, and cases there cited.

It is a proposition too plain to require the citation of authority to support it, that where an executor releases a debt due to his testator, or cancels or delivers to the obligor a bond, of which the testator was obligee, this will charge him to the amount of the debt; and so if he releases a
519 part of the debt, or cancels, *or delivers up the whole obligation, when, in point of fact, he has received but a part of it, he commits a devastavit, and will be charged with the whole, though he received but a part. In the case before us, the executor in fact received a little more than half the debt, and gave an acquittance for the whole, and that too when the necessities of the estate did not require it, and without the consent of one of the legatees entitled to receive it. I do not mean to say that in every case where an executor received Confederate currency greatly depreciated, for a debt payable in a sound currency, he thereby commits a devastavit. There may be many cases where the courts would hold an executor justified in receiving such a currency; as where the necessities of the estate required it, where it could be used in payment of the debts of the testator, or where (there being no debts) the parties entitled to distribution consent to receive it, or where the security for the debt had become doubtful, and the estate could be benefited by receiving even a depreciated currency. It is difficult to lay down any

general rules applicable to all cases which arise out of dealings by executors during the war. Each case must depend upon its own facts and the circumstances at the time surrounding the executor. But I think it is clear that where the exigencies of the estate do not require the collection of a debt, which rests upon undoubted security, and especially where the only object of the collection is for distribution among the legatees, and the collection is made without the consent of the legatees, the executor must be held personally liable when he permits the debtor to discharge his debt in a depreciated currency, and he will not be permitted to shift the responsibility from himself and cast the burden of loss upon the lega-
520 tees. An executor, *who receives a depreciated currency under such circumstances, commits a devastavit, for which the law casts upon him a personal liability.

The able counsel for the appellants seeking to relieve the executor in this cause, from the stress of those well settled rules of law which declare what constitutes a devastavit, and fixes a personal liability upon an executor, labored to show that the executor in receiving from Irvine Hite Confederate currency, benefited the estate, because the security for the debt was doubtful, inasmuch as the debts due from Madison and Irvine Hite exceeded the value of the land. They submit a statement in figures, by which they show that the debt secured by lien on the land amounted to $32,728.27, while the value of the land (after deducting a small portion sold to Bowen) was $31,644.03; showing an excess of debt over value of land of $1,084.24. And it is argued that while the debt was increasing by the accumulated interest, the land was subject to be greatly depreciated by the fact that it lay within a region much exposed to the casualties of war and the depredations of contending armies; and that the buildings, fences and timber were in constant danger of destruction; and that therefore the security for the debt was doubtful, and the executor was justified in collecting it in a depreciated currency. It is a sufficient answer to this view to note the fact that one-third of the debts secured upon the real estate, went, under the will, to J. M. Hite, and that in point of fact the amount due the estate, which the executor was charged with collecting, was only two-thirds of the amount estimated as the debt secured on the land, to wit: the sum of $21,818.84; so that in point of fact, there was a debt of $21,818.84 secured by lien on land worth
521 at least $31,644.03; *thus leaving a balance of nearly $10,000 over and above the debt which was to be paid. I think, therefore, it must be conceded that the land was the most ample and certain security for the debt.

But it is insisted by the learned counsel for the appellants that the executor acted in good faith, himself believing that it was best for the estate, and those entitled to distribution, that the debt should be collected; and that upon the principles settled by this court in Davis, comm'r v. Harman and in Myers' ex'or v. Zetelle, 21 Gratt. 194, 733, he ought to be excused from all liability. As has been observed before, the question how far, or under what circumstances an executor may be excused or justified in receiving Confederate money, greatly depreciated, for a gold debt well secured upon real estate, without incurring liability for a devastavit has never been settled by this court. Nor is it necessary to charge an executor for a devastavit to show that he has acted fraudulently, or shown mala fides in his administration of the estate. The cases relied upon involved very different questions from the case at bar. In the one case, Davis v. Harman, a commissioner of the court who had in his hands certain funds, claimed by contesting parties, was directed to hold the fund until the rights of the parties could be litigated. He put the fund in bank and there it perished, not in consequence of the deposit, but in consequence of "the sudden and irretrievable destruction of the whole currency of the country by the termination of a civil war, which had destroyed the very power that created it." The court held that the commissioner had incurred no personal liability.

The case of Myers v. Zetelle, 21 Gratt. 733, rested upon the peculiar facts of
522 that case. The pivotal *point of that case was the power of attorney under which the agents acted, conferring upon them the amplest power and the largest discretion. They were clothed with authority to sell his real estate, and to collect his debts, whether due or not due. They collected a debt, it is true, which was not due, and which was secured by a lien upon a house in the city of Richmond, and this court held that, under the peculiar circumstances of that case, the agents could not be held liable. This point in that case is pressed in argument here as conclusive of the position that the executor in this case ought not to be held liable. But, in my view, the cases rest upon totally different grounds. In the first place, the agents in the case of Myers v. Zetelle, were clothed with the undoubted authority to do what they did do by the very terms of the power of attorney; and the only question was, whether in the exercise of a full discretion, voluntarily conferred upon them by their principal, they acted with such a reckless disregard of their obligations as to impose on them a legal liability for their conduct. Referring to that case upon this point, I find that after noting the fact that they had the undoubted authority, under the power of attorney, to collect this debt, and referring to the circumstances which then surrounded the agents, the court used the following language: "The city of Richmond was threatened, if not actually invested, by powerful armies from different points. They had every reason to believe that the city would be bombarded and burnt if taken. The security for the debt of

Pizzini was the house which was mortgaged to secure the debt. If that was burnt, it was doubtful if the debt could be made.

"The evacuation of Richmond was 523 an event that *might be expected any day. They had no reason to suppose that the evacuation of the city would be followed by the surrender of the Southern armies, but that the war might still continue, and the Southern cause yet be triumphant, and that the best security they could have would be the bonds of the Confederacy. With this belief, and under these circumstances, they received the debt of Pizzini. Looking back upon these events from our standpoint, we may say it was an act of folly upon the part of these agents to collect this debt so well secured; but can we say, under the circumstances which then existed, they acted with such reckless disregard of their obligations as to impose on them a legal liability for their conduct. All we can say is, that as events have transpired, it would have been better if they had not collected this debt; but can we say that, under all the circumstances, they were guilty of a breach of trust and violation of duty. It is easy to conclude now that a deed of trust upon a house in the city of Richmond was better security for a debt of five thousand dollars than a bond of the Confederate States. But when that city is threatened by beleaguring armies with bombardment and fire, we may conclude that a man at least acted honorably and in good faith, who, having unwaivering confidence in the triumph of the southern cause, preferred a bond of the Confederate States as better security than property thus threatened with destruction. * * * *

"But let it be conceded that these agents did commit errors of judgment; that, by a different course, they might have saved a large portion of their principal's estate from the wreck and ruin of the war; that if they had not sold his real estate that would have escaped the hazards of sequestration as well as the fires which did at last consume 524 a large portion of the city; *that the debt of Pizzini, if they had let it remain till due, would have been also saved to their principal: Admit all this, and yet in the absence of any proof of fraud or mala fides, upon the well settled principles of courts of equity they cannot be held liable for the loss their principal has suffered —that loss must fall on him and not on them."

I have extracted this much from the opinion in Myers v. Zetelle for the purpose of showing the exact grounds upon which this court, in that case, relieved the agents from personal liability. In the first place, they had the undoubted authority to collect the Pizzini debt, though not due, by the express terms of the power of attorney. In the second place, they had the best reasons to believe, and did honestly believe, that the security (being a house in a city which was the objective point of all the operations of the Federal armies) was threatened with destruction. Now, in the case before us, while, as a matter of course, the executor has the general power to collect the debts due his testator, he certainly has no right to release a debt, or to discharge a debtor of undoubted solvency from his whole obligation by receiving a part of it. He has no authority to receive in a depreciated currency a debt payable in gold and well secured upon real estate ample in value to make it perfectly safe, unless the exigencies of the estate require it; or, where there are no debts (as in this case), those who are entitled to distribution consent to receive it. In Myers v. Zetelle the agents had the express authority to collect Confederate money, for that money was in circulation at the time the power of attorney was executed, and was very soon afterwards the only circulating medium. Again, in the case before us the security for the debt was not a house in a city threatened with de- 525 struction, *a large portion of which was actually consumed by fire upon being captured, but it was a large tract of land in the country, upon which there were no buildings to be destroyed, and which could not be so materially injured by the ravages of war as to seriously impair the security.

The two cases differ, therefore, in these two essential particulars. In the one case the authority to collect the debt was conceded; in the other, the executor himself admits, in writing, that "it would not be proper for him, as executor, to receive Confederate money, unless the heirs would agree to take it from him." In the one case the security was, to say the least, doubtful; in the other it was ample and could not be destroyed.

But it is argued that the executor ought to be relieved because a majority of the heirs agreed to receive Confederate money. Surely, the consent of two of the heirs cannot affect the rights of the other one, who never gave her assent, but purposely withheld it. It was manifestly to the interest of James M. Hite, in his own right, and as trustee for Mrs. Baker, to give his assent to the arrangement proposed, to sell the land for Confederate money, and to receive that currency in payment of their legacies, for every dollar that was received from Irvine Hite to that extent relieved the land of James M. Hite from the lien fixed upon it by the will of his father for the payment of the purchase money. The interest of Mrs. Skinker was very different. Her whole patrimony consisted in her share of the debt due from Irvine and James M. Hite; and that debt had been secured to her by her father in reserving a lien upon land of sufficient value to make it secure, and its payment certain beyond a peradventure.

There was no reason why she should 526 give up *her whole interest in her father's estate thus secured to her, and no consent on the part of the other heirs could possibly affect her interest. The argument now made, that a majority having assented to the arrangement the executor ought to be relieved, was not one

which had any weight with as good a lawyer as Mr. Philip Williams; for the record shows that he made more than one attempt to obtain the consent of Skinker and wife, all of which were ineffectual, and it was not until Irvine Hite proposed to leave in his hands the sum of over four thousand dollars "to indemnify him," that he consented to the arrangement. He knew well, that the assent of James M. Hite in his own right, could not bind Mrs. Skinker in any possible contingency. He not only sought himself to obtain their consent but gives prominence in his answer to the fact that Irvine Hite expressed the opinion that Skinker and wife would give their assent to the arrangement proposed, and that he promised to see them and obtain their assent. All this shows that it never entered into his head to conceive that the assent of two of the heirs could in any way bind Mrs. Skinker.

But it is insisted that the executor is relieved from all liability, and the whole loss must fall upon the appellees, because Skinker and wife heard of the sale and did not object to it, though they had opportunity to inform the executor of their dissent, and, because they failed to do this, they must now be placed in the same situation as if they had given their assent. The record shows that Mrs. Skinker was in a distant county, which, part of the time, was in the lines of the federal armies, and all the time difficult of communication with the town of Winchester. It is not shown that she knew anything of the matter till 527 after *the land was sold. Her husband, it is shown, was, during the whole war, either in the Confederate army or in a northern prison, or in a hospital suffering from wounds and sickness. He passed through Winchester but twice in the year 1863, once just after the battle of Gettysburg, under marching orders not to leave the ranks, and shortly afterwards on the Sabbath, when prostrated by sickness, and was sent immediately to a hospital at Staunton. Neither had the opportunity to express their dissent, if that was at all necessary to protect their interests. But was it necessary? Were their legal rights to be effected by the fact that they expressed no dissent? By no means. It was not a case where their "silence gave consent." If they had had the most ample opportunity to speak, their silence was sufficient to protect them. Without their voluntary consent, there was no power on earth that could wrest from Mrs. Skinker the patrimony which her father had so well secured to her, and compel her to receive Confederate money or Confederate bonds in the place of it. It was enough that she should remain silent and withhold her consent. Without her consent, the executor has undertaken to convert her patrimony into a currency that has perished; without her consent, he has undertaken to put her all in Confederate bonds, not worth the paper upon which they were printed; without her consent, he has deliberately chosen to take upon himself the responsibility of receiving a depreciated currency, and investing in worthless bonds what was a certain and ample security; without her consent, he has deliberately assumed upon himself the risk of assenting to a sale and receiving a depreciated currency, which at the time he admits in writing, under his own hand, "it was not proper for him to receive unless with the con- 528 sent of the heirs;" and he *executes a deed as executor, which he had no right under the will to execute (until after the death of the testator's widow), conveying the very land upon which Mrs. Skinker's legacy was secured. And while he has thus deliberately taken upon himself this risk and this responsibility, his representatives here are seeking to throw the loss occasioned by it upon parties who never have, by word or act, done anything to deprive them of their unquestioned legal rights. I am constrained, however reluctantly I may be forced to that conclusion, to say that the executor by his conduct in this transaction has committed a devastavit, for which the law fixes upon him personal liability. In saying this, I am very far from attributing to him any fraudulent purpose. The whole record, as well as the high personal and professional character, which has secured for him, wherever he was known, a reputation for integrity, second to none, all alike forbid any such imputation. His conduct no doubt was influenced by a desire to accommodate Irvine and James M. Hite, both of whom were interested in selling the land for Confederate money. He no doubt thought that the consent of Mrs. Skinker would be given to the arrangement. He felt (confident as he was in the final triumph of the southern cause) that he was secure against all loss in having in his hands upwards of four thousand dollars over and above the amount due to Mrs. Skinker, paid to him, as he says in his answer, to indemnify him in the event Mrs. Skinker withheld her consent to receive it. But having assumed that responsibility, and deliberately incurred that risk, the court will not now permit his representatives to cast that loss upon parties who were never actors in the transaction which occasioned it; but it must rest where the law fixes it, upon 529 the executor, whose acts *amount to a devastavit, by which he incurs a personal liability.

Much has been said in argument about the hardship of holding the executor bound in this case. Such hardships meet us every day. The "hard cases" arising out of transactions in Confederate currency are constantly before us and constantly to be deplored. This is but another fragment of the numberless wrecks and widespread ruin which are found in the track of the terrible storm of civil war which has desolated our country and wrecked the hopes and the fortunes of a whole people.

But if a court is to be turned from its line of duty in the stern administration of justice upon the well settled principles of law governing each case, by considering

the peculiar hardship of the case, would not that consideration operate with full force in favor of the appellees, Skinker and wife. Is it not as "hard a case" that the loss should fall upon them? Would it not be a great hardship to take away from a married woman who never, through herself or her husband, by word or act assented to any of these arrangements entered into by the executor and the other heirs, that patrimony which her father in his will and by his solemn agreement had so carefully secured to her? Would it be no hardship to Skinker, who, when these transactions were going on, was fighting the battles of his country, or languishing in a Northern prison, or sick and wounded in a hospital, and had nothing to do with them, except to withhold his consent from an arrangement which others were deeply interested to make but which must certainly impair if not certainly destroy his wife's patrimony. Would it be no hardship to him, after the war was over, after suffering all its privations and dangers and wounds and imprisonments, 530 *when he comes to demand the little patrimony of his wife, which he properly refused by any act of his to deprive her of, that the court should thrust upon him a bundle of worthless Confederate bonds, and say to him there is the patrimony of your wife which her father was so careful to secure to her, and which you were so careful never to release, or transfer, or impair by any act of yours, but which without your consent, without her consent, has been converted into worthless trash. If the case is to be tried by the hardship which is to result from the decision, that consideration, it seems to me, operates with double force in favor of the appellees. But we have nothing to do with the hardship of the case. The hardship cannot be mitigated; the loss cannot be divided. It must fall on the one side or the other. It must be placed where the law fixes it. In my opinion, it must fall in this case upon the executor, who as knowingly and deliberately assumed the risk, and by his own conduct incurred a personal liability. I am of opinion that the decree of the Circuit court should be affirmed.

MONCURE, P., and ANDERSON, J., concurred in the opinion of Christian, J.

STAPLES and BOULDIN, Js., dissented.

The court having affirmed the decree, the appellant asked for a rehearing of the case.

ANDERSON, J. I have had great difficulty in bringing my mind to the conclusion, in this case, that the appellees are entitled to hold the executor responsible for that portion of Mrs. Skinker's legacy from her father, which has been lost by the executor's receiving payment thereof in 531 Confederate securities, although *received by him without her consent. The executor undoubtedly acted in good faith. He had no private interest to subserve in what he did. He made investments about the same time in Confederate securities. His most prudent and judicious neighbors did likewise. It is probable that he believed such investments were safe, having confidence in the success of the Confederacy. Under such circumstances I do not think it would be right to hold a fiduciary, an executor or administrator, responsible for the loss, if he acted within the scope of his authority and duty. But he must act strictly within the line of his duty.

Although a personal representative, acting strictly within the line of his duty, and exercising reasonable care and diligence, will not be responsible for the failure or depreciation of the fund in which any part of the estate may be invested, yet if that line of duty be not strictly pursued, and any part of the property be invested by such personal representative in funds or securities not authorized, or be put within the control of persons who ought not to be entrusted with it, and a loss thereby be eventually sustained, such personal representative will be liable to make it good, however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive. 2 Lomax's ex'ors, top p. 483, side p. 293.

In this case, upon mature deliberation, I am reluctantly forced to the conclusion that the executor did not act strictly within the line of his duty and authority. The will was his directory. It clothed him with all the authority he had in the premises. It was the law to him. It was his duty to follow its directions, and to carry out the intention of the testator. When a dying man confides to a surviving friend the ex- 532 ecution *of the testamentary disposition of his estate, in relation to those who are the objects of his bounty and affection, he ought to die with the assurance that his intentions will be carried out. It is a sacred trust, and must be enforced. When the will contains express directions what the executors are to do, an executor, who proves the will, must do all which he, as executor, is directed to do. (Ibid as above, § 2, top p. 475, side 288.) It is true that an executor has an absolute power of disposal over the whole personal effects of the testator, so that they cannot be followed by creditors or legatees, either general or specific, into the hands of the alienee. But in disposing of them I apprehend he must follow the directions of the will, otherwise he is not acting in the line of his duty. So he may collect debts due the testator, and it is his duty to do so, but not, as a general rule, to receive payment in a depreciated currency. He may collect them if necessary to pay debts or legacies, but not, when well secured, for the purpose of investment in uncertain securities, or to receive payment in a depreciated currency for the payment of legacies without the consent of the legatees. But in the exercise of these powers, if the will has given directions how they are to be exercised, he is not acting in the

line of his duty if he does not follow these directions.

In this case, if the executor had conformed to the provisions of the will and to the contract which the testator had made with his sons, which was evidently made in contemplation of death, and may be regarded as a part of his testamentary disposition, and which at least as executor he was bound to enforce, it is unquestionable that no loss could have been sustained by the legatees, by himself, or anybody else.

By the express stipulation of this con-
533 tract of sale to his sons *the testator had bound himself only to convey the title "as soon as the whole of the purchase money and interest thereon shall be paid." It was a joint contract with his two sons. Each of them was bound for the whole purchase money and the whole land was bound for the whole purchase money. The sons afterwards divided the land between them, and as between themselves, each one was bound to pay his proportion of the purchase money; but as between them and the testator they were jointly bound, and the whole land was bound for the whole of the purchase money. For by the contract the testator had stipulated to retain the title until the whole of the purchase money was paid.

It seems to me that the executor was not acting in the line of duty, when, in order to enable J. I. Hite, one of the purchasers, to pay up and discharge his proportion of the purchase money (as agreed between his brother and himself) in a very depreciated currency, he united with him in a deed of conveyance to the purchaser from him of one-half the land for depreciated Confederate money, and releasing thereby one-half the security for the remainder of the purchase money, without the consent of the legatee who is appellee here. In doing so he also departed from the only authority given to him to convey the title under the contract aforesaid, after the death of the testator's wife, who was then living. Although he acted from the most generous motives toward J. I. Hite and his sister Caroline, who was importuning him for money, and toward James Madison Hite, he was acting not by the request or with the consent of Eliza Skinker, the legatee who brought this suit for her legacy, and in acting as he did he assumed a personal responsibility. He was aware of it
534 *himself. In his letter to James M. Hite, he admits, that as executor it was not proper for him to do it without the consent of the legatees. He accordingly seeks to obtain their consent. He gets the consent of James Madison in his own right and as trustee for his sister Mrs. Baker, and Mrs. Baker's consent. But he fails to get the consent of Skinker and wife, and, finally, determines to act without their consent, no doubt hoping to get it afterwards; but for his security takes indemnity from Irvine Hite, the party most interested. These facts are convincing to my mind that this intelligent executor and sound lawyer was conscious of assuming a personal responsibility in what he did. And he, I concede most disinterestedly and from the best of motives, resolved to assume it and run the risk, relying, in part at least, for his security upon the indemnity which he had taken. But Mrs. Skinker and her husband declined, as they had a clear right to do, to give their consent or sanction to what had been done. It was the misfortune of the executor to lose the investment which he had, at his own risk, made for them in Confederate bonds, together with his indemnity for the personal risk. And Mrs. Skinker in this suit seeks to recover her legacy, which was well secured to her by the will of her father upon real estate, which she had never, by any act of hers, surrendered, and which the executor had no authority under the will to surrender for her. I think she is entitled to it, and I therefore concur in the result of Judge Christian's opinion.

The decree was as follows:

October 8th, 1873.—This day came again the parties by counsel, and the court having maturely considered the transcript of
535 the record of the decree *aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said decree; therefore it is decreed and ordered that the same be affirmed, and that the appellants pay to the appellees thirty dollars damages, and their costs by them about their defense in this behalf expended.

Whereupon, the appellants by counsel moved the court to set aside the foregoing decree and grant them a rehearing thereof; but because the court here is not yet advised of the judgment to be rendered in the premises, time is taken to consider thereof.

And at another day, to wit: the 17th day of November, 1874.—The appellants having submitted a motion at the last term of this court to set aside the decree pronounced in this cause on the 8th day of October 1873, and grant a rehearing thereof, and the court having maturely considered the motion aforesaid, and the arguments of counsel filed therein, doth order that the motion aforesaid be overruled, and that the decree pronounced in this cause, on the 8th day of October 1873, be certified to the Circuit court of Frederick county.

Decree affirmed.

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536 *Taylor v. Hutchison.

December Term, 1874, Richmond.

[18 Am. Rep. 699.]

I. **Partnership—Dissolution—Alien Enemies.**—Before and up to the breaking out of the late civil war, T and H were merchants and partners, doing business in the city of Washington. In May 1861 H left Washington and came to Virginia, making his domicil here, and remaining in the state. T and H having thus become alien enemies, their partnership was dissolved by operation of law.

II. **Same—Same—Continuing Partner.**—After H left Washington T continued the business for himself, and having the stock, debts due and fixtures,

valued, used the same in his business. He also had an account taken of the state of the partnership, from which it appeared that the liabilities of the partnership greatly exceeded the assets; that H had no capital then in the business, and that there was due to T a large debt. T then compromised with the creditors of the concern at forty cents in a dollar. After the war H sues T for an account and for a share of the profits made by T since the dissolution of the partnership. In this suit the account of the partnership is taken, which after giving H the benefit of the compromise, still shows that the liabilities exceeded the assets—HELD:

1. **Same—Same—Same—Rights.**—That though the disposal of the stock of a dissolved partnership by public auction is most favored, there is no general rule on the subject, but each case must depend on its own circumstances; and in this case the taking of the stock at valuation was proper.
2. **Same—Same—Same—Liabilities.**—Though it is a general rule that when upon a dissolution of a partnership the continuing partner carries on the business with partnership stock, he is liable to the outgoing partner for his full share of the profits; yet this rule does not apply, where at the date of the dissolution, the outgoing partner has drawn out his capital and has no property in the concern, but is indebted to it. In this case therefore, H is not entitled to a share of the profits made by T after the dissolution of the concern.

537 *This was an appeal by Maris Taylor from a decree of the Circuit court of Alexandria, made in a cause depending in that court, and in which Edgar S. Hutchison was plaintiff and said Taylor was defendant. The case is stated by Judge Christian in his opinion.

Claughton, for the appellant.

Wattles and John Howard, for the appellee.

CHRISTIAN, J. This is an appeal from a decree of the Circuit court of the city of Alexandria. The transcript of the record discloses the following facts: Maris Taylor and Edgar S. Hutchison, by articles of agreement entered into on the 6th day of May 1853, formed a copartnership as merchants, for carrying on the dry goods business in the city of Alexandria. The business was conducted by them in that city until the spring of 1859, when they removed to the city of Washington, where they conducted the same business under the same articles of copartnership. On or about the 24th day of May 1861, shortly after the commencement of the late civil war, Hutchison left the city of Washington and came to Virginia, where his family then resided, and never returned to Washington until after the close of the war. Whatever may have been his intention when he left Washington as to his purpose to return, he remained within the Confederate lines, united his fortunes with those of the Southern Confederacy, and was a part of the time he remained in Virginia employed as a clerk in the treasury department of the Confederate government located at Richmond. While not thus employed, he was engaged in mercantile pursuits in another part of the state within the Confederate lines.

538 *It appears from certain letters filed in the record, that after the close of the war Hutchison visited Washington, had an interview with his former partner, Taylor, and was furnished by him with an account or statement of the settlement of the copartnership made by Taylor on the 1st day of August 1861. In one of these letters, dated July 15th, 1865, Hutchison complains that Taylor had taken the stock on hand on that day (1st August 1861) at a discount of thirty-three and a third per cent. He protests against the allowance of so large a depreciation, and insisted that Taylor had sold these identical goods at a profit over and above the original cost. He also objects that, in the statement furnished by Taylor, of what is termed the "confidential debts" of Taylor and Hutchison, are embraced some $3,400 of money, due by Taylor individually, and borrowed before he, Hutchison, became connected with the business, and that this amount ought not to be embraced in the liabilities of the firm. He also protests that the estimate made by Taylor, of the solvent debts due the firm, was too low; and concludes this letter by saying: "Inasmuch as you settled with our creditors at forty cents in the dollar, that will form the basis of the settlement between you and myself; and when the corrections above referred to are made, and which I claim I am justly entitled to, it will exhibit quite a different result from that now shown on your books."

This letter bears date 15th July 1865, and it is worthy of special notice, that Hutchison does not then claim that there was no dissolution of the partnership at the time the settlement referred to in this letter was made by Taylor, nor is there any claim, or hint of any claim, on his part to any participation in profits made after August 1st, 1861, the date of Taylor's settlement

539 *furnished to Hutchison. He makes no objection that Taylor retained the partnership goods, but his objection is, that he retained them at "a discount of thirty-three and a third per cent."

His complaint in July 1865 is three-fold:—1st. That the partnership goods were retained by Taylor at less than one-third of their value. 2d. That the firm was charged with confidential debts, which Taylor alone was bound to pay. 3d. That the estimate made by Taylor, of the solvent debts due the firm of Taylor & Hutchison, was far below their real value. But there was then no complaint that the partnership was not in fact dissolved, nor was there any claim to a participation in the profits made after the 1st August 1861.

In March 1866 Hutchison filed his bill in the Circuit court of the city of Alexandria against his former partner, in which he alleges that at the time he left Washington, in May 1861, the firm of Hutchison & Taylor had on hand a stock of goods worth at least $15,000, and also a large amount of

solvent debts due the firm; that when he returned to Washington, in May 1865, he was informed by his copartner that he had dissolved the copartnership on the 1st day of August 1861; that this pretended dissolution was in violation of his rights and of the terms of the articles of copartnership; that said pretence of dissolution was made for the purpose of defrauding complainant; that the defendant had appropriated the assets of the firm to his own use, and refused to render any just account thereof to complainant. He prays that the defendant may be compelled to account for the assets of the firm, and that a commissioner of the court should be ordered to take an account of the partnership transactions; that the partnership should be dissolved; and 540 *that the defendant should be decreed to pay to him the just proportion due him.

The defendant Taylor answered this bill. He admits the co-partnership by which the plaintiff and defendant conducted the dry goods business first at Alexandria and afterwards at Washington. He exhibits with his answer the articles of co-partnership, by which it was stipulated that the said co-partnership could at any time be dissolved by mutual consent, and further that each partner covenanted to give his whole time and attention to the business of the firm; and the said articles of agreement provide that in the event of either partner failing to keep and perform the covenants of said agreement, that the other partner should have the right immediately to dissolve the partnership. After thus setting out the articles of co-partnership and averring that the business, so far from being prosperous had resulted in a clear loss of over $6,000, he states that "at the time complainant left the city of Washington, on or about the 22d May 1861, not contemplating a return to said city, and well knowing that the partnership affairs were not in a prosperous condition, he consummated a purpose which he had before frequently intimated, and proposed to defendant a dissolution of the co-partnership, to which the defendant consented; and at the same time it was agreed, that this defendant should take all the stock and debts due the partnership, to be accounted for at an appraisement to be made by J. Marion Hart, the bookkeeper of the concern, well experienced in mercantile matters." He exhibits with his answer also the appraisement and account of Hart, made, as he avers, in accordance with this agreement of dissolution by mutual consent, by 541 which it appears that *while the assets of the firm amounted to $15,443.01, its liabilities reached the sum of $36,950.96.

He also files with his answer a notice, which appeared at this time in the Washington papers, of the dissolution of the firm of Taylor and Hutchison, and the continuance of the business in the name of Maris Taylor. He also exhibits with his answer, an account of the partnership transactions, showing that the firm was indebted to Taylor in the sum of $12,000.

Various accounts were ordered by the Circuit court of Alexandria, both of the partnership transactions up to the time of the alleged dissolution and of the profits made by Taylor after the alleged dissolution. That court was of opinion that Hutchison was entitled to a share of the profits made by Taylor after the alleged dissolution of the partnership, and accordingly decreed to him, as his share, the sum of $6,368.70, with interest from 21st day of March 1865. From this decree an appeal was allowed to this court.

In the court below one of the great points in controversy was whether, in point of fact, there had been a dissolution of the partnership as alleged by the defendant.

Upon this point there were voluminous depositions, containing conflicting and contradictory testimony.

I do not deem it necessary, in my view of the case, to pass upon this question of fact so much discussed at the bar.

It is immaterial, to the decision of the legal question involved, how the partnership was dissolved, whether by mutual consent or by operation of law, the result of that dissolution is precisely the same, as it affects the rights of the parties in this case. Conceding that the averment in Taylor's answer, "that before Hutchison left Washington, in May 1861, there was a mutual 542 *agreement to dissolve their copartnership," is not sustained by the proofs in the cause, yet it is clear, upon the undisputed facts, that there was a dissolution, growing out of the separation of the parties on different sides of the belligerent lines during the war between the northern and southern states, commencing in the spring of 1861.

It is conceded that, in May 1861, Hutchison left the city of Washington, came to Virginia, where his family resided, and remained in this state until after the close of the war, where he was engaged part of the time in mercantile pursuits for himself, and part of the time as a clerk in the treasury department of the Confederate States located at Richmond. Whatever may have been his intention when he left in May 1861, as to his returning to Washington, he, in fact, became domiciled in Virginia, united his fortune with the Southern Confederacy, remained during the whole war within the Confederate military lines a subject of that government. He thus became domiciled in Virginia, and a citizen of this state, then at war with the United States, at the capitol of which his partner was domiciled.

That this state of things operated ipso facto as a dissolution of the partnership between them is now too well settled to admit of doubt or discussion. It is hardly necessary to refer to authorities on a point so well established. I will quote, however, a single extract from Mr. Justice Story (see Story on Partnership, § 315, cases there

cited) as apposite and conclusive. He says (p. 491, ed. 1859) dissolution of partnership by a public war between the countries of which the partners are respectively subjects, "would seem to be a necessary result of principles of public law well established and clearly defined. By a declaration
543 *of war, the respective subjects of each country became positive enemies of each other. They can carry on no commercial or other intercourse with each other; they can make no valid contracts with each other; they can institute no suits in the courts of either country; they can, properly speaking, hold no communication of an amicable nature with each other, and their property is mutually liable to capture and confiscation by the subjects of either country. Now it is obvious from these considerations that the whole objects and ends of the partnership, the application of the joint funds, skill, labor and enterprise of the parties in the common business thereof, can no longer be attained. The conclusion, therefore, would seem to be absolutely irresistible that this mutual supervening incapacity must, upon the very principles applied to all analogous cases, amount to a positive dissolution of the partnership."

After an interesting and instructive discussion of the subject, the author concludes: "The just inference from all these considerations seems therefore to be, that in all these cases there is an utter incompatibility created by operation of law, between the parties as to their respective rights, duties and obligations, both public and private; and therefore that a dissolution must necessarily result therefrom, independent of the will or act of the parties." Id. § 316.

This whole subject came up successively, before the Supreme court of New York and the Court of Errors of that state in the case of Griswold v. Waddington, 15 John. R. 57; S. C. 16 John. R. 438. The masterly opinions of Mr. Chief Justice Spencer and of Chancellor Kent are indeed judicial discussions of rare ability and research, which have been recognized as authority in this state, and every other state in the
544 *Union, where this question has come up for judicial investigation. We would refer to and adopt the exhaustive reasoning of these cases as re-affirming the principles laid down by Mr. Justice Story, and establishing the law for this state, as well as of every other state of the Union where the question has been considered.

We must therefore conclude that whatever the fact may be as to the dissolution of the partnership by mutual consent, as contended for by Taylor, it is certain that the partnership was dissolved by operation of law, when, in May 1861, Hutchison left the city of Washington and became domiciled in Virginia, and a citizen of that state, then at war with the United States.

It being thus settled that there was a dissolution of the partnership by operation of law, the main question we now have to decide is what was the interest of Hutchison in the partnership after its dissolution? Is he entitled to a share of the profits of the business made by Taylor after the dissolution?

It is insisted by the learned counsel for the appellee, that it is a uniform rule, of universal application, that whenever the continuing partner, after dissolution, carries on the business with the partnership stock, he is liable to the outgoing partner for his full share of the profits. This is certainly the general rule, and is founded upon sound principles and unquestioned authority. The reason of the general rule is plain. The right to share in the profits resulting from a continuance of the business after dissolution of the partnership, is founded upon the exposure of the property of the partner who goes out to the risk of the new business. But suppose the outgoing partner has in fact no property in the concern to be exposed; suppose
545 *at the date of the dissolution he has drawn out the whole of the capital he had put in the concern, or that he is indebted to the concern in an amount far exceeding his interest in it. Suppose it appears that at the date of dissolution he has not only drawn out his capital, but has also withdrawn his labor, skill and services, and that the liabilities of the concern are far in excess of the assets, and that these assets have been faithfully applied to the payment of the debts of the firm by the continuing partner, and, in point of fact, that the outgoing partner has thus no interest in the concern which can be put to the hazard of insolvency or bankruptcy. In such cases the principle of the rule contended for cannot apply, for the reason of the rule ceases to exist.

But it is insisted by the appellee's counsel, that inasmuch as the continuing partner did not sell out the old stock at public auction, but continued it in the business, the retiring partner is entitled to share in the profits independent of the state of the accounts between the partners at the date of the dissolution.

It is claimed that it is immaterial what the condition of the partnership affairs was at the time of dissolution; what was the interest of the partners respectively; what proportion of the capital had been contributed by either partner, or whether the outgoing partner had withdrawn his input, yet if the stock of the firm is carried over into the new business, and not sold at public auction, the outgoing partner is still entitled to have an account and share in the profits. This proposition cannot be maintained in the broad and unqualified manner in which it is stated. The authorities relied upon do not sustain it; but, on the contrary, it seems to be well settled that there is no uniform rule applicable alike to all
546 cases. In Parsons *on Partnership, p. 524, the author referring to a number of decisions on this subject, says: "In regard to the terms of the account and settlement, and the charges, credits or allowances to be made, it has been conceded by the highest authority, that specific rules

are of little use, because the justice of every case requires that its peculiar facts and merits, the nature of the trade, the conduct of the parties, and all the various circumstances which affect the rights of the parties, must be taken into consideration, to determine what they are or should be." The same author says: "A sale is, generally speaking, that method of disposing of the property, or facilitating its division, which is less open to fraud or mistake, and is therefore much favored. * * * * Still it must always be possible that the peculiar circumstances of the case may make a sale injurious, and that the true interests of all parties may be better preserved and protected without it." Id. 525.

In Willitt v. Blanford, 1 Hare's R. 253, Vice Chancellor Wigram, after reviewing all the English cases decided up to that time (1842) said: "I feel myself bound therefore, by authority and reason, to hold that the nature of the trade, the manner of carrying it on, the capital employed, the state of accounts between the parties, &c., may materially affect the rights of the parties."

Again he says, in the same case, page 269, "I have again considered the subject, and read the case to which I was referred, and I remain of the opinion I expressed at the close of the argument, that there is no rule of this court applicable alike to all cases, and that there is no rule which is so established, or general in its application, that it is to be taken to be the general rule, until circumstances are shown which
547 displace *it. The facts of each case must be fully brought under the view of the court before it can be in a position to state what justice to the parties seeking its protection may require with due regard to the interests of other parties. No one can attend to the elaborate judgments of Lord Eldon in Crawshaw v. Collins, Brown v. DeTastet, and even in Cook v. Cullingridge, without being satisfied that his mind saw the impossibility of subjecting cases so various as those of trading partnerships to any universal rule. And I think it is impossible to consider the subject abstractly upon authority, without feeling satisfied that justice would be endangered by an attempt to subject all cases of this description to any uniform rule." See also Parsons on Partnership, p. 523, and cases there cited in note.

In Wedderburn v. Wedderburn, 15 Eng. Ch. R. 722, 752, Lord Cottenham held that there was no absolute rule on this subject, but each case must depend upon its own peculiar facts, depending upon the state of accounts, the capital employed, &c.

In the same case, coming up again in 1856, it was held by Sir John Romily, that the liability to account for the profits derived from the trade carried on (after one partner had retired, or was dead, or became bankrupt), must depend on the nature of the trade, the mode of carrying it on, the capital employed, the state of account between the parties, and the conduct of the parties afterwards.

That the rule contended for by the appellee's counsel is not a universal one, is shown by a remark of Lord Eldon, in Brown v. De Tastet, Jacob R. 284, in which the doctrine supposed to be established in Crawshaw v. Collins, 2 Russ. R. 525, are brought in review, and considered productive of great hardship.

548 *The Lord Chancellor observed, in reply to the remarks of the counsel upon the case of Crawshaw v. Collins, that he did not mean to say, that in all cases of partnership the consequence of carrying on the business would be that the profits should be divided, as if the parties had not died or become bankrupt, but that such might be the law in some cases.

The general principle ought to be this: that as it is quite competent to the parties to settle the accounts and to mark out the relation between themselves as debtor and creditor, so when there is a non-settlement of the account (though a settlement may sometimes introduce great hardship and difficulty), yet those who choose to employ the property of another for the purposes of their trade, exposing it to all the risks of insolvency and bankruptcy, have no right to say that the account shall not be taken if it can be taken without incurring difficulties which might embarrass the house to such an extent as to make it unjust to demand it."

It would seem, therefore, that the right to share in the profits resulting from a continuation of the business, after the dissolution of the partnership, is founded upon the exposure of the property of the partner who goes out to the risks of the new business; and that if the partner going out has no property to be thus exposed, the principle cannot apply. See also Collyer on Part., 181, 182; and Hyde v. Entie, 4 Maryland Ch. Decisions, p. 80.

Applying these doctrines to the case before us, we are bound to conclude that Hutchison was not entitled to an account or share of the profits made by Taylor after a dissolution of the partnership. All he was entitled to was to call upon the continuing partner, Taylor, for a proper application of the assets on hand at the
549 dissolution *of the partnership, to the payment of the liabilities existing at the date of the dissolution. The law having by its interdict put an end to a partnership between two partners, who had become alien enemies, Taylor could not bind Hutchison to any debts created by him upon the credit of the firm. Hutchison was no more bound than if he had been dead or a bankrupt, or the partnership had been dissolved by mutual consent.

Nor was Hutchison entitled to a share of the profits made by Taylor after the dissolution. When he left Washington he had withdrawn his whole input capital. According to the settlement of the partnership transactions made by a trusted agent of the firm, J. Marion Hart, the bookkeeper, the

assets on hand on the first day of August 1861, including stock, debts, fixtures and cash on hand, amounted to $15,848.99, while the total liabilities of the firm amounted to the sum of $37,098.25; of which latter amount $12,749.50 was due from the firm to Taylor. So that there was, according to this statement, an excess of liabilities over assets of $21,189.26.

This statement is modified, however, by the estimate of the assets made in the mode directed by the decree of the Circuit court, which increased the amount of assets to $21,728.46, and reduced the liabilities by arrangement made with northern creditors by compromise made by Taylor, to $26,234.87; $12,749.50 of which was due to Taylor. This is the most favorable estimate which can be made for Hutchison, and is not excepted to by him; and this still shows an excess of liabilities over the assets of $4,506.41.

It will thus appear, that at the dissolution of the partnership the firm was in-
550 debted to Taylor upwards *of $12,000; Hutchison had withdrawn his capital; and the assets on hand, under the most favorable aspect of the case, were nearly $5,000 less than sufficient to meet the liabilities of the firm. Having withdrawn his capital, as well as his personal services, and being largely indebted to Taylor, and the liabilities of the firm being largely in excess of its assets, and the partnership having been dissolved by operation of law, he cannot now participate in the profits made by Taylor after dissolution of the partnership. The right to share in the profits resulting from a continuation of the business after dissolution is founded upon the exposure of the property of the partner who goes out, to the risks of the new business. In the case before us, Hutchison had no interest in the partnership except that the assets should be applied to the discharge of the liabilities of the firm at the time of dissolution. This was not such an interest as could be exposed to the risks of the new business. The partnership could not exist during the war, because the partners were alien enemies. Taylor could not have made any contract by which Hutchison would have been bound as his partner. He was bound to account to Hutchison for his share of the stock at a fair valuation, no matter what the result of his business had been. If he had suffered loss, he would have had to bear the loss alone. Being alien enemies, living on different sides of belligerent lines, they could not share in the profits made by each other. Even if, by express contract, they had bound themselves to share in profits made in their business during the war, such a contract would have been unlawful, and could not be enforced; for that would have created such a confusion of obligations between the law of partnership and the law of war, such a conflict between their duty as partners and their duty as
551 *patriots, as public policy imperatively prohibits. See Griswold v. Waddington, 16 Johns. R. 438, 489.

Now it is apparent, from the whole record in this case, that if after the commencement of the war, and after Hutchison had left Washington, and changed his domicil to Virginia, Taylor had sold out the stock of the firm at public auction, Hutchison would not have had the slightest pretence of a claim that Taylor should account to him for his share of the proceeds of sale. Instead of a sale at public auction, Taylor took the stock at a valuation fixed by a disinterested party, and one familiar with the stock, the clerk and bookkeeper of the firm. How does this change the question or affect the rights of Hutchison? It has already been seen that while a sale is, generally speaking, the mode of disposing of the partnership property, which is least open to the danger of fraud or mistake, and is therefore much favored, yet, according to Parsons (supra), "still it must always be possible that the peculiar circumstances of the case may make such sale injurious, and that the true interest of all parties may be better preserved and protected without it." Now the main ground upon which a sale at public auction is "much favored" is, that at such sale both partners may be present and bid for the stock, and prevent a sacrifice.

In this case, one of the partners (Hutchison) could not have been present, and the other partner could have bought the stock without an interested competing bidder being present to make him pay its value. This, it seems to me, is one of the cases which comes within the very terms of the exception stated by Mr. Parsons.

There can be no doubt that if the
552 stock of goods *had been sold at public auction in the absence of Hutchison, Taylor would have bought them at a much smaller sum than the valuation estimated by Hart. And certainly it must be conceded by all, that if there had been such sale, Hutchison could not have had the slightest pretence of a claim for a share in the profits made by Taylor after the dissolution of the partnership.

The taking the stock at valuation, instead of sale, was manifestly to the advantage of Hutchison; and if he could not assert his claim to a share of profits in the event of a sale, he ought not now to assert it. Upon the whole case, I am of opinion that the decree of the Circuit court is erroneous. The decree ought to be reversed and the bill dismissed.

The other judges concurred in the opinion of Christian, J.

Decree reversed.

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553 *Harrison's Ex'or & als. v. Price's Ex'or & als.

December Term, 1874, Richmond.

1. **Chancery Practice—Entries of Record—Setting Aside.**—An order is made in a cause, that on the motion of the plaintiffs, and by consent of parties, the cause came on to be heard upon the bill and exhibits, and answer and exhibits, on considera-

tion whereof the court takes time to consider. In fact a number of deeds and two records had been placed by the clerk among the papers, by direction of plaintiffs' counsel, but had not been endorsed as filed; which were intended to rebut the defense set up in the answer. Before the case was decided, the plaintiffs' counsel, discovering the error in the order, moved the court to set it aside, that the cause might be brought on on replication to the answer and the evidence. The entry is not an order, but a mere statement, and should be set aside, and the cause be heard upon the pleadings as they were intended to be, and all the evidence.

2. **Sureties—Notice to Creditor to Sue.***—Where one surety in a bond gives notice to the obligee to sue the obligor, the statute does not peremptorily require the obligee, after obtaining judgment, to sue out execution upon it; it only requires him to use due diligence in prosecuting suit "to judgment, and by execution."

3. **Same—Same—Laches of Creditor.**—In such case, where the creditor has not been guilty of laches, but the clerk has refused to issue the execution, on the ground that the stay law forbade it, and the court has sustained him in it, whether the judgment of the court was right or wrong in enforcing the stay law, negligence cannot be imputed to the creditor.

4. **Same—Same—Duty of Creditor—Liability of Surety.**—Upon such notice to the creditor by a surety, the creditor is not required to pursue the estate of the principal in equity to impeach alleged fraudulent conveyances, or to subject an equity of the principal to the payment of his debt, or to exhaust his remedies against the principal before he can have satisfaction out of the estate of the surety.

554 *5. **Same—Same—Statute.**—The statute which authorizes a surety to give notice to the obligee to sue, gives the surety a more summary remedy than he had before by bill in equity, but does not change the relation or the contract between creditor and surety. It only holds the creditor responsible, if by reason of his laches or negligence, the equity of the surety against the principal is infringed.

In August 1869, John W. Cunningham, executor of M. M. Harrison, deceased, and George G. Goodrich, assignee of Pleasant Harrison, who sued for themselves and such other creditors of William B. Price, deceased, as should come in, &c., instituted their suit in equity in the Circuit court of Brunswick county, against John H. Lewis, executor of said Price, and his widow and children, all whom were infants. In their bill they charged that they were judgment creditors of the estate of William B. Price, by judgments recovered against the executor; of which they file copies. That the personal estate will not be sufficient to pay the debts of said Price; but that he left a large real estate. And they pray that the accounts of the executor may be settled, and also accounts of debts, and of the absolute and annual value of the real and personal estate of which said Price died seized; that the court would decree a sale of the real estate if it should be found necessary, and for general relief.

A guardian ad litem was appointed for the infant defendants, and he put in an answer; and Lewis, the executor, also answered. He says, it is true, the personal assets of his testator are not sufficient to discharge his liabilities. He says further, that the debts alleged to be due from the testator to the plaintiffs were contracted by him as surety, and that the complainants, if entitled to a decree against the estate of his testator therefor, cannot be entitled to such decree until they shall produce to the court satisfactory evidence of the insolvency of his principals.

555 *The cause came on to be heard on the 15th of October 1867 upon the bill taken for confessed as to Mrs. Price, the answers of the guardian ad litem and the executor, with replications thereto, when the court made a decree directing the executor to render his account of administration before a commissioner of the court. And the commissioner was directed to take the other accounts asked for in the bill.

In February 1868 the plaintiffs filed an amended bill, bringing in the co-obligors of Price in the bonds upon which their judgments were obtained. In their amended bill they state that four of these co-obligors, whom they name, had made assignments of their real and personal estate before complainants had obtained their judgments, and complainants do not expect to realize anything from the deeds; there being many other creditors who are preferred to them: That three of them have filed petitions in bankruptcy; and that execution for one year's interest proved wholly unavailing against all the obligors against whom the court would give a judgment on a motion for interest.

The commissioner made his report, which was excepted to by the plaintiffs, and recommitted by the court. And another report was returned in October 1868; which was also excepted to by the plaintiffs.

On the 14th of October 1869, the defendant, Lewis, had leave to amend his answer filed in the cause. And on the 12th of October 1870, the following entry was entered on the record:

"On motion of the defendant, leave is given him to file his answer in this cause, to which the plaintiff replied generally; which answer is as follows:"

In this answer, the executor admits the plaintiffs recovered judgments against him, as stated in their bills, in October 1866; but he avers, that said judgments

556 *were rendered on contracts for the payment of money upon which his testator was only bound as surety, after and in pursuance of a written notice from him to plaintiffs, requiring them to sue all the parties to said contracts, solvent and resident in the state, and to prosecute said suits to judgment and by execution; and he avers, that the plaintiffs after recovering their judgments, failed within a reasonable

*Rights of Sureties.—The principal case is cited in Coffman v. Moore, 29 Gratt. 248; Price v. Harrison, 31 Gratt. 114; Yuille v. Wimbish, 77 Va. 311.

time to sue out execution, either against respondent as executor, although the estate of the said Price was then and is now solvent, or against the co-obligors of the said Price, some of whom it is believed and charged were then solvent. And he avers and maintains, that the plaintiffs by reason of their laches, and neglect in thus failing diligently to prosecute their demands by execution, as they were required by their contract and the law of the land to do, have forfeited all right to demand of the said Price's estate, or of his co-sureties, or their estates, the whole or any part of the money due upon said contracts, now at law merged in the judgments aforesaid.

The defendant further admits that certain of the co-obligors of his testator have made deeds of assignment for the benefit of their creditors; but he charges that several of said deeds, by reason of large reservations to the grantors, were fraudulent upon their face, null and void, and no obstacle to a levy, had the plaintiffs sued out executions upon their judgments at the time or soon after they were rendered. That if any executions were issued against the co-obligors of said Price for a year's interest upon the judgments recovered against them, which proved unavailing, the same was issued more than twelve months after the said judgments were obtained. And if any of said co-obligors have been adjudicated 557 bankrupts, which *he admits is the fact, that their petitions in bankruptcy were filed more than twelve months after the rendition of said judgments. And he avers the same facts as to all other creditors of Price who have joined in the suit, except certain whom he named.

On the 13th of October 1870, the following decree was entered of record:

On the motion of the plaintiff and others claiming to be creditors of the estate of William B. Price, deceased, who have united with the plaintiffs in this bill, and by consent of parties, this cause came on this day to be heard upon the papers formerly read, the amended bill with exhibits, taken as confessed as to defendants, naming the co-obligors, the answer of J. H. Lewis, executor, with exhibits, this day filed by leave of the court, and was argued by counsel. On consideration whereof the court wishing further to be advised, takes time to consider.

On the 21st of April 1871, the following order was entered: "Upon motion of the plaintiffs by counsel, leave is given them to file the petition of G. G. Goodrich and affidavits of R. Turnbull, S. Thrower, G. Dromgoole and W. F. C. Gregory; and thereupon the plaintiffs moved the court to rescind the decree made at the October term 1870; which motion being argued by counsel is overruled by the court for the following reasons:"

1st. The said order or decree of October 1870 was entered in open court, in the presence of G. Dromgoole and Ro. Turnbull, two of the counsel marked upon the record as counsel for the plaintiffs; that said order was read aloud in open court at the term it was ordered to be entered, having been submitted to one of the said counsel before it was presented to the court; the deeds and other papers specially referred to 558 *in the petition of the plaintiffs, were not referred to in the pleadings in the cause nor marked as exhibits, nor even endorsed filed by the clerk; and that some of said papers were sent to the court after the term at which the cause was submitted on the said order.

2d. Because the cause was set for hearing by the plaintiffs, without an opportunity afforded the defendants to take proof in support of their answer, and because the legal effect of that order is but fair and just in this case.

The petition referred to in the above order, states that he did not consent that the cause should be heard simply upon the bill and the exhibits therewith filed, and the amended answer and exhibits therewith. The petitioner is informed that a replication was put in, which has been disregarded in bringing on the case, and that important testimony, to wit: a series of deeds executed by the co-obligors of Price, and also the record styled Harrison's ex'or v. Edmunds, and a copy of a judgment recovered by Harrison's ex'or v. Edmunds and another at the October Term 1867 of this court, on a motion for interest, and of the execution thereon with the return of "no effects," upon which the plaintiffs relied as testimony in the cause, to show diligence in making the money out of every obligor who could be reached by execution, has been entirely overlooked or disregarded in bringing on the cause. That this testimony was placed among the papers in the cause previous to the last term, as will appear by the certificate of the clerk. He therefore insists the said interlocutory decree ought to be amended, and made to conform to the pleadings and proofs in the case.

The clerk of the court certifies that seven deeds from the co-obligors of Price, and the judgment and fi. fa. of Harrison's ex'or v. Edmunds and Fitchett, on a 559 *motion for interest, were copied by him and put among the papers in the cause, by the instructions of the plaintiff's counsel, before the October Term of the court for 1870. That another deed he names, was put in his hands before the last term of the court, with directions to file the same in the cause; and that before the last term he was instructed by G. Dromgoole, one of the counsel of the plaintiffs, to copy and file in said cause a certain record styled Harrison's ex'or v. N. G. Edmunds & als., which had been made out for the court of appeals; and he suggested to Dromgoole the propriety of getting the copy from Major Gregory (one of the counsel) to save the expense of another copy. And Dromgoole states that he, as counsel, placed this record in the bundle of papers previous to the entering of the interlocutory decree.

It appears from the affidavits filed, that the decree or order was prepared by one of the counsel for the defendant; that none of

the counsel for the plaintiffs understood the order as excluding the papers which had been, as they supposed, filed in the cause, and that Dromgoole had argued the cause in writing, upon the belief that the evidence was filed, and supposed it was a mere formal order; and he was not aware that the defendant's counsel were assuming to act for the plaintiffs.

The cause came on to be heard on the 21st of April 1871, upon the papers formerly read, and upon the amended bill taken for confessed as to the defendants, naming the co-obligors, the answer of the infant defendants by their guardian ad litem, and the answer of John H. Lewis, executor, to the amended bill without replication; and it appearing to the court that William B. Price was surety upon the claims asserted against his estate by Cunningham, 560 executor of Harrison, *Goodrich, and a number of others named, and the court being further satisfied that these parties, after receiving notice in writing, &c., did institute their suits and obtain judgments in a reasonable time, but have failed to sue out executions against solvent and resident defendants; the court is of opinion that by reason of this neglect and failure of said creditors to sue out execution as aforesaid, the estate of the said William B. Price is wholly exonerated from their demands. The bill of the plaintiffs, and of the other named creditors, who had become parties thereto, was therefore dismissed with costs. And as to the other creditors the cause was remanded to rules. From this decree Harrison's ex'or and Goodrich applied to a judge of this court for an appeal; which was allowed.

Jones & Bouldin, for the appellants.

Page & Maury, for the appellees.

ANDERSON, J. delivered the opinion of the court.

The court is of opinion that the entry made in this cause on the 13th of October 1870 ought, upon the petition which was presented by the plaintiffs, with the exhibits and affidavits accompanying the same, to have been set aside; and that the case ought to have been brought on to be heard upon the pleadings as they were in fact, and all the proofs in the cause. The said entry is not a decree. It is merely a statement that on the motion of the plaintiffs, and by consent of the parties, the case was submitted that day upon the pleadings and papers described. It is evident from the affidavits and other evidence filed that this statement was not true. And no decree had been made upon that alleged submission, 561 until after the said *motion was made by the plaintiffs and overruled at a subsequent term of the court. The whole matter was in the breast of the court, and the fact was palpable that the said entry was erroneous, and it ought to have been rescinded. It was clearly error in the court to proceed to hear and determine the cause upon a misstatement of the pleadings, and upon only a part of the evidence in the cause, excluding from its view and consideration important documentary evidence, which had been filed with the papers in the cause, by order of plaintiffs' counsel, prior to the making of said entry on the 13th of October 1870, and which was brought prominently to the notice of the court before the final hearing and decision, and was relied upon by the counsel in their note of argument before the papers were placed in the hands of the court.

The court is also of opinion that as between the obligors and the obligee, the obligors are all principals. But as between the obligors themselves, it is competent for any of them to show that he executed the bond for a co-obligor, who was the principal debtor. And that the statute which discharges the surety from the obligation of the contract, if the creditor fails to sue in a reasonable time after notice, and to prosecute his suit with due diligence, being designed only to give effect to the equities of the surety against his principal, it is competent for an obligor, in order to avail himself of his rights under this statute, to show, that as between him and his co-obligor, he executed the bond as his surety.

The court is also of opinion that the act of assembly, chap. 144, § 5, p. 993, Code of 1873, which is the same in the Codes of 1849 and 1860, does not peremptorily require the creditor to sue out an execution 562 *upon the judgment. It only requires him to use due diligence in prosecuting suit "to judgment, and by execution," that is, in executing the judgment. In this case it is admitted that the plaintiffs brought suits and obtained judgments in a reasonable time; but it is alleged that they were guilty of gross laches in failing to sue out execution. They did not sue out executions. But their failure to do so is not attributable to negligence or laches on their part. It is shown by the record that they demanded of the clerk to issue fi. fas. upon the judgments, soon after they were rendered. But the clerk refused to issue them upon the ground that he was prohibited by the act of assembly of March 2d, 1866, commonly known as the staylaw. They then sought the interposition of the court, to compel its officer to issue the executions. But the court refused and sustained the action of its clerk. The appellants were not responsible for the stay law; or for the action of the courts or its officers, in recognizing its obligation. It was not in their power to issue the executions. They did all that they could do to cause the executions to be issued by the officers of the law, who only could issue them. Laches or negligence cannot be imputed to them for not prosecuting the suit by execution, whether the judgment of the court was right or wrong in enforcing the staylaw. As well might it be said, if the court by erroneous rulings had delayed the plaintiffs in recovering judgments, that they had not prosecuted their suit to judgment with due diligence.

The court is also of opinion, that the act of assembly requiring a creditor to sue, and to prosecute his suit with due diligence to judgment, and by execution, upon receiving notice from the surety to sue, does not require the creditor to pursue the 563 principals' estate in *equity, to impeach alleged fraudulent conveyances, or to subject an equity of the principal to the payment of his debt, or, in a word, to exhaust his remedies against the principal before he can have satisfaction out of the estate of the surety. Such a requirement would be repugnant to the rights of the creditor under his contract, and inconsistent with the relation between him and the surety; who is equally bound to the creditor with the principal for the payment of the debt. His obligation is not conditional but absolute. The creditor may sue him alone, if the obligation is several, or joint and several, and may levy execution upon the property of the surety, instead of the principal at his pleasure, and the surety has no equity against the creditor that would entitle him to a stay of execution. And there is nothing in the statute which changes this relation or the rights and obligations of the parties under it. The statute creates no equities in favor of the surety against the creditor, but proceeds on the ground of an equity in the surety against his principal, and is designed to make it availing; and holds the creditor responsible only for its infringement. (Humphrey v. Hitt, 6 Gratt. 509.) Independently of the statute, the surety might enforce his equity against the principal. If he was apprehensive of loss by the delay and forbearance of the creditor he might file his bill in chancery to compel his principal to pay the debt. The statute gives him a more summary remedy, but does not change the relation or the contract between the creditor and surety. It only holds the former responsible, if by reason of his laches or negligence the sureties' equity against his principal is infringed.

We have seen that the creditor has not incurred that responsibility in this 564 case. But as all the parties *are before the court, the appellee, if his testator is shown to have executed the bond as surety, ought to have a decree over against his principal, upon payment of the debt, if he desires it, subjecting any estate the principal may have to refund what he pays, and also a decree against his co-sureties for contribution.

But as the decree of the Circuit court undertook to decide the cause, without considering the plaintiffs' replication to the defendants' answer, and without looking into important evidence which had been filed with the papers in the cause, the entry of October 13th, 1870, and the decree made pursuant thereto, should be set aside, and the cause remanded to the Circuit court, to have the same status in that court that it had before said entry was made, and to be brought on to be heard there upon the replication, the depositions, exhibits, and all the other evidence in the cause. And the plaintiffs' exceptions to the commissioner's report and all other questions decided by said decree, which have not been reviewed and decided in this opinion, are, by the setting aside of said decree in toto, left open and undecided here, to be passed on by the Circuit court when the whole case is before it.

The court is of opinion therefore to reverse the decree of the Circuit court with costs, and to remand the cause for further proceedings therein in conformity with this opinion.

The decree is as follows:

The court is of opinion that the Circuit court erred in overruling the motion of appellants to rescind the entry made on the 13th of October 1870; and in not bringing on the cause to be heard upon the true state of the pleadings, and upon all the evidence in the cause; and in holding that 565 William B. Price's estate *was wholly exonerated from the demands of the plaintiffs, the appellants, and the creditors who united in the suit with them, who had received notice to sue, by reason of the failure of the plaintiffs to sue out executions upon their judgments, and in dismissing the plaintiff's bill as to the said Price's executor and devisees, &c., with costs. It is therefore ordered and decreed that the said decree of the Circuit court of Brunswick county be reversed and annulled. and that the appellees pay to the appellants their costs expended in the prosecution of their appeal here; and the cause is remanded to the said Circuit court for further proceedings to be had therein in conformity with the principles herein declared, and with the opinion of this court filed with the record.

Decree reversed.

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566 *Lynchburg Female Orphan Asylum v. Ford.

December Term, 1874, Richmond.

1. **Contracts.**—F contracts to make, burn and deliver to L a certain quantity and quality of bricks, 80 *per cent.* of the price to be paid when ready for delivery, according to kiln measure; the remaining 20 *per cent.* to be paid when the bricks are laid in the wall of the building which L proposed to erect. The bricks have been made, and the 80 *per cent.* paid; but they are still in the kiln, when the architect of L rejects a large portion of them as not being of the quality contracted for. The quality of the bricks is the subject of difference; but, in their submission to arbitration, they say, "whereas certain differences have arisen as to the quality of the bricks manufactured under said contract, and as to the construction of said contract"—HELD:

1. **Same—Construction—Arbitration and Award.**—The latter clause will be held to refer to the construction of the contract in relation to the quality of the bricks; and the arbitrators awarding the payment by L to F. of the 20 *per cent.* reserved, is beyond the submission.

2. **Same—Same—Same—Submission.**—The submission is not to be extended by the counsel of F arguing in the presence of the counsel of L, that it embraces the question of the payment of the reserved 20 *per cent.*

3. **Same—Same—Same.**—That part of the award in relation to the quality of the bricks being entirely distinct and not dependent upon that part directing the payment of the reserved 20 *per cent.*, that part may be sustained, whilst the latter part is set aside.

This was an action of debt upon an award, in the Circuit court of the city of Lynchburg, brought by William H. Ford against The Lynchburg Female Orphan Asylum of Lynchburg, to recover the sum of $1,100 awarded to him. The defendant 567 pleaded "nil *debet;" and also that the award was without the submission.

Upon the trial the jury found a verdict in favor of the plaintiff for the said sum of $1,100, with interest; and the defendant thereupon moved the court to set aside the verdict and grant a new trial, on the ground that the verdict was contrary to the law and the evidence. But the court overruled the motion, and rendered judgment according to the verdict; and the defendant excepted, and applied to this court for a supersedeas; which was allowed.

It appears from the evidence, that William H. Ford entered into a written contract with the building committee of the trustees of The Lynchburg Female Orphan Asylum, by which he undertook to make, burn and deliver on the grounds of the trustees, and on the spot to be selected by the committee, one hundred and sixty-seven thousand pressed stock brick, to be moulded in sand, dust or spanish red, or any other paint, to be hereafter determined by said committee, all to be of uniform color; also three hundred and thirty-three thousand of what is known as common brick; both kinds to be all hard burnt, of a size and a cost stated, and to be delivered in parcels and at times agreed upon; the same to be paid for as follows: eighty per cent. kiln measure, when and for the first kiln burnt, and so on, until the whole are ready for delivery; and twenty per cent. the remainder, to be held back until the brick are laid in the walls and counted in the manner and according to the custom of the country; and when so laid and counted, the said twenty per cent. will then be paid to the said Ford; and if the said Ford has been overpaid he binds himself to refund the same at once.

"Should there be a difference of 568 opinion between *the building committee and said Ford about kiln measure, quality of the brick, or any other question of doubt in construing this contract, then such question or questions shall be referred to arbitrators, the committee to select one man, the said Ford to select another, and they two to select a third, whose decision shall be binding and final." And the contract also provides that Ford would furnish any additional quantity of brick of the same kind upon the same terms.

In pursuance of this contract, Ford seems to have made and burned, and had ready for delivery, 667,032 common brick, and 254,000 stock brick, according to the kiln measure, and, as they were prepared and counted, the eighty per cent. was paid to Ford.

In February 1871, John Elliott, the architect of the trustees of the asylum, condemned the greater portion of the brick which Ford had prepared; and thereupon there was a correspondence between Ford and the chairman of the building committee, in relation to the submission of the subject to arbitrators, each proposing a form of submission. It is obvious, from this correspondence and the form of submission proposed, that the question in dispute was the quality of the brick. The form of submission at length agreed upon, after reciting the clause of the contract in relation to the mode of settling any differences that might arise between the parties, proceeds: and whereas certain differences have arisen as to the quality of the brick manufactured under said contract, and as to the construction of said contract; now therefore Edward J. Fowkes and Samuel A. Bailey are hereby selected, who are to select a third, and they to decide said differences according to the provisions embraced in said before mentioned contract.

The arbitrators chosen by the parties 569 selected C. D. *Hamner as the third; and they all united in the following award: We find that William H. Ford has complied with the provision of the contract referred to in the submission, and that the failure in the quality of the brick is not by reason of any default of his. We therefore adjudge that the Asylum shall pay to William H. Ford the sum of $1,100, in full for balance due on contract.

One of the arbitrators was examined as a witness, and stated that at the time of the award none of the brick referred to in the submission and award had been removed from the kiln where they were burned, or laid in the buildings for which they were intended. That the $1,100 awarded to be paid by the defendant to the plaintiff, was for the twenty per cent. reserved in the contract to be paid after the said brick had been laid in the walls, and was ascertained upon an estimate from the original kiln measure, and without any actual count, an allowance being made by estimation for salmon brick. And that the question, whether the plaintiff was entitled to be paid at once the said twenty per cent., and whether the defendant had forfeited its right to hold on to said reserved per cent. until the brick were counted, by being worked into the wall, was raised and argued by the plaintiff's counsel before the arbitrators, before they had made their award, and when both parties were present; and the arbitrators understood and agreed that they had, in deciding upon the construction of the contract on the differences between the parties submitted to them, to decide upon the construction of the whole contract,

whether any and what balance was due to said plaintiff. And the court further certified that it did not appear from the evidence what were the actual differences in
570 the construction *of the aforesaid contract which were really submitted to the arbitrators.

Early, for the appellant.

Kirkpatrick, for the appellee.

STAPLES, J. It is very clear that the only matter of controversy between the parties at the time of the submission was in reference to the quality of the brick manufactured by the plaintiff. There may have been in connection with this, some question as to the place of delivery, but the real contention originated in the condemnation of the brick by General Elliott, the architect having charge of the work. The resolutions of the board of trustees, the correspondence of the parties, and the submission, unmistakably indicate that this was the point of controversy. It does not appear that the plaintiff was asserting any demand of his own, but rather repelling the charge of violating his contract. He insisted that the brick were not defective; or if defective, it was not his fault but that of the defendants or their agents. It is impossible to look through this record without being brought irresistibly to the conclusion that this was the matter and the only matter intended to be submitted to the arbitrators.

It is true the submission recites that certain differences had arisen as to "the quality of the brick and as to the construction of the contract." If the latter phrase, so much relied on, has any real significance, if in fact there were differences as to the construction of the contract, they have reference to the real point of contention; and that is whether the plaintiff had made and delivered such brick as the contract required. This, of course, would involve to a considerable extent the construction of the contract.

571 *The case of Scott v. Barnes, 7 Barr's R. 134, illustrates this view. In that case the court says: "The words, 'all matters in controversy,' would extend to mutual demands if they stood alone, but as they must be understood as referring to the subject matter expressed by the parties themselves, they are restrained by the context." And so here the phrase "difference as to the construction of the contract," must be restrained by the context, and be held to apply to the subject matter of controversy plainly comprehended by the submission.

The sum of eleven hundred dollars awarded the plaintiff, it is to be recollected, is in full of the twenty per cent. expressly reserved by the trustees, and which was not to be paid until the brick were laid in the walls and counted in the manner and according to the custom of the country. Both at the date of the submission and of the award the brick had not been laid in the walls; indeed they had not been removed from the kilns in which they were burnt.

It is not reasonable to suppose that the defendants would consent to submit to arbitration any question in regard to the number of brick. It does not appear there was any controversy upon this point; if there was it was to be settled by actual count and not by arbitration. This was the security the defendants had provided, and the courts will not presume they intended to relinquish it. They will not presume that the trustees would agree to make immediate payment of the reserved twenty per cent., or that they would be willing that the referees should be invested with authority to award such payment, when by the express terms of the contract the payment was not to be made until the brick were laid in the walls and counted according to the custom of the country.

572 *The parties might submit such matter to arbitration if they pleased; but no such inference would be drawn from the use of a vague and general phrase, "that certain differences had arisen as to the construction of the contract." The arbitrators were simply called on to settle a controversy in regard to the quality of the brick. When that was done their duty ended. If, after their decision was rendered, the defendants still declined to receive the brick, the plaintiff would have his action; and the award would be conclusive evidence of the performance of the agreement, so far as the quality of the brick is concerned. In regard to the number, the plaintiff being deprived of the count as stipulated in the contract, by the conduct of the defendants, might properly rely on the next best evidence the case would afford. In thus construing the submission, substantial justice is done, and the intention of the parties, as gathered from the record, is carried into execution.

It has been insisted that the parties by their conduct before the arbitrators tacitly agreed that this question might be settled by them, and that the defendants are estopped to deny that the matter is within the terms of the submission. This argument is based upon the statement of the judge of the Circuit court, that evidence was adduced before the jury to show that the question of the plaintiff's "right to immediate payment of the 20 per cent. was raised and argued by plaintiff's counsel before the arbitrators before the award was made, and when both were present."

It has been held, in a number of cases, that where the language of the submission leaves it doubtful as to the matters intended to be submitted, the conduct of the parties before the arbitrators may be looked
573 to *for elucidation. If the matters are presented by one without objection by the other; if evidence has been offered upon them, and they have been considered in argument, it will be assumed they fall within the scope of the submission. Moise on Arbitration 62.

This is, perhaps, a very just conclusion. But clearly the argument of counsel, representing one of the parties, can have no such

effect. It would be carrying the doctrine to most mischievous lengths to hold that every claim asserted by counsel, in the course of a protracted controversy, may be looked to for elucidating an ambiguous submission, and for investing the arbitrators with authority not otherwise apparently conferred. For these reasons, I think that so much of the award as directs the payment of eleven hundred dollars exceeds the terms of the submission, and is therefore utterly void.

The next question to be considered is whether the award is void in toto, or whether it is good so far as it is within the scope of the submission. The rule upon this subject is, that if the thing awarded to be done, which is bad, as being beyond the submission, forms no part of the consideration for, or element in, the performance of that part which is good, as being within the submission, but is wholly distinct and independent thereof, then the award can be separated, and the bad part rejected, and that which is good held valid and binding upon the parties. Moise on Arbitration.

In the case before us, the arbitrators find that the plaintiff has complied with his contract, and that the failure in the quality of the brick is not by reason of any default of his. This is clearly distinct, and separable from the residue, which awards the payment of money. Had the arbitrators stopped with the first *part of the finding, beyond all question the award would have been good. It cannot be invalidated by the addition of a matter not submitted, and which forms no part of the consideration for, or element in, the performance of that which is within the terms of the submission.

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It has been argued, however, that conceding the award is severable it is uncertain, and does not respond to the matters submitted. It is true the arbitrators do not find the plaintiff has manufactured such brick as he agreed to make. They find, however, that he has complied with his contract, and that the failure in the quality of the brick is not attributable to him. It is impossible to believe that the parties simply intended to submit to the arbitrators to determine the quality of the brick, and to leave open and unadjusted the real matter of controversy, who ought properly to sustain the loss. An award, thus restricted, would have defeated the main purpose of the submission. I think it is sufficiently certain and responsive to the inquiries before the arbitrators.

CHRISTIAN and ANDERSON, Js., concurred in the opinion of STAPLES, J.

BOULDIN, J., concurred so far as it sets aside the award in part. He was inclined to go further, and set it aside throughout. But he concurred in the decision.

MONCURE, P., was inclined to sustain the whole award. But he concurred in the decision.

Judgment reversed.

575 *Great Falls Man. Co. v. Henry's Adm'r.

December Term, 1874, Richmond.

1. **Chancery Practice—Staying Proceedings at Law.***—When a defendant in an action at law files a bill to make his defense in equity and asks for a stay of proceedings in the law court, it is a matter in the discretion of the chancellor, in granting the injunction, whether he will or will not require a confession of judgment in the action at law.
2. **Same—Same—Confession of Judgment.**—In such case if a confession of judgment in the action at law is required, the order should require the judgment to be taken "to be dealt with as the court shall direct."
3. **Same—Same—Same.**—Though the order requiring the confession of the judgment is absolute, yet if the court dissolves the injunction and dismisses the bill on the ground that the plaintiffs' defense to the action is legal, and the court of equity has no jurisdiction, the decree should direct that the judgment at law should be set aside and the case reinstated as it was when the injunction was granted. And if this is not done, the chancery court will, on motion afterwards made, direct th judgment to be set aside.

This was an appeal from the decree of the Circuit court of Fairfax county, dissolving an injunction and dismissing the bill, in a suit brought by the Great Falls Manufacturing Company against the administrator of William Henry, deceased. The case is fully stated in the opinion of the court delivered by Judge Bouldin.

Beach, for the appellant.

Claughton and George Walker, for the appellee.

BOULDIN, J., delivered the opinion of the court.

576 *This is certainly a case of peculiar hardship on the appellant. It has been subjected to a heavy judgment amounting, in principal and interest, to some five thousand dollars, and to the costs of the legal and equitable tribunals, when the justice of the demand has been always denied, both at law and in equity, and when the appellant has had a trial of the merits of the claim before neither tribunal.

The case is this:

In the year 1873 a suit at law was instituted in the Circuit court of the county of Fairfax by the administrator of one William Henry against the Great Falls Manufacturing Company, upon a covenant alleged to have been duly executed by the company, and to have been lost; and the object of the suit was to recover certain sums of indebtedness, alleged to have accrued under the covenant during the months of December 1853, and January, February and March 1854, nineteen years before the institution of the suit. The company appeared and filed several pleas, how many or what pleas

*Injunctions to Actions at Law.—On this subject, see Thornton v. Thornton, 31 Gratt. 212, and *note*; Staples v. Turner, 29 Gratt. 330, and *note*.

does not appear, as the law record is not before us; but it is evident from the chancery record that they were pleas to the merits, denying the justice of the claim and that a covenant had ever been executed.

Pending this suit at law and before the same was tried, the appellant in this court (defendant below), being advised that the case was a proper one for the cognizance of a court of equity, and could not be fully developed at law, filed his bill on the equity side of the same court, charging that the dealings with Henry set forth in the suit at law, had occurred nineteen years before the institution of the suit, and were barred by limitation and lapse of time; and that the transactions sought to be re-opened 577 at this late period had occurred *during the administration of a former president of the company, who had been long dead; denying that there was anything due to the appellee; and denying also that there ever was a covenant between the parties; and alleging that the books showed a final settlement with Henry, but that vouchers had been lost; and from death of parties and complication of accounts it was a proper case for equity; and an injunction was asked to the proceedings at law.

It is manifest from this statement that the plaintiff in equity claimed no equitable set-off or other strictly equitable defense to the claim at law, but simply denied the right of the plaintiff at law to recover the claim or any part of it, before any tribunal, and merely sought to transfer the litigation to the equity side of the court, as the more appropriate tribunal, under all the circumstances of the case, to do justice between the parties. It is very clear therefore that the appellant could not safely confess judgment at law; the right to recover at all, either at law or in equity, being wholly denied by appellant in both tribunals, and being, in fact, the very gist of the contention. The case as stated, to say the least of it, presented very grave doubts as to equitable jurisdiction; but the court took jurisdiction, and on the 3d of June 1873, awarded an injunction; but put the appellant on terms of confessing judgment at law. In compliance with these terms, the appellant confessed judgment at law; and then, on the coming in of the answer, the court on the 2d day of September, on motion and in vacation, unconditionally dissolved the injunction, evidently, we think, for want of equity in the bill. The appellant then, in November, moved the court so to modify the order of dissolution as to require the appellee to set aside the 578 judgment confessed *as aforesaid, and to re-open the case for a trial on its merits in the law court; but this motion was overruled by the Circuit court, and the judgment at law was left in full force; and thus the appellant, after denying and earnestly resisting the appellee's right, either at law or in equity, to recover one dollar of his claim, finds himself subjected by order of the chancery court to a judgment amounting, principal and interest, to some five thousand dollars, and to damages according to law, and the costs in both tribunals, without the pretense of a trial in either.

It is from these proceedings that an appeal has been allowed to this court, and the case presented is, as we have already said, one of singular hardship on the appellant, to say the least of it.

Can relief be granted under the rulings of equity in such cases? We should regard it as, in some sort, a reproach on the equity tribunals if it could not.

The terms upon which injunctions are awarded by the English court of chancery are, in each case, a question for the discretion of the court; "but the general principle upon which the court proceeds is, to put the party applying upon such terms as will enable the court to do justice to the party restrained in the event of his (the plaintiff's) failure to make out his case at the hearing." Kerr on Injunctions, ch. 3, p. 18. This power to impose terms is a conservative power, merely intended as a shield to protect the party whose hands, by the act of the court, are tied, to preserve his rights intact as far as practicable, but not to be used as an instrument of aggression and attack on the other side. It was intended merely to put the court in a condition to do ultimately complete justice to both sides of the case without wrong to either. Accordingly, in all those cases in which the 579 court deems a *confession of judgment at law a proper protection to the defendant in equity (a matter always, both here and in England, entirely in the discretion of the court), we find it to be the well established practice of the English court of chancery to require the judgment to be taken, "to be dealt with as the court shall direct." Kerr on Injunctions, ubi supra, and the cases cited, which we refer to (without comment on them in detail), as fully sustaining the doctrine laid down.

The equity courts of Virginia have the same discretion as to the terms upon which an injunction shall be awarded, as is exercised by the English court of chancery, except in those cases in which this general discretion is limited by express statutory provision. No such provision has ever been enacted, commanding them, in any case, to require a confession of judgment at law as a condition of equitable interference with legal proceedings. That matter is left, as in England, entirely to the discretion of the chancellor in each case, to be exercised on well established principles of equity and law, so as to preserve, as far as practicable, the rights of the party restrained, and at the same time to inflict no wrong on the plaintiff in equity. This wholesome end is attained by the practice of the English chancery (to which we have referred) of requiring the judgment at law to be taken "to be dealt with as the court shall direct"; a practice which commends itself to our sense of justice, and should, in such cases, be always adopted by our courts of equity.

That our own courts have the discretion above accorded to them in relation to re-

quiring a confession of judgment at law; and that they will not require it at all, if on the case made in equity it appear that it will be unsafe for the defendant at
580 law to make such *confession, is fully recognized by this court in Warwick &c. v. Norvell &c., 1 Rob. R. p. 308.

The syllabus of that case on this point is as follows:

"A defendant at law, having a legal defence to the action, and a distinct ground of equitable relief against the plaintiff's claim, may bring his suit in equity, without waiting for the determination of the action at law, and may, without being compelled to waive his legal defence by confessing judgment, have a hearing in the court of chancery, on the merits of his case, and a decree for the proper relief."

Judge Allen, delivering the opinion of the court, p. 320, said:

"No authority has been produced which establishes that a party having a defense at law to an action, and a distinct ground for equitable relief should his defense prove unavailing, must abandon his legal defense by confessing judgment. Where there is a concurrent jurisdiction of the same matter, and the plaintiff may sue in either form, there is good reason to compel him to elect between them. Redress can be obtained in either, and the plaintiff should not be permitted to harass his adversary by pursuing him in both tribunals. The defendant has no such election. He is brought into court against his consent, and I perceive no good reason why he should be prohibited from setting up his distinct ground for equitable relief during the pendency of the action at law." The learned judge then goes on to refer to circumstances under which it would be allowable to proceed in equity pending the suit at law; and says "In such cases the defendant cannot safely confess a judgment."

In these views the whole court seem to have concurred; and it is obvious that
581 the equity courts of this *State will exercise a wise and just discretion in requiring a confession of judgment at law as the condition of awarding an injunction to legal proceedings, the same in fact which is exercised by the English chancery. They will not require an unconditional confession of judgment at law in any case in which the circumstances are such as to render the confession unsafe. Should they do so, and should the defendant at law obey the requisition and suffer thereby, it will be error, which should, in some way, be corrected, either by the court which committed the blunder, or by the appellate court.

In this case, it is manifest that the appellant did not come into equity conceding the right of the plaintiff at law to recover in that tribunal, but seeking to set up some equitable defense not available at law. Had such been the frame of the bill, there might have been some reason to require him to confess judgment on equitable terms. But such was not the case. The appellant came into equity, denying in toto the right of the appellee to recover at law or in equity, denying the existence of any indebtedness at all, and merely invoking, under the peculiar circumstances of the case, the aid of the equity court in making his defense available. It is very evident that, in such case, if entertained in equity at all, the defendant at law could "not safely confess a judgment," and therefore no such confession should have been required, but if required, it should certainly have been on terms of being "dealt with as the court shall direct," so that it might retain control of the judgment. But the Circuit court, as we have seen, in disregard of the principles above declared, required an unconditional confession of judgment as the price of the injunction: thus compelling the defend-
ant at law to acknowledge, as the
582 *price of his injunction, that a debt was in fact due, the existence of which he had ever denied, both at law and in equity.

These harsh terms were complied with by the appellant with the consequences already stated.

We are of opinion that the Circuit court erred:

1. In taking jurisdiction of the case at all. The defense set up was purely a legal defense, and the Circuit court had no authority either to award the injunction, or to require the defendant at law to confess judgment. The injunction should have been simply denied, leaving the legal proceedings intact.

2. Having taken jurisdiction, the court erred in requiring a confession of judgment, either conditional or unconditional. It is not a case in which the defendant at law could safely confess judgment; and a different kind of protection should have been secured to the plaintiff at law.

3. The Circuit court erred in dissolving the injunction, without requiring as a condition thereof that the judgment at law should be set aside, and the case re-opened for a trial on its merits.

It has been objected, however, that the judgment confessed at law, under the order of the equity court, is, as matter of law and fact, a final judgment of another tribunal, and the case presented in the bill being one of which the court had no jurisdiction, it could not entertain it, even for the purpose of correcting its own wrong, and putting the parties "in statu quo."

We should be very unwilling to be forced to such a conclusion, even by direct and pertinent authority to sustain it, and with none to oppose it; but, fortunately for the ends of justice, the very reverse has been decided by the English court of chan-
583 cery. Hooper v. *Cooke, Jurist (1856), part 1, p. 527. (No. 75, vol. 2, N. S.)

In that case a defendant in ejectment had filed a bill to restrain proceedings at law upon grounds which he supposed gave him a standing in equity, but which really presented a question purely legal. Upon moving for an injunction to stay the proceedings at law, he agreed to give judgment in the

action, "to be dealt with as hereafter directed." The master of the rolls, Sir J. Romilly, dismissed the bill on the hearing for want of equity, the question presented therein being purely legal and not cognizable in equity. On appeal to the Lord Chancellor the decision of the master of the rolls was affirmed, but with an addition, requiring the plaintiff at law to withdraw his judgment, and the defendant to make certain admissions. The Lord Chancellor said:

"This bill has been filed upon the assumption that the questions cannot be tried at law; which I consider was an entire misapprehension. I concur with the view of the case taken by the master of the rolls, that the plaintiff has failed in making out any case for equitable relief, and the appeal must be dismissed with costs; but upon the rights at law I express no opinion. I make this order, upon terms that the defendant here, the plaintiff at law, withdraw the judgment he has obtained, and that the defendant at law do admit the plaintiff's title, except as it is affected by the deed of 1778."

In the same case, as reported in the Law Journal, vol. 34, p. 468, the Lord Chancellor is reported as saying: "This is, as I have said, a legal question; and I therefore entirely agree with the master of the rolls that this bill should be dismissed, and dismissed with costs. As, however, I
584 think there has been a slip on *the part of the plaintiffs in saying that they were advised that they had no valid defense at law, I shall only dismiss it on these terms; I shall make it a term with the defendants, obliging them to withdraw the judgment which they obtained in the action of ejectment by consent of the plaintiffs, that the case may be tried on its merits."

"His Lordship directed various admissions to be made on both sides in the action for the purpose of raising the proper issue."

This case is strikingly analogous to the case at bar, and, as we have seen, the Lord Chancellor did not hesitate to take jurisdiction for the purpose of correcting the "slip" that had been made, notwithstanding the judgment had been voluntarily confessed as a means of obtaining a standing in equity, and notwithstanding the bill was dismissed with costs for want of equity on its face. By an order in that cause the judgment was required to be withdrawn, and, by like order, certain admissions were required to be made on both sides, so that the case might be fairly heard on its merits.

We think this course was eminently just and equitable; and that a like course should have been pursued by the chancellor on dissolving the injunction in this case. The defendant in equity should have been required to withdraw his judgment at law obtained by the plaintiff's consent, made under an order of court; to reinstate the cause on the docket, and to submit to a trial thereof on the merits on the issues already in the cause, or on such other proper issues as might be made up.

The court is therefore of opinion that the orders of August, and November 1873, so far as they conflict with what is above declared, are erroneous, and should
585 *be reversed with costs to the appellant in this court, and that a decree should be entered in accordance with this opinion.

The decree was as follows:

This day came again the parties by their counsel, and the court having maturely considered the transcript of the record and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that under the circumstances of this case, even were it a proper case for equitable jurisdiction, the plaintiff in equity should not have been required to confess judgment at law. It was therefore error to dissolve the injunction unconditionally and to refuse afterwards to modify the order of dissolution in that respect. The defendant in equity should have been put under terms to withdraw the judgment erroneously required to be confessed by the chancery court.

It is therefore decreed and ordered that the orders of the 2d day of September 1873, dissolving the injunction previously awarded, and of the —— day of November 1873, refusing to modify that order of dissolution, be reversed and annulled; and that the appellee do pay to the appellant the costs of the appeal to this court.

And this court proceeding to enter such decree as should have been entered by said Circuit court, it is decreed and ordered, that the injunction awarded the plaintiff on the 3d day of June 1873, be and the same is hereby dissolved. But this order shall not take effect until the plaintiff at law shall have withdrawn or caused to be set aside the judgment obtained as aforesaid by confession, and shall have caused the case
586 *to be reinstated on the docket, to be tried at law on the issues now in the cause, or on such other proper issues as may be hereafter made up.

All which is ordered to be certified to said Circuit court.

Decree reversed.

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587 ***Davis' Widow v. Davis' Creditors.***

December Term, 1874, Richmond.

Conveyance from Husband to Wife—Rights of Creditors.—D, who was seventy years old, and his wife A thirty-five, on the consideration that A would unite with him to convey to trustees three tracts of land in trust to pay his debts, conveyed to a trustee two tracts, in trust for A for her life, and then to their children. On the same day D and A conveyed the three tracts to trustees to pay his debts. At the time it was supposed the tracts and personal estate conveyed to pay D's debts were sufficient for the purpose; but owing to the decline in prices they fell far short of doing it. After the death of D, some of his creditors filed their bill to

*For monographic note on Dower, see end of case.

set aside the deed in trust for A, on the ground that the settlement was grossly excessive; and this is ascertained to be the fact—HELD:

1. **Same—Same.**—The settlement will be set aside as to the excess.
2. **Same—Same—Rights of Wife.**—Where a wife is induced to unite with her husband in conveying away her interest in his real estate, upon condition that certain and specific property shall be settled on her in consideration of her thus parting with her rights, if such settlement is set aside and annulled, she has the right to be placed in the same position, and restored to the same rights, with which she was invested by law before she united in the deed of which the specific settlement was the consideration; provided this can be done without prejudice to the rights of creditors or purchasers.
3. **Same—Same—Same—Dower.**—In this case A is entitled to be restored, as far as possible, to the same position, and invested with the same rights she had before she united in the deed with her husband; the value either to be commuted in money, or laid off in kind in the lands not sold by the trustees. And this may be done without prejudice to the rights of creditors or purchasers, as the value of her dower in the five tracts may be laid off to her in the two tracts conveyed in trust for her, which is still unsold.

588 *This case was argued in Staunton and decided in Richmond. It was a suit in equity in the Circuit court of Augusta county, brought in October 1870, by Benjamin C. Patterson and others, creditors of Braxton Davis, deceased, against his widow and children, to set aside a deed executed by said Braxton Davis, conveying to a trustee two tracts of land for the benefit of Mrs. Davis for her life and then to their children, in consideration of her joining in conveying his other real estate to trustees for the benefit of Davis' creditors. The ground on which the plaintiffs relied to set aside the conveyance, is that the settlement was excessive. These deeds are sufficiently set out in the opinion of the court.

In June 1871, the court directed a commissioner to take an account, first, of the clear value of the lands conveyed by Braxton Davis and wife to the trustees to secure the debts of Davis; second, an account of the value of the lands conveyed by Davis to the trustee for Mrs. Davis; and third, an account of the contingent dower interest of Mrs. Davis in the real estate of Braxton Davis at the date of said deeds, viz: the 22d of May 1866, and of the excess, if any, of the settlement made on Mrs. Davis by said deed. And any other matters specially stated, &c.

It appears that at the time of the execution of these deeds Braxton was seventy years of age, and Mrs. Davis was thirty-five. He died in October 1868, before this suit was instituted. And it appears further, that one of the tracts conveyed for the payment of debts, called the Craig tract, had been sold for $20,280, another, called the Coiner tract, had been sold for $5,000, and a part of the Turk tract had been sold for $10,140; the remainder of said tract being estimated as worth $5,460. The com-
589 missioner did *not take the sales made as the value of the land, because, as he reports, "he was informed by witnesses in the cause they were sold for more than they were worth, owing to the fact that they were purchased by creditors at high prices, in order to secure their claims." Under the deed they were authorized to set off their claims against the purchase money.

The commissioner fixes the value of the three tracts conveyed to secure debts at $35,675; and the two tracts conveyed in trust for Mrs. Davis at $28,311; and he fixed the contingent dower interest of Mrs. Davis in all the land at $8,890.43. He further reported that the personal property conveyed in trust for Mrs. Davis was worth $2,100. To this report Mrs. Davis filed exceptions.

The cause came on to be heard on the 21st of June 1871 when the court overruled the exceptions, and confirmed the report. And deducting the $2,100 from the $8,890.43, and fixing the amount due to Mrs. Davis at $6,790.43, to be paid her in money or settled on her in land, commissioners were appointed to lay off and assign to Mrs. Davis out of the two tracts conveyed in trust for her as her provision, under the deed to her trustee, such portion of the real estate as would be equivalent in value to $6,790.43, supposing both tracts to be worth $28,311, or, in the proportion of $6,790.43 to $28,311, whatever estimate of present value the commissioners might make. And thereupon Mrs. Davis and her children applied to this court for an appeal; which was allowed.

A. H. H. Stuart, for the appellants.

Sheffey & Bumgardner, for the appellees.

CHRISTIAN, J., delivered the opinion of the court.

590 *It is a doctrine of courts of equity, supported by abundant authority, and established by the decisions of this court, that a post nuptial settlement in favor of a wife, made in pursuance of a fair contract for valuable consideration, will be held good. And although it may have been made under such circumstances, that it must be pronounced fraudulent and void as to the creditors of the husband, yet if the wife have relinquished her interest in property, on the faith of such settlement, it will be held good to the extent of a just compensation for the interest she may have parted with. William & Mary College v. Powell, 12 Gratt. 372, and cases there cited.

The wife's right of dower is a valuable interest, which she cannot be compelled to resign, and which the law very carefully protects from the control of her husband. And therefore the release of her dower is held to be a good consideration for a settlement, and is good against creditors of the husband to the extent of the value of the dower released.

Courts of equity are always liberal towards the wife in supporting such settlements,

when fairly made, and will not interfere in favor of creditors, unless the estimated value of the dower released be shown to be excessive. When found to be excessive, courts of equity will generally not set aside the deed of settlement as null and void, but will reduce the amount settled upon the wife to a fair and just compensation for the interest she may have parted with. Harvey v. Alexander, 1 Rand. 219; Quarles v. Lacy, 4 Munf. 251; Sykes v. Chadwick, 18 Wall. U. S. R. 141.

Let us now apply these principles to the case before us. Braxton Davis being heavily indebted to numerous creditors, and being the owner of large and valuable real estate, executed two deeds, each bearing date *the 22d May 1866. By the one he conveyed to Alex. H. H. Stuart and John B. Baldwin, certain personal estate and three valuable tracts of land, and his interest in a fourth tract, in trust to secure his creditors. This deed empowered the trustees to make sale of the real and personal estate conveyed at such times as they may deem expedient; and provides that at such sales any of the creditors of said Davis shall be allowed to purchase and receive credit on account of their respective purchases, for any just claims they may hold or acquire prior to said sale. The trustees were directed to pay "first, all debts for which any one might be bound as surety for said Davis; all the other creditors to be paid pari passu."

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This deed had this further provision: "In order to ascertain the amount of the debts, the sum due to each creditor, said trustees may convene all the creditors, by publication, before a commissioner, who shall determine in each case how much is justly due."

The other deed, executed the same day, after reciting "that whereas said Braxton Davis is now advanced in life and encumbered by many outstanding debts, which he wishes to secure by deed of trust on various tracts of valuable land, in all of which the said Agnes M. Davis has a right of dower; and whereas it is desirable that the said Agnes M. Davis should unite in the deed of trust so as to secure a perfect title to the purchasers under said trust deed; and whereas she has agreed to unite in said deed upon the condition that said Braxton Davis shall convey to a trustee for the benefit of herself and her children by her marriage with said Davis, other lands and personal property of a value equivalent to her right of dower in the whole estate of said Braxton Davis," &c., the grantor conveyed to John B. Baldwin *trustee, in consideration of the premises, and in order to carry into effect the above recited understanding and agreement, two tracts of land, one being the tract on which the said Davis resided, containing one hundred and ten acres, and the other, known as the Porterfield tract, containing three hundred and eleven acres, together with all his household and kitchen furniture, and certain other personal estate therein named, "upon the following trust, viz: that he shall allow said Agnes M. Davis to occupy and reside on said farms for and during her coverture, free from the debts or contracts of her husband; and in the event of the death of her husband, that he will convey said lands to said Agnes M. Davis to hold it during her natural life, with remainder to the children of said Braxton and Agnes M. Davis, in fee."

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The creditors were no parties to these deeds, nor is it pretended that they were represented by the trustees in the first named deed, or had any notice of it until it was admitted to record.

But in this connection may be noticed the position taken by the learned counsel in his petition of appeal, and urged in argument here. Admitting that the creditors were not present, consenting to this disposition of his property by Davis, the grantor, and that the trustees did not represent them, he insists that they accepted and ratified this arrangement made for their benefit, by proving their respective claims before the commissioner appointed by the trustees, under the provision of the deed before referred to, and that having thus accepted the provisions of the deed they cannot now claim against it. It is sufficient to remark, that the record in this case does not show that any commissioner was ever appointed to audit their claims, though it is asserted by the counsel for the appellant *that the fact did appear in the court below; and he suggests a diminution of the record if this court should agree with him in considering it a fact of sufficient importance. On the other hand, the counsel for the appellee denies that the plaintiffs in this suit (there seems to be other suits involving the same questions in the Circuit court) ever did present their claims before a commissioner appointed by the trustees under the deed. However the fact may be, the court will not hold the creditors bound by the provisions of the deed, upon the ground that they were accepted and ratified, simply because they proved their respective claims before a commissioner appointed by the trustees. If they did thus produce and prove their debts, it was before the large indebtedness of the grantor was known, and before it was ascertained what was the probable value of the estate, real and personal, which he had dedicated to the payment of his debts by placing it in the hands of trustees. They might well have produced their claims before the commissioner, under the conviction that the property in the hands of the trustees was amply sufficient to pay all his debts. But when it turns out upon the actual sale of the property conveyed that there is not enough in the hands of the trustees by many thousand dollars to pay the debts of the grantor, surely the creditors, who were no parties to the deed, are not bound by it, simply because, at the invitation of the trustees, they brought their claims before a commissioner of their appointment to be audited. This cannot be construed into a purpose on their part

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to claim only under the deed, or in any manner as a ratification of its provisions.

The case, unencumbered by this pretension of the appellant, presents one single question as to whether the settlement made upon the wife is excessive, or, 594 *rather so excessive, that a court of equity will set it aside as a fraud upon the rights of the creditors; and, if so set aside, what are the rights of the wife as against the creditors. The grantor was the owner of five tracts of land, and a supposed interest in a sixth, which last turned out to be of no value.

He conveyed three of these tracts to trustees for the benefit of his creditors, to wit: the "Turk Place," containing five hundred acres, the Craig tract, containing about five hundred acres, and the Coiner tract, containing over two hundred acres. These three tracts are estimated by the commissioner (and we think it a fair estimate upon the evidence) at the aggregate sum of $35,675.

Two tracts of land were settled by the grantor upon his wife, upon consideration that she should relinquish her right of dower in the whole. These were the Porterfield tract, containing three hundred and eleven acres, and valued by the commissioner at $20,860, and the Rader tract, containing one hundred and ten acres, valued by the commissioner at $7,471, aggregating $28,331, being more than two-thirds of the amount in value of the lands conveyed to his creditors.

The court is of opinion that the settlement of this amount upon the wife was grossly in excess of a fair and just compensation for her dower rights in the whole real estate of her husband, and that there is no error in the decree of the Circuit court in so declaring.

But the court is further of opinion that the Circuit court ought not to have set aside the settlement made in favor of Mrs. Davis without first giving to her the election either to accept a reasonable amount in lieu of her right of dower, or to have laid off to her in kind in the land not sold by the trustees, her dower in the whole real estate of her husband.

595 *Where a wife is induced to unite with her husband in conveying away her interest in his real estate upon condition that certain and specific property shall be settled on her in consideration of her thus parting with her rights, if such settlement is set aside and annulled she has the right to be placed in the same position and restored to the same rights with which she was invested by law before she united in the deed of which the specific settlement was the consideration; provided this can be done without prejudice to the rights of creditors or purchasers.

In the case before us we must regard the two deeds executed and recorded on the same day, as one and the same transaction; and so regarding them, it is apparent that it was agreed between the said Braxton Davis and the said Agnes M. Davis that the conveyance for her benefit of the Porterfield tract and the Rader tract would be a fair equivalent for her right of dower in his whole real estate; and that she united in the deed to the trustees upon condition that these two tracts of land should be settled on her. This was the consideration upon which she parted with her interest in the three valuable tracts of land conveyed by her husband for the benefit of his creditors.

One of the tracts settled upon her was the homestead, which, it is fair to presume, had in her eyes peculiar value. The presumption is she would never have united in the deed but for this specific arrangement for her. At any rate, this was the specific consideration upon which she executed the deed. She was parting with valuable interests. Her husband was advanced in years; she was young. She had the right of dower in five valuable estates. She had the right to demand a settlement to compensate her for the relinquishment of her rights.

596 *No doubt at the time the settlement was made, the grantor believed that the three valuable farms and the large personal estate which he had dedicated to the payment of his debts, and directed his trustees to sell for that purpose, would be amply sufficient to satisfy all his creditors. But owing to the depreciation in the market value of the land, the sales will not meet the debts by a large deficiency; and the court below was compelled to declare the settlement on Mrs. Davis excessive, and forced to decree to her what was, in its opinion, a fair settlement.

We are of opinion, however, that Mrs. Davis, under the circumstances of this case, was entitled to be restored, as far as possible, to the same position and invested with the same legal rights she had before she united in the deed with her husband; and the husband being dead, she may, if she so elects, claim her right to dower in the whole real estate of her husband; the value either to be commuted in money or laid off in kind, in the lands not sold by the trustees. This can be done without prejudice to the rights of creditors or purchasers, as the value of her dower in each of the five tracts of which her husband died seized, may now be laid off in the lands still unsold, to wit, the Porterfield and Rader tracts.

The court is therefore of opinion that the decree of the Circuit court be reversed, and the cause be remanded to said Circuit court to be proceeded in in accordance with the principles herein declared.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree of the said Circuit court in declaring the settlement made upon the appellant, Mrs. Agnes 597 *Davis, widow of Braxton Davis, deceased, by deed bearing date May 22d, 1866, was excessive, "and that the same if uncorrected would operate a gross fraud upon the large number of unpaid creditors of Braxton Davis." But the court is further

of opinion, that inasmuch as Mrs. Davis united in the deed made by her husband to Stuart and Baldwin, trustees, for the benefit of his creditors, upon condition that the "Porterfield" and "Rader" tracts of land should be settled upon her; and as this settlement cannot now be enforced, because it is excessive, the said Circuit court ought, instead of reforming and reducing the amount of the settlement to what it considered a fair and just compensation for the relinquishment of her contingent right of dower, should first have restored Mrs. Davis to the same position and the same legal rights which she had before she united in said deed with her husband, and should therefore have given to her the election, whether she would accept a reasonable settlement to be made by the court in lieu of the settlement made by her husband, or whether she would elect to assert now her claim of dower in all the real estate of her husband, he being now dead, and there being two tracts of land not yet sold by the trustees, in which her dower in kind can now be laid off and assigned to her. It is therefore decreed and ordered, that the decree of the said Circuit court (except so far as it declares that the said settlement is excessive, in which respect it is affirmed,) be reversed and annulled, and that the appellants recover against the appellees, the creditors of said Braxton Davis, deceased, their costs by them expended in the prosecution of their appeal aforesaid here; and that the cause be remanded to the said Circuit court with instructions to give to the appellant, Agnes M. Davis, the option
598 whether she will *accept a reasonable allowance to be made by the said Circuit court in lieu of the settlement made by her husband for her by the deed of the 22d May 1866, or whether she will now assert her claim to dower in the whole real estate of her husband, Braxton Davis, deceased; and if she claims the latter, then the same shall either be laid off to her in kind in the "Porterfield" and "Rader" tracts, which remain unsold, which said dower may, with the assent of the creditors, and, if she so elect, be commuted under the direction of the court to its value in money. But whether her dower be laid off in kind, or commuted to its value in money, such dower shall be credited by the amount of personal property she has already received. And it is ordered that this decree be entered on the order book here, and forthwith certified to the clerk, where the cause is pending as aforesaid, who shall enter the same on his order book, and certify it to the said Circuit court of Augusta county.

Decree reversed.

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I. DEFINITION.

A. At Common Law.—"Where a woman marries a man seised at any time during the coverture, of an estate of inheritance such as that the issue of the marriage may by possibility inherit it, as heir to the husband, and the husband dies, the wife surviving is entitled to one-third for her life as tenant in dower." 2 Min. Inst. (4th Ed.) 134; 1 Th. Co. Lit. 569, 578.

B. By Statute.—"A widow shall be endowed of one-third of all the real estate whereof her husband, or any other to his use, was, at any time during the coverture, seised of an estate of inheritance (or entitled to a right of entry, or action for such estate), unless her right to such dower shall have been lawfully barred or relinquished." Va. Code 1887, §§ 2267, 2268; W. Va. Code 1899, ch. 65, §§ 1, 2. See Chapman v. Chapman, 92 Va. 537, 24 S. E. Rep. 225.

"There seems to be no other difference between the common law and this statutory dower, than that the latter does not require seisin even in law, but is content with a right of action, where the widow would have been entitled to dower, if the husband or any other to his use, had recovered possession." 2 Min. Inst. (4th Ed.) 134, 135.

II. REQUISITES.

A. In General.—"The requisites of consummate dower are marriage, seisin of the husband during coverture, and death of the husband. By marriage and seisin of the husband during coverture, the wife acquires a contingent interest which is called inchoate dower." 10 Am. & Eng. Enc. Law (2nd Ed.) 128. For a full discussion of the requisites of dower, see 2 Min. Inst. (4th Ed.) 135 *et seq.*

B. Seisin of the Husband.

1. **Must Be Beneficial.**—"In the present state of our law, the right to dower springs from the substantial, not the formal ownership of the husband. At common law, it is true, the legal title only was regarded; and a mere legal seisin, without any beneficial ownership, enabled the wife to recover dower. Thus the wife of a trustee who had the legal estate in fee, and the wife of a mortgagee after condition broken, had a valid title to dower. But the courts of equity corrected this injustice, and in such cases restrained the widow and punished her with costs, if she attempted to recover by legal proceedings. Another consequence of the disregard by the courts of common law of any but legal rights, was, to refuse dower to the widow in trusts and other equitable estates, and consequently in the equity of redemption of a mortgage in fee. This narrowness, instead of being redressed, was followed by the courts of equity, and still prevails in the English jurisprudence. But in Virginia, New York, and other states of this union, it is corrected by legislative enactments. Our act of 1785 [now sec. 2429 of the Code of 1887] gives dower in equitable, in like manner as in legal estates: and in this, as in other respects, the rules and incidents of legal estates are now applied to trust and mortgaged property. The equity of redemption of a mortgage in fee descends to the heirs of the mortgagor; and though the widow is not entitled to dower as against the mortgagee, where the mortgage was executed before the coverture, or during the coverture with her concurrence in the mode prescribed by law; yet in either case she is entitled to dower in the equity of redemption; for of that, or, what is the same thing, of the estate subject to the mortgage, the husband is to be considered as having died seised. Heth v. Cocke and Wife, 1 Rand. 344; Swaine v. Perine, 5 Johns. Ch. R. 492; Hale v. James, 6 Johns. Ch. R. 258. This is equally true of the vendee's right of redemption in regard to the vendor's lien. His wife is dowable of that, but of nothing more; or, what is in effect the same, she is dowable of the estate purchased, subject to the equitable incumbrance for the purchase money. * * * * * Thus it will be seen that there is no longer any magic in the word *seisin*, by which the shadow may be made the substance, or the substance the shadow. A legal title in the husband is nothing as regards the wife's right of dower, unless accompanied by the beneficial ownership; and the beneficial ownership is everything, though separated from the legal title." BALDWIN, J., in Wilson v. Davisson, 2 Rob. 405-407. Quoted with approval in James v. Upton, 96 Va. 300, 31 S. E. Rep. 255; Waller v. Waller, 33 Gratt. 83.

Where a purchaser of land takes possession, and pays part of the price, he is beneficially seized to the extent of the price paid, although he has not acquired the legal title; and hence, under Va. Code 1887, § 2429, giving dower in equitable estates, his widow is entitled to dower, subject to the lien for the unpaid purchase money, whether he died possessed of the land, or had alienated it during coverture without her concurrence. James v. Upton, 96 Va. 296, 31 S. E. Rep. 255.

A. and B. each held large debts against C., secured by a deed of trust upon his land. Afterwards, D. recovered judgment against C. for $1,800. B. assigned his debt to A. and C. was adjudged a bankrupt. C.'s assignees sold the equity of redemption in said land to A., who soon afterwards assigned all of said trust debts to E. D. then brought suit to sell said land to pay his judgment, wherein the trust debts, as the first lien thereon, were decreed to E., who at the sale of the land under said decree became the purchaser thereof; and A. having died, his widow filed her petition in a creditors' suit, in which said land was decreed to be sold to pay the debts of E., claiming dower therein. *Held*, that A. was never seised, at law or in equity, of any estate in said land, and that his widow is not entitled to dower therein. Kanawha Valley Bank v. Wilson, 29 W. Va. 645, 2 S. E. Rep. 768.

Seisin Subject to Sale before Marriage.—A widow has no dower in lands sold by her husband prior to the marriage, although the husband may have died without conveying title; for, while he has the legal title, he is not beneficially seised during the coverture, as against the vendee. Waller v. Waller, 33 Gratt. 83; 2 Min. Inst. (4th Ed.) 147. See Chapman v. Chapman, 92 Va. 537, 24 S. E. Rep. 225.

Seisin Subject to Deed of Trust.—Where a husband dies in possession of land, which he has conveyed by a deed of trust in which his wife did not join, she is entitled to dower in like manner as if the deed had not been made. Tracey v. Shumate, 22 W. Va. 474; Macaulay v. Dismal Swamp Land Co., 2 Rob. 507.

Seisin Merely in Trust.—A father, desirous of pro-

viding for his daughter, procured H. to purchase land in his own name, and have it conveyed to him, to be held by him at a reasonable time, and then to be conveyed directly to the daughter. The father furnished the money to pay for the land, and the daughter entered into possession of the same. The father died shortly thereafter and H. sometime thereafter, without having made the deed. A bill was brought against the widow and infant heirs of H. to compel conveyance to the daughter. *Held*, that the widow of H. is not entitled to dower in the land, as her husband held the bare legal title without any beneficial interest. Hardman v. Orr, 5 W. Va. 71.

Seisin in Another's Name to Defraud Creditors.—Where land, purchased by a wife and deeded to her, is successfully attacked by her husband's creditors as being in fraud of their rights, he having paid the purchase money, the husband has no seisin, actual or constructive therein, out of which the wife is dowable under Va. Code 1887, § 2267. Grant v. Sutton (Va.), 22 S. E. Rep. 490. See Blow v. Maynard, 2 Leigh 29.

Seisin Subject to Mortgage or Deed of Trust for Purchase Money.—Here, the widow's right to dower is only in the equity of redemption, or in the surplus after the satisfaction of the debt so secured. Heth v. Cocke, 1 Rand. 344; Gilliam v. Moore, 4 Leigh 30, 24 Am. Dec. 704; Wheatley v. Calhoun, 12 Leigh 264, 37 Am. Dec. 654; Daniel v. Leitch, 13 Gratt. 195; Robinson v. Shacklett, 29 Gratt. 99; Coffman v. Coffman, 79 Va. 504; Hurst v. Dulaney, 87 Va. 444, 12 S. E. Rep. 800; Hunter v. Hunter, 10 W. Va. 321; George v. Cooper, 15 W. Va. 666; Spencer v. Lee, 19 W. Va. 179; Holden v. Boggess, 20 W. Va. 62; Reinhardt v. Reinhardt, 21 W. Va. 76; Martin v. Smith, 25 W. Va. 579, Roush v. Miller, 39 W. Va. 638, 20 S. E. Rep. 663.

2. Must Be Immediate.—In order to entitle the wife to dower, the husband must have immediate seisin of the inheritance, and therefore the wife cannot be tenant in dower of a reversion or a remainder expectant upon an estate of freeholder, unless the particular estate be determined or ended during the coverture. Blow v. Maynard, 2 Leigh 29; Cocke v. Philips, 12 Leigh 248.

3. Duration of Seisin.—Where the husband, during coverture, purchases land and receives a conveyance for the same, and at the same time executes a mortgage to the vendor, or to a third person who advances the purchase money, to secure the payment of such purchase money, the widow is not, as against the mortgagee or his assigns, entitled to dower, although she did not join in the execution of the mortgage; but she is dowable of any surplus remaining after the satisfaction of such mortgage, and she is dowable of the whole land purchased as against all persons except the mortgagee and those claiming under him. Cowardin v. Anderson, 78 Va. 88; Hunter v. Hunter, 10 W. Va. 321; George v. Cooper, 15 W. Va. 666, 10 Am. & Eng. Enc. Law (2nd Ed.) 137.

Same Day Means Same Time.—"The real question in this case is as to the right of dower. The authorities cited by the counsel leave no doubt that where the vendor passes the title to the vendee, and at the same time takes a mortgage or deed of trust for the security of the purchase money, in which the wife of the vendee does not join, she will nevertheless take her dower in the estate subject to the trust or mortgage. In such case, the husband is seized but for an instant, and not beneficially for his own use; the deed of conveyance, and the mortgage or deed of trust, are to be considered, like the levy of a fine, as parts of the same transaction and of the same contract; as taking effect at the same instant, and as constituting but one act. If both contracts were contained in the same instrument there could be no doubt; and it is the same thing though they are contained in different instruments, provided they are parts of the same contract, and make together but one transaction. That they are parts of the same transaction, must be presumed where they are executed at the same time; and, moreover, as they cannot be absolutely isochronous, as there must be some interval, however small, the court ought always to take the same day to mean the same time, unless the contrary be found,—unless it be found that the acts were separate, distinct and independent." Gilliam v. Moore, 4 Leigh 30, 24 Am. Dec. 704, quoted with approval in Coffman v. Coffman, 79 Va. 504. See also, Wilson v. Davisson, 2 Rob. 384; Summers v. Darne, 31 Gratt. 791; Hurst v. Dulaney, 87 Va. 444, 12 S. E. Rep. 800.

Mortgage Executed Ten Months after Purchase.—Two persons purchased real estate jointly, one of the terms of purchase being that on receiving a conveyance from the vendor they should, at the same time, execute a mortgage of the property to secure the purchase money. The vendor made the conveyance to the purchasers, but, owing to a disagreement as to its provisions, the mortgage was not executed till ten months thereafter. It was held that the rights of the mortgagee were paramount in equity to the dower rights of the purchasers' wives, and that, upon the death of one of the purchasers, his widow was only dowable of his equity of redemption in the land. Wheatley v. Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

III. NATURE AND INCIDENTS.

A. Inchoate Dower.

1. In General.—During the life of the husband, the wife has no estate or interest in his lands. She has a mere contingent right of dower which may be the subject of a conveyance or relinquishment under the statute. It may also constitute a valuable consideration for a postnuptial settlement, because it is in the nature of a contingent lien or incumbrance upon the realty. Beyond this, however, it is not even a right in action. Corr v. Porter, 33 Gratt. 278. See in this connection, Miller v. Crawford, 32 Gratt. 277; Blow v. Maynard, 2 Leigh 29. But the contingent right of dower in real estate, in which her husband has no interest, is her separate estate, and she may dispose of the same by her sole act as if she were unmarried. Acts 1899-1900, p. 34.

A contingent right of dower is not separate estate under chapter 103 of the Virginia Code. Land v. Shipp, 98 Va. —, 36 S. E. Rep. 391, 6 Va. Law Reg. 158 and *note*.

A covenant for seisin, or of the right to convey, which in most cases is its equivalent, is not broken by an outstanding inchoate right of dower. It does not affect the technical seisin of the grantee. Building, L. & W. Co. v. Fray, 96 Va. 559, 32 S. E. Rep. 58, 4 Va. Law Reg. 838.

Within the Meaning of a Covenant against Incumbrances.—Inchoate dower is an incumbrance within the meaning of a covenant against incumbrances contained in a conveyance. Ficklin's Adm'r v. Rixey, 89 Va. 832, 17 S. E. Rep. 325, 37 Am. St. Rep. 891.

2. Legislative Control over.—Since inchoate dower is not a vested right, it is subject absolutely to the control of the legislature, which may modify or de

stroy it at will without exceeding its constitutional limits. Thornburg v. Thornburg, 18 W. Va. 522.

3. **How Present Value Computed.**—The rule for computing the present value of a wife's contingent right of dower is to ascertain the wife's expectation of life and that of the joint lives of the husband and wife, and from the present value of an annuity, payable during the wife's life, deduct the present value of an annuity payable during their joint lives. Strayer v. Long, 86 Va. 557, 10 S. E. Rep. 574. See *note* on this case, and table for computing present value of a contingent right of dower, 3 Va. Law Reg. 69-80.

If a sum secured to a wife in consideration of a release of her contingent right of dower be set aside as excessive, she will be restored, if practicable, to her former rights. Runkle v. Runkle (Nov., 1900), 37 S. E. Rep. 279, 6 Va. Law Reg. 618.

B. Consummate Dower.

1. Before Assignment.

a. **Right to Occupy Mansion House and Curtilage.**—A husband devised his real estate to his wife for her life, and at her death to his son, and bequeathed his personal estate to be divided equally among his eight children. His widow renounced the provision made for her by the will. *Held*, that she was entitled to occupy the real estate in person or by agent, without rent, till her dower was assigned. McReynolds v. Counts, 9 Gratt. 242. See Grayson v. Moncure, 1 Leigh 449.

The heir cannot maintain an action of trespass for a trespass committed on the quarantine lands of the widow before the assignment of her dower. Latham v. Latham, 3 Call 181.

Such Possession Not Adverse.—Since the widow is entitled under the statute, Va. Code 1887, § 2274, to hold the mansion house and curtilage until her dower is assigned, her possession prior to the assignment, not being adverse, will not in law be so deemed, and the statute of limitations will not begin to run, until such possession ends, or she publishes her claim and her possession to be adverse and hostile by actual and open disseisin. Hannon v. Hounihan, 85 Va. 429, 12 S. E. Rep. 157. See also, Hope v. N. & W. R. Co., 79 Va. 283; Ball v. Johnson, 8 Gratt. 281.

b. **No Right to Other Premises.**—A plaintiff in ejectment may recover against a widow holding possession of the land of which her husband died seised, and having a right of dower, if it does not appear that the land in controversy was assigned her as her dower, or as a part thereof, or was attached to the mansion house of her husband at the time of his death. Moore v. Gilliam, 5 Munf. 346; Chapman v. Armistead, 4 Munf. 382.

c. **Rights and Liabilities as to Taxes and Improvements.**—A widow remained in the mansion house, having with her her infant children, whom she supported, and no dower was assigned to her. She paid a balance of the purchase money due for the property and secured by the vendor's lien. She also paid the taxes, and expended money in improvements. *Held*, that, as against creditors of her husband, she had a prior lien on the property for the amount paid for taxes, and for the purchase money paid by her, less the sum which she, as dowress, was liable to pay; that she was not entitled to be reimbursed for improvements, and that, as a sale was necessary before assignment of dower, she was to pay rent for two-thirds of the property until the sale, if she continued in possession. Simmons v. Lyles, 32 Gratt. 752.

2. **After Assignment—Liability for Waste.**—It is not waste for a tenant in dower of coal lands to take coal to any extent from a mine already opened, or to sink new shafts into the same veins of coal; and she may penetrate through a seam already opened, and dig into a new seam that lies under the first. Crouch v. Puryear, 1 Rand. 258.

Nor is it waste for a tenant in dower of land incapable of cultivation to cut timber therefrom, where the land is only valuable for the production of timber. Macaulay v. Dismal Swamp Land Co., 2 Rob. 507.

IV. PROPERTY, ESTATES AND INTERESTS SUBJECT TO DOWER.

A. **Mines and Quarries.**—A widow is dowable of coal lands, but only such as were opened and worked in her husband's lifetime. Crouch v. Puryear, 1 Rand. 258.

B. **Property Annexed to Freehold.**—As title to dower is consummated by the death of the husband, when the wife is endowed she is in from his death, and, like any other tenant of the freehold, takes upon recovery whatever is then annexed to the freehold, whether it be so by folly, mistake or otherwise. Engle v. Engle, 3 W. Va. 246.

C. **Slaves.**—Where a widow holding slaves in right of dower marries again, the slaves belong to her second husband and his representatives until her death. McCargo v. Callicott, 2 Munf. 501.

D. **Unimproved Lands.**—A widow is dowable of lands incapable of cultivation and only valuable for the timber thereon. Macaulay v. Dismal Swamp Land Co., 2 Rob. 507.

E. Partnership Realty.

1. **Virginia Rule.**—Real estate purchased with partnership funds for partnership purposes is so far considered as personalty that the widow of a deceased partner is not dowable therein. Deering & Co. v. Kerfoot, 89 Va. 491, 16 S. E. Rep. 671; Parrish v. Parrish, 88 Va. 529, 14 S. E. Rep. 325; Davis v. Christian, 15 Gratt. 11; Pierce v. Trigg, 10 Leigh 406. See article on "Dower in Partnership Realty," 4 Va. Law Reg. 310 *et seq.* See also, Hancock v. Talley, 7 Va. Law Reg. 24 (May Number, 1901), and *note*.

Two persons purchased a mill and 200 acres of land for the purpose of carrying on the business of milling in partnership. They took a conveyance of the property jointly and gave their joint bonds for the purchase money. *Held*, that, though such bonds were paid partly out of partnership funds, and partly by one partner after the death of the other, the real estate was not partnership property, but each partner was tenant in common with the other of an undivided moiety; and therefore the widow of the deceased partner is dowable of his moiety. Wheatley v. Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

2. **West Virginia Rule.**—In West Virginia, it seems, the widow of a deceased partner is dowable of his interest in the partnership real estate, but the right does not attach until the partnership debts are paid. Martin v. Smith, 25 W. Va. 579.

F. **Determinable Estates.**—Where a devise of land is defeasible by the death of the devisee without lawful issue of his body, and the devisee so dies, his widow is entitled to dower in the land. Medley v. Medley, 27 Gratt. 568; Jones v. Hughes, 27 Gratt. 560; Taliaferro v. Burwell, 4 Call 321; Tomlinson v. Nickell, 24 W. Va. 148; Nickell v. Tomlinson, 27 W. Va. 697.

G. **Estates in Expectancy.**—Where a man dies entitled to a remainder in fee of real estate, expectant on an estate of freehold therein, his widow is not entitled to dower in the land, when the remainder falls in. Cocke v. Philips, 12 Leigh 248. Nor is a

widow entitled to dower in a reversion of lands. Blow v. Maynard, 2 Leigh 29.

H. Equitable Estates.—Under the act of 1785, giving a widow dower in trust estates, it seems that she is entitled to dower in an equitable estate in fee simple, contracted by verbal agreement to be conveyed to her late husband, provided the contract be proved to be such as would authorize a court of equity to decree the legal estate. Rowton v. Rowton, 1 Hen. & Munf. 91. Prior to the act of 1785, a widow was not dowable of land in which her husband owned only an equitable estate. Claiborne v. Henderson, 3 Hen. & Munf. 322.

C. and W. purchased land to be divided between them by a designated line, W. to pay the whole purchase money, and C. to pay W. his part at a certain time; within the time, C. paid W. the greater part of the purchase money for his part of the land; and then, also within the time, the contract between C. and W. was rescinded, W. agreeing to take back C.'s part of the land, upon condition that C. should have credit on another account, for the money he had paid; and C. died, never having been in possession of the land. *Held*, that, under 1 Rev. Code, ch. 99, § 31, as the contract between C. and W. was wholly executory, and was rescinded before C. had completed the payment of the purchase money, and as he had never had legal or equitable possession, he had no such equitable estate that his widow was dowable thereof. Wheatley v. Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

Incomplete Equitable Estate of Husband.—A husband who enters into an agreement for the purchase of land, takes possession of it, and pays part of the purchase price, is beneficially seised of the land to the extent that he has paid the purchase price, although he has not acquired the legal title; and his widow is entitled, under the provision of Va. Code 1887, § 2429, to dower in the land, subject to the lien upon it for the unpaid purchase price, whether he died possessed of the land, or had aliened it during the coverture without her concurrence in the mode prescribed by law. If so aliened, however, the widow's right to dower is subject to the provisions of section 2278 of the Code of Virginia. James v. Upton, 96 Va. 296, 31 S. E. Rep. 255, 4 Va. Law Reg. 448.

I. Lands Held in Trust by Husband.—A father, desirous of providing for his daughter, procured H. to purchase land in his own name, and have it conveyed to him, to be held by him a reasonable time, and then to be conveyed directly to the daughter. The father furnished the money to pay for the land, and the daughter entered into possession of the same. The father died shortly thereafter and H. sometime thereafter, without having made the deed. A bill was brought against the widow and infant heirs of H. to compel conveyance to the daughter. *Held*, that the widow of H. is not entitled to dower in the land, as her husband held the bare legal title without any beneficial interest. Hardman v. Orr, 5 W. Va. 71.

J. Lands Held in Another's Name to Defraud Creditors.—Where land, purchased by a wife and deeded to her, is successfully attacked by her husband's creditors as being in fraud of their rights, he having paid the purchase money, the husband has no seisin, actual or constructive therein, out of which the wife is dowable under Va. Code 1887, § 2267. Grant v. Sutton (Va.), 22 S. E. Rep. 490. See Blow v. Maynard, 2 Leigh 29.

K. Lands Sold before Marriage and Conveyed Afterwards.—The widow of a vendor of real estate is not entitled to dower in the land of her husband, where it appears that the vendor sold the land before marriage, put the vendee in possession and received a part of the purchase money, and after the marriage conveyed the land to the vendee by his sole deed. And although the vendee may have been in default in the payment of the purchase money during the coverture, his mere default would not entitle the widow to dower under Va. Code 1887, § 2268. Chapman v. Chapman, 92 Va. 537, 24 S. E. Rep. 225; Waller v. Waller, 33 Gratt. 83.

L. Mortgaged Lands.

1. In General.—G. conveyed land to M., who, on the same day, conveyed the same land to trustees to secure the purchase money. *Held*, that the two conveyances should be considered parts of the same transaction, that the seisin of M. was instantaneous and transitory, and that M.'s widow is not entitled to dower in the land. Gilliam v. Moore, 4 Leigh 30, 24 Am. Dec. 704.

Where the husband and wife, grantees, pay only part of the purchase money, and such payment is applied to a prior deed of trust on the land, the wife is not entitled to dower therein. Robinson v. Shacklett, 29 Gratt. 99.

In 1853 W., before his marriage, sold a tract of land to B., taking a deed of trust to secure the unpaid purchase money. B. returned north during the war, and in his absence the land was sold by the trustee under the deed of trust and W. purchased it for more than his debt. He then married. After the war, B. returned and filed a bill to set aside the sale, and the court set the sale aside and decreed that the land be sold to pay W. the purchase money due him. *Held*, that the sale to W. having been decreed to be a nullity, his widow is not entitled to dower. Waller v. Waller, 33 Gratt. 83.

A. purchased land from G., N. advancing the purchase money. To secure the money thus advanced, A. executed a deed of trust upon the land and afterwards died. *Held*, that A.'s widow is not entitled to dower in the land. Spencer v. Lee, 19 W. Va. 179.

West Virginia Code 1868, ch. 65, § 3, provides that "where land is *bona fide* sold in the lifetime of a husband to satisfy a lien or incumbrance thereon created by deed, in which the wife has united, or for the purchase money thereof, whether she has united therein or not, or created before the marriage, or otherwise paramount to the claim of the wife, she shall have no right to dower in said land. But if a surplus of the proceeds of sale remain after satisfying the said lien or incumbrance or purchase money, she shall be entitled to dower in said surplus; and a court of equity having jurisdiction of the case may make such order, as may seem to it proper to secure her right." *Held*, that, under this section, the wife, after her husband's death, may enforce her dower right in the land itself, although there has been a judicial sale thereof to satisfy a purchase money lien, and the surplus, after the satisfaction of such lien, has been paid to the husband, or to another judgment lien creditor, against whose claim that of the wife is paramount. Holden v. Boggess, 20 W. Va. 62.

Where a purchaser of land subject to a mortgage applies to equity for relief against a judgment in ejectment and the dower interest of the mortgagor's wife has been relinquished to the complainant, but not to the mortgagee, the court in directing the

sale ought to protect the complainants right to such dower interest. Davison v. Waite, 2 Munf. 527.

2. **Equity of Redemption.**—Where a husband has mortgaged his property before marriage, the only claim his widow has therein is to dower in the equity of redemption. The same principle applies to mortgages after marriage, where the wife unites in the mortgage. Heth v. Cocke, 1 Rand. 344.

Two persons purchased real estate jointly, one of the terms of purchase being that on receiving a conveyance from the vendor they should, at the same time, execute a mortgage of the property to secure the purchase money. The vendor made the conveyance to the purchasers, but, owing to a disagreement as to its provisions, the mortgage was not executed till ten months thereafter. It was held that the rights of the mortgagee were paramount in equity to the dower rights of the purchasers' wives, and that, upon the death of one of the purchasers, his widow was only dowable of his equity of redemption in the land. Wheatley v. Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

A wife has an inchoate right of dower in the equity of redemption only in land of the husband conveyed by husband and wife in trust to secure his debt. Land v. Shipp, 98 Va. —, 36 S. E. Rep. 391, 6 Va. Law Reg. 158.

3. **Dower in Surplus after Paying Mortgage Debt.**—The widow is entitled to dower in the surplus arising from a sale of her husband's land under a deed of trust given to secure the purchase money; but the land is not liable in the hands of the purchaser for such dower interest, nor is the purchaser bound to see to the application of the purchase money. Hurst v. Dulaney, 87 Va. 444, 12 S. E. Rep. 800; Coffman v. Coffman, 79 Va. 504; Robinson v. Shacklett, 29 Gratt. 99; George v. Cooper, 15 W. Va. 666.

A purchaser of a tract of land on which there was a deed of trust to secure a debt retained the amount of the debt out of the purchase money for the purpose of paying it, but died owing a much greater amount than could be paid out of his personal estate. *Held*, that the widow may institute a suit in equity to have the land sold and the debt paid, and to have her dower out of the residue of the purchase money. Daniel v. Leitch, 13 Gratt. 195.

A widow is entitled to dower out of the surplus remaining after the payment of a purchase money mortgage. George v. Cooper, 15 W. Va. 666. A married woman who has relinquished her dower may redeem a mortgage, and thus prevent a disastrous foreclosure and sale of the property including her dower interest. Gatewood v. Gatewood, 75 Va. 407.

V. PRIORITY BETWEEN DOWER AND OTHER INCUMBRANCES.

A. **In General.**—"A wife's right of dower is an emanation from the ownership of her husband, and subject to all its qualifications; though not to his alienations or incumbrances during the coverture, without her consent declared in the mode prescribed by law. Her right is dependent upon his, as existing at the inception of the coverture, or as acquired by him during its continuance. If he mortgage his land before marriage, her claim to dower is subordinate to the mortgage, and, if that be foreclosed, is completely divested. So if she unite, with the requisite solemnity, in his mortgage made after the marriage, the effect of a foreclosure is the same. If, during the coverture, he purchased mortgaged land, her title, like this, is subject to the incumbrance, and the foreclosure of it destroys both. The result is the same where an incumbrance is created by the very act of purchasing: for if the purchase money be unpaid and not secured, an equitable mortgage is embodied in the transaction itself, and if that be foreclosed by a sale of the property under the decree of a court of equity, the wife's right of dower is completely extinguished." BALDWIN, J., in Wilson v. Davisson, 2 Rob. 405.

The right of dower, provided by law in behalf of a widow, is paramount to all conveyances, incumbrances, contracts, debts or liabilities of the husband executed or incurred by him during the coverture. Higginbotham v. Cornwell, 8 Gratt. 83, 56 Am. Dec. 130.

A wife's right of dower, whether inchoate or consummate, is an existing lien, and a covenant against incumbrances is broken by its existence. This lien is inferior to all liens which attached prior to the marriage, but superior to those acquired thereafter without her consent. Ficklin v. Rixey, 89 Va. 832, 17 S. E. Rep. 325, 37 Am. St. Rep. 891.

B. **Attachment before Suit for Divorce.**—An attachment against the effects of the husband as an absconding debtor, levied before the institution of a suit by the wife for a divorce, entitles the attaching creditor to be satisfied out of the attached effects, in preference to the claim of the wife. Jennings v. Montague, 2 Gratt. 350.

C. **Contribution of Dower Interest towards Payment of Charges on Land.**—Where the owner of land charged with a legacy dies leaving a widow, she is not entitled to have the heirs' shares subjected to its payment, but her dower interest is chargeable with a sum equivalent to the annual interest on one-third of the debt, at compound interest, for the probable period of her life, ascertained from the tables of mortality. Harper v. Vaughan, 87 Va. 426, 12 S. E. Rep. 785.

D. **Lien of Insurance Company.**—Where a husband insures property in the Mutual Assurance Society and dies seised, his widow takes her dower interest subject to the lien of the society. Shirley v. Mutual Assurance Society, 2 Rob. 705.

E. **Mechanic's Lien.**—A mechanic's lien does not override the dower interest of the wife, but where she has joined in a deed of trust to secure the building fund company, the property should be sold out and out, and first applied to the debt due the company. But she has a contingent dower interest in the equity of redemption and, being a party to the suit in which the property is sold and therefore bound by the decree in the cause, the court should make a proper provision to compensate that interest out of the surplus proceeds of sale, if any, before any part of it is paid over to the assignee of the building contract. Iaege v. Bossieux, 15 Gratt. 83, 76 Am. Dec. 189.

F. **Purchase Money Mortgage.**—Where it was stipulated in a contract to sell land that the vendee should execute a purchase money mortgage to the vendor, but such mortgage was not executed until ten months after the delivery of the conveyance, the dower of the vendee's widow is subject to such mortgage. Wheatley v. Calhoun, 12 Leigh 264, 37 Am. Dec. 654.

Where land is conveyed upon condition that the grantee shall pay the grantor's debts, and, by deed executed later on the same day, the grantee conveys the land to secure money loaned him to pay such debts, the grantee's widow is not entitled to dower in the land until said debts are paid, though

she did not join in the trust deed. Coffman v. Coffman, 79 Va. 504.

A conveyance of land to a husband, who, as a part of the same transaction, executes a deed of trust to secure the unpaid purchase money, does not give the husband such a seisin of the land as will entitle his wife to dower, as against the grantee in the deed of trust; and the fact that the latter is an assignee of the vendor of the land does not affect the principle. Hurst v. Dulaney, 87 Va. 444, 12 S. E. Rep. 800.

A widow's dower in lands is subject to a mortgage thereon for the purchase money. Hunter v. Hunter, 10 W. Va. 321.

Where land is conveyed to a party, who, at the same time by deed of even date, conveys the same to a trustee to secure the unpaid purchase money, the two deeds will be regarded as parts of the same transaction, and the seisin of the grantee in the first deed will be held to be instantaneous and transitory, and his widow will not be entitled to dower in the land against the vendor, though she did not join in the deed of trust, but she will be entitled to dower in the surplus after the payment of the purchase money so secured. George v. Cooper, 15 W. Va. 666.

A husband conveyed real estate to a trustee to secure the payment of a debt, and the wife united in the conveyance. After his death, a creditor's bill was filed to subject his real estate to the payment of his debts, and the said trust property was sold under a decree in said suit. *Held*, that the widow is not entitled to dower in the property so conveyed, or in the proceeds thereof, unless there is a surplus after the payment of said trust debt and such costs as are properly chargeable to the fund arising from the sale of the property so conveyed. Reinhardt v. Reinhardt, 21 W. Va. 76.

Where a conveyance of the legal title is made to a purchaser in order that he may, by deed of trust made at the same time, pass the title to the trustee in the trust deed to secure the payment of such purchase money to the *cestui que trust* who has paid it for him, the two deeds are to be treated as parts of the same transaction, made to retain on the face thereof a lien on the land for such unpaid purchase money, and the right of dower of the widow of the purchaser is subordinate to the lien of the deed of trust. Roush v. Miller, 39 W. Va. 638, 20 S. E. Rep. 663.

Vendor's Lien for Purchase Money.—A widow is not entitled to dower in lands subject to a vendor's lien, except as to the residue after the satisfaction of such lien. Martin v. Smith, 25 W. Va. 579. Prior to the statute, Va. Code 1849, p. 474, § 3; Va. Code 1887, § 2269, a vendor of land conveyed the same to the vendee in fee simple and received a part of the purchase money, taking no security for the residue. On a bill against the vendee to enforce the implied equitable lien of the vendor, a sale was made of the land, and the proceeds were more than sufficient to satisfy the vendor's claim. Judgment creditors of the vendee claimed the surplus, and with his consent a decree was entered accordingly. After the vendee's death, his widow claimed dower in the land. *Held*, that she was not entitled to dower in such land. Wilson v. Davisson, 2 Rob. 384.

If land be conveyed to a husband who, as a part of the same transaction, reconveys it to a trustee to secure only two-thirds of the purchase money, although none of the purchase money is paid, and he subsequently sells the land to his grantor for the amount agreed to be paid by him and conveys the same to his grantor by a deed from himself and wife which is lost before being admitted to record, his widow has no claim on the land, whatever may be her claim on the one-third of the purchase price for which no lien was reserved. Building, L. & W. Co. v. Fray, 96 Va. 559, 32 S. E. Rep. 58, 4 Va. Law Reg. 838.

Suit by Vendor—Parties.—Where a vendor of land who has retained the title files a bill against the widow and infant children of the vendee for a sale of the land to satisfy his debt and the widow answers claiming dower in the land subject to the vendor's lien, judgment creditors of the vendee may make themselves parties to the cause and have the land, subject to the vendor's lien and the widow's dower, applied to the payment of their debts. Simmons v. Lyles, 27 Gratt. 922.

Lien Lost by Taking Security.—Where the vendee gives a bond and security for the purchase money for land, the vendor's lien is not retained, and the vendee's widow is entitled to dower in such land. Blair v. Thompson, 11 Gratt. 441.

VI. HOW DOWER BARRED OR RELINQUISHED.

A. By Divorce.—A divorce *a vinculo matrimonii*, although for a supervenient cause, or for a cause which, while it existed at the date of the marriage, is yet by statute specially declared to dissolve the marriage only from the time of the sentence, operates as a bar to dower or curtesy. Porter v. Porter, 27 Gratt. 599; Harris v. Harris, 31 Gratt. 13; Cralle v. Cralle, 79 Va. 182. See 2 Min. Inst. (4th Ed.) 137.

A divorce *a mensa et thoro*, where there is a decree for the perpetual separation of the parties, has the same effect upon the rights of property which either party may acquire after the decree as a divorce *a vinculo matrimonii* would have. Va Code 1887, § 2264; Marshall v. Baynes, 88 Va. 1040, 14 S. E. Rep. 978.

Upon decreeing the dissolution of a marriage, whether from the bond of matrimony or from bed and board, the court may make such further decree as it may deem expedient in regard to the estate, etc., of the parties. Va. Code 1887, § 2263. See Cralle v. Cralle, 84 Va. 198, 6 S. E. Rep. 12; Cralle v. Cralle, 79 Va. 182; Francis v. Francis, 31 Gratt. 283; Harris v. Harris, 31 Gratt. 13; Porter v. Porter, 27 Gratt. 599; Carr v. Carr, 23 Gratt. 168; Bailey v. Bailey, 21 Gratt. 43.

B. By Desertion or Misconduct of Wife.—The provision of W. Va. Code of 1868, ch. 65, § 7, declaring that "if a wife voluntarily leave her husband without such cause, as would entitle her to a divorce from the bond of matrimony, or from bed and board, and without such cause and of her own free will be living separate and apart from him at the time of his death, she shall be debarred of her dower and inheritance," is not restricted, but embraces the case of a widow, who, nine years before the passage of such act, had left her husband without such cause as is specified in the act, and which leaving or desertion continued for two years after the passage of the act until his death. Thornburg v. Thornburg, 18 W. Va. 522. For a similar provision in Virginia, see Va. Code 1887, § 2273.

C. By Antenuptial Agreement.—By an agreement in contemplation of marriage, the intended husband bound his estate to pay the intended wife certain sums of money if she survived him, which were to be in full compensation for her dower. *Held*, that this agreement barred her of her dower in her husband's real estate. Findley v. Findley, 11 Gratt. 434. See McReynolds v. Counts, 9 Gratt. 242; Burdine v. Burdine (September, 1900), 36 S. E. Rep. 992, 6 Va. Law Reg. 389.

By an antenuptial contract, the wife agreed that she would relinquish all right, title or interest in her prospective husband's estate; that she would never claim at law, or otherwise, any part of his property by reason of the marriage; that she would never in the future acquire any property of her prospective husband further than he might convey to her by deed or will; and that he should at all times during his life have the right to convey any part of his real estate without her consent. *Held*, that this contract was no bar to her right of dower. Hinkle v. Hinkle, 34 W. Va. 142, 11 S. E. Rep. 993.

D. By Postnuptial Agreement.—The dower interest of the wife constitutes a valuable consideration which will support a postnuptial settlement; and such settlement, made in consideration of the surrender of such dower interest, may be supported against the claims of creditors. Nor will the fact that such settlement was fraudulently made affect this, because it would be a sufficient answer to the charge of fraud on the part of the husband and wife in executing the deed of settlement to say that if there was fraud, and she participated in it, still it will not be imputed to her by reason of her coverture. Strayer v. Long, 86 Va. 557, 10 S. E. Rep. 574; William & Mary College v. Powell, 12 Gratt. 372; Blanton v. Taylor, Gilmer 209; Taylor v. Moore, 2 Rand. 563; Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519. See also, Harrison v. Carroll, 11 Leigh 476.

Where a wife relinquishes her right of dower in certain land belonging to her husband in consideration of his conveying other property to her, the value of such dower, where the latter conveyance is held invalid, should be saved to her in opposition to the claims of her husband's creditors. Quarles v. Lacy, 4 Munf. 251.

Where an insolvent husband, in consideration of the relinquishment by his wife of her inchoate right of dower, settles on her certain property, such settlement will not be disturbed in behalf of creditors, unless it appears to be grossly excessive; and then, only as to the excess. Burwell v. Lumsden, 24 Gratt. 443, 18 Am. Rep. 648.

Where a wife was induced to unite with her husband in conveying away her interest in his real estate, upon condition that certain property be settled upon her in consideration of her thus parting with her rights, she has the right, if such settlement is set aside and annulled, to be placed in the same position and restored to the same rights with which she was invested by law before she united in the deed of which the specific settlement was the consideration, provided this can be done without prejudice to the rights of creditors or purchasers. Davis' Widow v. Davis' Creditors, 25 Gratt. 587.

Sale of Contingent Dower to Husband.—If a husband purchase his wife's contingent right of dower in his real estate, and secures the purchase price along with other debts by a deed of trust on his real estate, on the death of the wife intestate, the debt secured to her becomes extinguished, as the husband is her sole distributee, and the deed of trust stands as a security for the other creditors secured. The husband cannot assign such debt to another person to the prejudice of the other creditors secured. Allen v. Patrick, 97 Va. 521, 34 S. E. Rep. 451, 5 Va. Law Reg. 523.

Release Directly to Husband.—The contingent right of dower of a wife in her husband's lands is not a separate estate within the meaning of chapter 108 of the Code of 1887, and the wife having no other estate with reference to which she might contract is not bound by the provisions of a deed of separation, whereby she released directly to her husband her dower in her lands. Land v. Shipp, 98 Va. —, 36 S. E. Rep. 391, 6 Va. Law Reg. 158.

E. By Partition Sale during Coverture.—A partition sale during coverture of land held by a woman's husband in common, made by order of court, bars the wife's contingent right of dower therein, although she was not a party to the suit. Va. Code 1887, § 2564; Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262; Weaver v. Gregg, 6 Ohio St. 547, 67 Am. Dec. 355; Washb. on Real Property (4th Ed.) 191, 199.

F. By Statute of Limitations—West Virginia.—The statutory bar to a widow's remedies for the recovery of her dower is the lapse of ten years from the death of her husband, when her right to sue accrues. Smith v. Wehrle, 41 W. Va. 270, 23 S. E. Rep. 712. See Mullan v. Carper, 37 W. Va. 215, 16 S. E. Rep. 527.

G. By Jointure.

1. In General.—Prior to the act of 1866 the statute, Va. Code 1860, ch. 110, § 4, provided that "if any estate, real or personal, intended to be in lieu of dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate or the residue thereof." This statute was construed in Higginbotham v. Cornwell, 8 Gratt. 83, 56 Am. Dec. 130, where it was held that a provision for the wife, to bar her dower, must not only have been so intended, but that such intent must appear from the conveyance or devise, either by express words or by necessary implication. See also, Higginbotham v. Cornwell, 8 Gratt. 83, 56 Am. Dec. 130; Craig v. Walthall, 14 Gratt. 518; Dixon v. McCue, 14 Gratt. 540; Nelson v. Kownslar, 79 Va. 468; Douglas v. Fray, 1 W. Va. 26; Shuman v. Shuman, 9 W. Va. 50. To change this rule of construction the amendatory act of 1866 was passed, which amended the statute by adding thereto these words: "And every such provision, by deed or will, shall be taken to be in lieu of dower, unless the contrary intention plainly appears in such deed or will, or in some other writing signed by the party making the provision." Acts 1865-6, p. 166; Va. Code 1873, ch. 104, § 4; Va. Code 1887, § 2270. See Bolling v. Bolling, 88 Va. 524, 14 S. E. Rep. 67.

A marriage settlement of land and slaves for the wife's jointure, "in full satisfaction of her dower or thirds in any lands, tenements, and hereditaments, whereof the husband should, at any time during his life be seised of any estate of inheritance," is no bar to her right of dower in the slaves, though made before the Act of 1792, declaring slaves to be personal property. Ball v. Ball, 3 Munf. 279.

By a marriage settlement, the wife, at the death of her husband, was to have one-third of all the negroes whereof the husband died possessed in lieu of dower; and if she survived and had no child by him, she was to have all the negroes which came by her in her absolute right. She did survive and had no child by him. *Held*, that she was entitled to the dower slaves in addition to her own before the marriage. Hearne v. Roane, Wythe 90.

A husband, during the coverture, sold and conveyed land with general warranty, but his wife did not join in the deed. By his will he gave his whole estate, real and personal, to his wife for her life, remainder to his children. It was held that she was entitled to take under the will, and also to have her dower in the land sold. Higginbotham v. Cornwell, 8 Gratt. 83, 56 Am. Dec. 130.

Definition.—Jointure at common law consists of an estate or interest in land to take effect in possession or profit immediately on the death of the husband, in satisfaction of dower, and it must so appear in the deed. It is an absolute bar only when made before marriage. If made after marriage it only puts the wife to her election whether to accept the provision or claim dower. The only difference made by statute in Virginia is that the jointure may be of personal as well as real estate. Land v. Shipp, 98 Va. —, 36 S. E. Rep. 391, 6 Va. Law Reg. 158.

Essentials to Bar Dower.—If, after the husband's death, the widow accepts a provision made for her in lieu of dower, she bars herself of dower, but if she has received the provision during her husband's lifetime and has spent or wasted it, she may take her dower as if no provision had been made. It is necessary, in order to estop her, that she should have enjoyed the provision, or a part of it at least, after her husband's death. Land v. Shipp, 98 Va. —, 36 S. E. Rep. 391, 6 Va. Law Reg. 158.

Intention to Create Jointure—When Parol Evidence Admissible.—Under the 11th section of the Act of Assembly relative to dower, 1 Rev. Code, p. 171, any estate conveyed by deed or will for a wife's jointure in lieu of dower, though not so expressed, may be averred to have been so intended, and parol or other evidence *dehors* the deed or will is admissible as to the relative situation of the parties and circumstances of the testator from which such intention may be inferred. Ambler v. Norton, 4 Hen. & M. 23.

The intention of the testator to exclude the wife's dower may be either express or implied. But if not expressed in the will then, in order to ascertain the implied intention, it is not only proper but absolutely essential that the situation of the testator, the property owned by him, and the surrounding circumstances likely to influence him in the disposition of his property should be known. Atkinson v. Sutton, 28 W. Va. 197.

Real or Personal Estate May Constitute Jointure.—Under 1 Rev. Code 1819, ch. 110, § 4, providing that, "if any estate, real or personal, intended to be in lieu of her dower, shall be conveyed or devised for the jointure of the wife, such conveyance or devise shall bar her dower of the real estate, or the residue thereof," either real or personal estate alone or both combined may make a jointure. Craig v. Walthall, 14 Gratt. 518. See also, Land v. Shipp, 98 Va. —, 36 S. E. Rep. 391, 6 Va. Law Reg. 158. But it was held, before the enactment of the above statute, that a widow could not be barred of her dower by a devise of an estate for years, and that a provision in personal estate could not bar her dower in real estate. Wiseley v. Findlay, 3 Rand. 361, 15 Am. Dec. 712.

Jointure Need Not Be Exempt from Incumbrances—Loss of Jointure.—It is not essential to the validity of a jointure that it should be exempt from any incumbrance; the widow, if evicted of her jointure, having still a right to claim her dower. Ambler v. Norton, 4 Hen. & M. 23.

Plea of Jointure in Bar of Dower—Necessary Allegations.—In pleading a jointure in bar of dower, it is not necessary to specify the name of the county in which the jointure land lies; provided the locality and identity of the land be described with reasonable certainty. Ambler v. Norton, 4 Hen. & M. 23.

In averring a jointure in bar of dower, the failure to state in the plea that the husband "being seised in fee of the premises" made the jointure, is not a substantial defect, and is not sufficient so authorize the reversal of a judgment for the tenant, the defendant having failed to assign it as a cause of demurrer. Ambler v. Norton, 4 Hen. & M. 23.

Nor is it necessary in such plea to state expressly that the jointure was to take effect in possession immediately on the death of the husband, or that it was determinable by such acts only as would forfeit the dower at common law, it being incumbent on the demandant to show in his replication that any intervening estate existed, or that the jointure was subject to any condition other than the law imposes on a dowress. Ambler v. Norton, 4 Hen. & M. 23.

Rights of Husband's Creditors.—Where a life estate in lands, given to a widow in lieu of dower is of less value than her dower would have been, it is not chargeable with any of the debts of her deceased husband. Gaw v. Huffman, 12 Gratt. 628.

2. Election of Widow to Waive Jointure and Demand Dower.—Under Va. Code 1860, no question of election between dower and a provision in lieu thereof arises, unless the intention to bar is clear. But under Va. Code 1873, unless the intention plainly appears not to bar dower, the election must be made by the widow between dower and the provision as prescribed by section 5 of chapter 106. Nelson v. Kownslar, 79 Va. 468. See Va. Code 1887, § 2271.

The doctrine of election is founded on the same reasons and governed by the same rules when applied to a widow claiming dower as to any other case. One entitled to a benefit under an instrument must, if he claims that benefit, abandon every right which, if asserted, would defeat, even partially, the provisions of the instrument. If the widow's taking dower would interfere with any of the provisions of the will, she must elect. Rutherford v. Mayo, 76 Va. 117; Dixon v. McCue, 14 Gratt. 540.

Where the widow renounces the will of her husband, who has no child alive, she is entitled to dower in his slaves and a moiety of his other personal estate in absolute property, although he left no grandchildren. Bernard v. Hipkins, 6 Call 101.

Where a widow, under a mistake as to her rights under the will of her husband, kept possession of the land for five years, cultivated it and took a legacy of $500 to aid her in managing the farm, it was held that she had not elected to take under the will but might still have her dower assigned to her. Dixon v. McCue, 14 Gratt. 540.

Election by Failure to Renounce Husband's Will.—Where the widow does not renounce her husband's will within the prescribed period, she is not entitled to dower in the undevised slaves. Noel v. Garnett, 4 Call 92.

Where a widow does not renounce her husband's will within one year after his death, she loses her distributive share of the personal estate and is confined to the provisions of the will; but is entitled to her dower in the lands. Blunt v. Gee, 5 Call 481.

A testator died in 1862, leaving a considerable estate in lands, slaves, *choses in action*, etc. He gave to each of his five children $1,000 in money or land, and to the widow all the residue, *durante viduitate*, or, if she married, one-half of the same. She did not renounce the will, but held the property under the will for thirteen years. *Held*, that the provision was intended as her jointure under the statute, Va. Code 1860, ch. 110, § 4, and that she had elected to take it in lieu of dower. Rutherford v. Mayo, 76 Va. 117.

By a will probated in 1873, a testator bequeathed $20,000 in bank stocks to his wife, directing that the residue, after the payment of his debts, should go

to his wife and children. The value of the property was so much depressed by the financial panic of 1873 that the assets became less than the debts and the bank stock worthless. The widow never renounced the will and did not claim dower until 1877. *Held*, that the widow having declined for over four years to renounce the will and claim the provisions made for her by the law, and having with full knowledge of the facts elected to accept the provisions made for her by the will cannot now—even though she has been lawfully deprived of her jointure—be allowed to revoke her election and have dower, especially after the realty has been sold to innocent purchasers under decrees in a suit to which she was a party. Cooper v. Cooper, 77 Va. 198.

3. **Conflict of Laws.**—The provisions of Va. Code 1887, § 2270, do not change the common-law rule that a will of personalty must be construed according to the *lex domicilii* in which it was made; and where one domiciled in New York bequeathed personal property to his wife, but made no disposition of real estate in Virginia, and there was nothing in the will incompatible with her claim to dower, the testator's intent must be measured by the common-law rule in New York, to the effect that the provision would not be in lieu of dower unless a different intent was expressed in words, or clearly shown on the face of the will. Bolling v. Bolling, 88 Va. 524, 14 S. E. Rep. 67.

H. **By Wife's Uniting with Husband in Deed of Conveyance.**—At common law a wife was unable to unite with her husband in conveying land so as to relinquish her claim to dower. But the statute, by its inherent force, obviates the legal unity of husband and wife in the cases where it applies, and formerly did away with the husband's supposed influence by a privy examination. See Va. Code 1873, ch. 117, § 4. But the Code of 1887 dispenses with even this requirement. Va. Code 1887, § 2502. Mr. Minor, in discussing the principle upon which the statute is to be construed, says that "it is an exception to the common law and so must be construed strictly. A substantial compliance with it is sufficient, but no requirement can be pretermitted, without invalidating the transaction. Thus, the statute until 1888 applies to no other transaction than a conveyance of lands or chattels; not to a power of attorney, nor to any executory contract (Shanks v. Lancaster, 5 Gratt. 111); the husband must be a party (Sexton v. Pickering, 3 Rand. 468); and both he and his wife must sign it (Tod v. Baylor, 4 Leigh 498); there must appear to have been a privy examination of the wife (Healy v. Rowan, 5 Gratt. 431); and an explanation to her of the conveyance (Hairston v. Randolphs, 12 Leigh 445; Harkins v. Forsyth, 11 Leigh 294); nor is any disability obviated, save that of coverture, *e. g.*, not infancy (Thomas v. Gammel, 6 Leigh 9). But some important statutory changes in these requirements have been made by the Code of 1887, and subsequent statutes. Thus, the statute does now include a wife's contract to convey and power of attorney (Acts 1889-90, p. 193, ch. 238), and the privy examination and explanation are dispensed with (Va. Code 1887, § 2502)." 2 Min. Inst. (4th Ed.) p. 174.

The effect of a wife's uniting with her husband in a deed is not to vest in the grantee any estate, separate and distinct from that of the husband, but simply to relinquish a contingent right in the nature of an incumbrance upon the land conveyed, which, if not so conveyed, would attach and be consummate on the death of the husband. Corr v. Porter, 33 Gratt. 278; Nickell v. Tomlinson, 27 W. Va. 697.

Inchoate dower is not a vested estate or property in a wife until the death of her husband, and in a suit to sell the husband's land in his lifetime to pay liens no provision need be made out of the proceeds to meet the wife's dower when consummate. George v. Hess (W. Va.), 37 S. E. Rep. 564.

Where it does not appear that the privy examination of the wife was taken as required by statute, she is entitled, on the death of her husband, to recover her dower in the real estate conveyed by the deed, or to recover its commuted value in money. First National Bank of Harrisonburg v. Paul, 75 Va. 594.

Where the real and personal property of an intestate remained undivided between his widow, who was also his administratrix, and his only daughter, and, in view of the daughter's approaching marriage, a marriage settlement was executed conveying all the real estate by metes and bounds and the personal estate by description to trustees, of whom the mother was one, it was held that the mother did not, by becoming a party to the deed, relinquish her right to dower in the land. Wilcox v. Hubard, 4 Munf. 346.

Where a married woman has regularly united with her husband in a deed, she is not entitled to dower in the land conveyed, though the consideration was confederate money. Henderson v. Alderson, 7 W. Va. 217.

Where Conveyance Induced by Threats.—Where a widow was induced to sell her dower interest in the land which was her home, by threats that her children's land was under the hammer and would have to be sold, that an iron furnace would be put up close to her house, and that she would be compelled to raise her children amid such surroundings, the sale was set aside by the appellate court, the sale of the children's land being set aside on other grounds. Peirce v. Graham, 85 Va. 227, 7 S. E. Rep. 189.

Where Conveyance Made by Infant Wife.—A deed made by an infant *feme covert* in which she relinquishes her right of dower may be avoided when she becomes of full age and *discovert*. Then, being *sui juris*, she may ratify it expressly or impliedly, as by accepting a compensation allowed by a decree to which she or her counsel has consented. Darraugh v. Blackford, 84 Va. 509, 5 S. E. Rep. 542; Wilson v. Branch, 77 Va. 65.

Where Conveyance Not Recorded.—An unrecorded deed from husband and wife conveying his land does not convey the wife's contingent right of dower in the land. The deed must be admitted to record as to the husband as well as to the wife in order to accomplish this result. Va. Code, § 2502: Building, L. & W. Co. v. Fray, 96 Va. 559, 32 S. E. Rep. 58, 4 Va. Law Reg. 838.

Where Wife's Name Does Not Appear in Deed.—Though a deed be signed and sealed by a married woman and her husband, and the certificate of her acknowledgment is in due form, yet if her name does not appear in the body of the deed as one of the grantors therein, such deed is inoperative to convey any interest she may have in the real estate thereby conveyed, or to relinquish her contingent right of dower in the lands therein named. Laughlin Bros. & Co. v. Fream, 14 W. Va. 322.

Where Conveyance Set Aside as Fraudulent.—Where a husband fraudulently conveys real estate to the use of his children and contingently to the use of his wife, who did not execute the conveyance, and

after his death the widow, in a creditors' bill to set the conveyance aside, claims under it, she is entitled to dower in the lands, although the deed is declared fraudulent and void. Blow v. Maynard, 2 Leigh 29. See Grant v. Sutton (Va.), 22 S. E. Rep. 490.

Agreement to Convey—Specific Performance.—Specific execution of an agreement to sell and convey will not ordinarily be decreed against a vendor whose wife refuses to join in the deed, where there is no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the full purchase money and accept the deed without her joining. Graybill v. Brugh, 89 Va. 895, 17 S. E. Rep. 558; Clarke v. Reins, 12 Gratt. 98. See also, Dunsmore v. Lyle, 87 Va. 391, 12 S. E. Rep. 610, where specific performance was refused, though the bill offered to accept a deed subject to the wife's dower.

Who May Claim under Conveyance.—Where a vendor, seised of an estate in fee in land, determinable by an executory devise over, upon his dying without issue, conveys such land by a deed in which the wife regularly unites, the purchaser, upon the death of the vendor without issue, is entitled to have his widow's dower in such land cut off to him. Nickell v. Tomlinson, 27 W. Va. 697.

Protection of Wife's Interest as against Husband's Creditors.—A husband and wife agreed that in consideration of the husband's conveying a house and lot to a trustee for her and her children, she would unite in the conveyance of his other real estate when he should sell it. *Held*, that, to the extent of her dower interest in the husband's real estate, the husband's conveyance to the trustee was on valuable consideration, and to that extent the wife is entitled to satisfaction out of the proceeds of the sale of the house and lot, as against creditors of the husband, for debts contracted at the time of the deed. Johnston v. Gill, 27 Gratt. 587.

M, the owner of a large estate, being insolvent and having several judgments and executions against him, made a deed, in which his wife joined, by which he conveyed all his property for the payment of his debts. In this deed it was provided that the value of the wife's contingent right of dower should be ascertained in a mode specified, and in consideration of the sums so ascertained she joined in the deed releasing such right. The trusts of the deed were, that C and S, who had undertaken to pay off the executions, and who were creditors of M, should be creditors of the first class, each for the amounts they should pay and the amount due them, and the wife for the value of her contingent right of dower, ascertained as prescribed in the deed; and all other creditors in the second class. The whole property did not sell for enough to pay the first class creditors in full, and a judgment rendered against M, and docketed before the deed was executed. *Held*, that the wife of M must abate ratably with C and S for the payment of said judgment, and for any deficiency of the trust fund to pay the said C, S and the wife, in full of their claims. Miller v. Crawford, 32 Gratt. 277.

Conveyance by Husband for Benefit of Creditors.—Where a husband makes a deed of trust conveying land to trustees, with power to sell the same for payment of debts, and they allow the husband to remain in possession during his life, and make no sale under the deed until his death, the husband is to be considered as having died seised of the land subject to the deed of trust, so that his widow, if she did not join in the deed, is entitled to dower in the land, and may recover the rents and profits from the husband's death in like manner as if the deed had not been made; and if the widow dies before recovering such rents and profits, the same may be recovered to the time of her death by her administrator. Macaulay v. Dismal Swamp Land Co., 2 Rob. 507.

I. How Dower of Insane Wife Barred or Relinquished.—The husband of an insane wife cannot, by a proceeding on an *ex parte* petition, deprive his wife of her contingent right of dower in his real estate. The proceeding under Va. Code 1887, § 2625 must be *inter partes*, the wife must be made a party thereto, and, after notice, have an opportunity of being heard, or else the proceeding is void. Hess v. Gale, 93 Va. 467, 25 S. E. Rep. 533.

VII. ASSIGNMENT.

A. Proceedings for Assignment.

1. In General.—A court of equity has jurisdiction to assign dower in land within the state, but not in lands lying in another state. Blunt v. Gee, 5 Call 481. As to the assignment of dower, see Va. Code 1887, § 2274, as amended by Acts 1895-6, p. 309.

A widow cannot, merely on her right to dower, file a bill to sell the heir's fee simple and get money from its sale in lieu of dower. Hobäck v. Miller, 44 W. Va. 635, 29 S. E. Rep. 1014. See *note* on this case, 4 Va. Law Reg. 197.

An assignment of dower in lands and slaves, by order of the county court, by motion only, and without any suit for that purpose, will not be set aside after a great length of time, but the inequalities and excess only corrected. Fitzhugh v. Foote, 3 Call 13.

A writ of dower *unde nihil habet* cannot be maintained against a mere tenant for years, but should be brought against a tenant of the freehold, having the inheritance, or an estate equal in duration to the life of the demandant. Miller v. Beverly, 1 Hen. & M. 368.

It is not error to decree a sale of the lands of a deceased husband without ascertaining in the suit in what lands, conveyed in his lifetime, the widow is entitled to dower, and assigning her dower therein, for she may herself bring suit against the proper parties for that purpose. Hunter v. Hunter, 10 W. Va. 321.

M., the widow of J., being in possession of a tract of land as her dower, entered into a written agreement by which the land was to be sold and the proceeds invested in another tract about to be sold by a commissioner, to be held by M. for life as she held the dower land. This agreement was duly carried out. *Held*, that as against her creditors M. has but a life estate in the land purchased, to the extent that it was paid for by the proceeds of the sale of the dower tract. Hughes v. Harvey, 75 Va. 200.

2. Parties.—In a bill in equity to recover dower in lands aliened by the husband during the coverture, without the consent of the wife evidenced by her privy examination and relinquishment, it is not necessary to make the heirs of the husband, or any purchasers except the holders of the land, parties. Boyden v. Lancaster, 2 Pat. & H. 198.

In a bill by a widow for dower in land sold in the lifetime of her husband, and coming to the present owner through several intermediate conveyances, the present owner is the only necessary party defendant. Blair v. Thompson, 11 Gratt. 441.

In a bill brought by a party to whom a widow has conveyed her dower interest in two tracts of land, to have dower assigned therein, where the parcels

of land at the time said suit is brought are held and owned by different parties, the persons owning and holding said respective tracts of land are necessary parties defendant. Morgan v. Blatchley, 33 W. Va. 155, 10 S. E. Rep. 282.

Joinder of Parties.—A bill against several purchasers of separate and distinct tracts of land aliened by a husband during coverture, without the relinquishment of the wife, to recover dower in each tract is not multifarious. The plaintiff may elect to proceed against each separately or all together. Boyden v. Lancaster, 2 Pat. & H. 198.

3. Appointment and Proceedings of Commissioners to Make Assignment.—Where commissioners are appointed by an *ex parte* order to lay off and assign a widow's dower in the lands of her deceased husband, such order is not binding on the heirs, though the commissioners report an assignment of dower, and their report is confirmed. Raper v. Sanders, 21 Gratt. 60.

An assignment of dower, made by commissioners under order of court, at the instance of one of several co-heirs, is binding on the widow, if it be a full and just assignment, and also on the co-heirs, though infants, if it be not excessive. Moore v. Waller, 2 Rand. 418.

In a suit against the widow and heirs of a decedent to subject his lands to his debts, a commissioner was directed to inquire and report whether she elected dower in kind, or commutation. The commissioner reported that she elected commutation. His report was confirmed, and the lands were sold free of dower. With her consent, and by leave of court, a lot in town was assigned her for her dower, of which she continued in possession until her death. After her death a petition was filed to subject the lot to her husband's debts. *Held*, that the lot was the widow's property in fee, and passed to her heirs. Fisher v. Clements, 82 Va. 813, 1 S. E. Rep. 182.

4. Assignment before Sale of Lands.—Unless the widow of an intestate elects, in a proper manner, to take the value of her dower in the real estate of which her husband died seised, her dower should be assigned to her in the realty before a sale thereof for the payment of the intestate's debts. Laidley v. Kline, 8 W. Va. 218; Kilbreth v. Roots, 33 W. Va. 600, 11 S. E. Rep. 21.

It is error to order the sale of land to pay debts charged thereon, subject to the widow's dower, but a sale may be ordered without assigning dower in the land, provided the widow elects to take the value of her dower from the proceeds of the sale. Underwood v. Underwood, 22 W. Va. 303.

Where a widow is entitled to have her dower laid off in kind, unless she has made a valid arrangement waiving this right, it is the duty of the court before decreeing the sale of the land to have her dower laid off in kind; and if this be not done, it is error, for which such decree will be reversed. Tracey v. Shumate, 22 W. Va. 474.

5. Commutation—Re-Estimate.—Where the widow, in a suit to which the creditors and heirs were parties, agreed to sell her dower at a price approved by a decree of the court, a resale and re-estimate will not be decreed on the ground that the allowance was excessive, especially where the creditors do not complain. Scott v. Ashlin, 86 Va. 581, 10 S. E. Rep. 751.

6. Objections to Assignment First Made on Appeal.—Objection cannot be made for the first time in the appellate court that an order confirming the assignment of dower does not appear to have been made at the instance of the heir or devisee. Parrish v. Parrish, 88 Va. 529, 14 S. E. Rep. 325.

B. Time of Valuation.—Upon a bill in equity by a widow against the alienee of her husband, for dower in lands aliened by the husband in his lifetime, she is dowable of the lands as of the value thereof at the time of alienation, not at the time of the assignment of the dower; nor is she entitled to any advantage from enhancement of the value, either by improvements made by the alienee, or from general rise in value, or from any cause whatever. Tod v. Baylor, 4 Leigh 498.

Under W. Va. Code, ch. 65, §§ 10, 11, 12, where a husband in his lifetime has sold realty which was subject to dower, the value of the widow's dower is to be computed, as against the alienee, at the date of her recovery, if in kind, with lawful interest from her suit; but she cannot insist that her dower shall be assigned *in specie*, nor can she refuse to receive the equivalent annuity, or a gross sum in lieu thereof, the option in this matter being lodged by the statute exclusively with the alienee; and when, under 12, the alienee elects to pay an annuity, or a gross sum in lieu thereof, the value of the dower is computed as of the time of the alienation. Verlander v. Harvey, 36 W. Va. 374, 15 S. E. Rep. 54.

B. sold a tract of land with a mill on it to C. The mill was subsequently washed away, and another built on the same site. A third mill upon a more extensive plan was afterwards built. *Held*, that the widow of B. was entitled to dower in the land only, and not in the mill. Braxton v. Coleman, 5 Call 433, 2 Am. Dec. 592.

C. Gross Sum in Lieu of Dower.—Unless it is impracticable to assign a widow her dower in kind, a court of equity has no power, against her will, to decree a sale of the real estate and give her money in lieu of her dower. Wilson v. Branch, 77 Va. 65, 7 Va. Law J. 161, 46 Am. Rep. 709; White v. White, 16 Gratt. 264, 80 Am. Dec. 706.

It is error to decree a specific sum in lieu of dower without the assent of all the parties interested. Blair v. Thompson, 11 Gratt. 441; Wilson v. Davisson, 2 Rob. 384; Jarrell v. French, 43 W. Va. 456, 27 S. E. Rep. 263.

Where, in a suit in equity, brought for the purpose of subjecting the real estate of a decedent to the payment of his lien debts and an assignment of dower to his widow, the dower cannot be assigned in kind, and it is necessary to sell the whole real estate and to satisfy the claim of dower out of the proceeds, the court cannot, without the consent of all the parties, satisfy such claim by the payment of a gross sum out of the proceeds, but must securely invest one-third of the proceeds and direct the interest on such investments to be paid to the widow during her life in satisfaction of her claim of dower. Harrison v. Payne, 32 Gratt. 387. Compare Stimson v. Thorn, 25 Gratt. 278.

A widow entitled to dower in the real estate of her deceased husband is not a joint tenant, tenant in common or co-parcener with the heirs at law, within the meaning of the statute concerning partition, so as to authorize a court of equity to sell the whole estate, against her will, and compel her to receive a money compensation out of the proceeds, in lieu of her dower. White v. White, 16 Gratt. 264, 80 Am. Dec. 706; Hull v. Hull, 26 W. Va. 1.

A widow is not entitled to money arising from a sale of land by her husband during his lifetime, in lieu of her dower. Fitzhugh v. Foote, 3 Call 13.

Where the widow brings a suit in chancery against the alienee, and the prayer of her bill is that "her dower in the said real estate be assigned, set out, and allotted to her, or a gross sum in lieu thereof given her," and the answer of the alienee denies that the plaintiff is entitled to a sum in gross for her dower interest, if she has one, and avers that, if she is entitled to anything at all, she is entitled to one-third interest in the realty, to the assignment of which the defendant is willing, and there is no replication to the answer, it is error in the court to commute the dower, against the wishes and election of the alienee, and to decree to the widow a gross sum, and charge the same as a lien upon the whole of the real estate of the husband which had been so aliened in his lifetime. Verlander v. Harvey, 36 W. Va. 374, 15 S. E. Rep. 54.

D. Actual Admeasurement or Allotment.—In the assignment of dower to a widow, the assignment should be based upon both the annual and fee simple value of the property. Devaughn v. Devaughn, 19 Gratt. 556.

Where D. died seised of certain real estate on which he and his wife lived, his widow's dower should be assigned out of such land, in exoneration of other land sold by D. to H. Stimson v. Thorn, 25 Gratt. 278.

A widow is entitled, as against creditors of her husband by lien created since her marriage, to have her dower in his real estate assigned in kind, if it can be done, without regard to its effect upon the interest of his creditors. If from the nature of the property, or of the husband's interest in it, the dower cannot be assigned in kind the court may sell the whole property and make her a money compensation. Simmons v. Lyles, 27 Gratt. 922.

Mansion House.—The widow is not entitled, as a right, to have the mansion house included in the dower assigned to her. Devaughn v. Devaughn, 19 Gratt. 556.

Lands Held in Common.—Where a husband held lands as tenant in common or, now that the *jus accrescendi* is abolished, as joint tenant, his widow may be assigned her dower in common with the other tenants. Parrish v. Parrish, 88 Va. 529, 14 S. E. Rep. 325.

Distinct Lots or Parcels.—It is not error to assign dower in one of several lots or parcels of land. Alderson v. Henderson, 5 W. Va. 182.

Allotment by Metes and Bounds.—The common-law rule is that dower must be assigned by metes and bounds. But where the object is entire, as a house, the widow may be assigned a certain number of rooms; in which case, passages and stairways may be enjoyed jointly with others. Parrish v. Parrish, 88 Va. 529, 14 S. E. Rep. 325.

E. Damages for Detention.—It was formerly held that damages for the detention of dower could not be recovered by the widow against the alienee of the husband. Thomas v. Gammel, 6 Leigh 9. But under Va. Code 1887, § 2277, damages are allowed against the alienee of the husband from the commencement of a suit against him.

F. Rents and Mesne Profits.—A widow obtained a decree against an infant heir, directing commissioners to assign dower, which she might have had executed immediately, but did not for a year, during which time she remained in the mansion house, and consented to the cultivation of the land by the agent of the heir. After her dower was assigned, she received one-third of the rents, which had accrued before assignment, claiming no more at the time. Subsequently, she brought an action to recover the other two-thirds. *Held*, that she was not entitled to recover them. Grayson v. Moncure, 1 Leigh 449. See Lee v. Stuart, 2 Leigh 76.

The object of dower is to afford the widow a sure and competent support, and it should be so assigned that she may enjoy one-third of the income arising from the estate; the probable rents and profits, and not the mere fee simple value, being the chief subject of consideration. While the report of commissioners to assign dower, and the action of the court in confirming their report, are entitled to much consideration, they are not conclusive, and, if they plainly depart from the above rule, the decree confirming the report will be reversed, and the report set aside. Fuller v. Conrad, 94 Va. 233, 26 S. E. Rep. 575, 3 Va. Law Reg. 51.

The widow is entitled, under the act of 1792, to occupy the plantation belonging to the mansion house of her husband, without responsibility for rent, until dower is assigned to her. Wiseley v. Findlay, 3 Rand. 361, 15 Am. Dec. 712.

Period for Which Recoverable.—Upon a bill in equity by a widow for dower in lands conveyed by her husband during his lifetime, she is not entitled to an account of profits from the death of her husband, but only from the date of the subpœna in the cause. Tod v. Baylor, 4 Leigh 498. See Va. Code 1887, § 2277.

Division of Rents and Profits.—Where there has been a full and just assignment of dower, at the instance of one of several co-heirs, and the widow keeps possession of the whole land under pretext that the assignment was not legal, she will be accountable to the heirs for the rents and profits of all but her dower lands. Moore v. Waller, 2 Rand. 418.

Crops Severed before Assignment.—Since the widow is entitled at the death of the husband to be endowed of one-third of the land with the crop growing on it, so if the crop be severed before the assignment of dower, she is entitled to be endowed of the land in like manner, and of one-third of the crop thus severed, for by the severance the estate has been diminished in value to the amount of the crop. Engle v. Engle, 3 W. Va. 246.

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599 *Roy's Ex'ors v. Rowzie & als.

December Term, 1874. Richmond.

1. **Wills—Bequests—Intention of Testator—Parol Evidence.***—Where the person or object or subject referred to in a bequest is uncertain, or does not answer precisely the description given them in the will, or where there are two or more objects or subjects which answer equally the description, resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used; and if such intention is so ascertained with sufficient certainty the bequest is valid.

***Intention of Testator—Parol Evidence.**—The proposition set forth in the first headnote of the principal case is followed in Senger v. Senger, 81 Va. 687, where it is held that the only exception to the rule excluding parol evidence as to the intention of a testator, is in cases of latent ambiguity, which is where, for anything appearing on the face of the will, the intention is certain, but there is some collateral matter *de hors* the will, that causes ambiguity;

2. **Same—Charitable Bequests—Construction.***—A bequest to "the Baptist Theological Seminary in South Carolina," held, upon the evidence, to have been intended to be a bequest to the "Southern Baptist Theological Seminary," a Baptist theological institution in South Carolina, and incorporated by an act of that state.

3. **Same—Same—Bequest to Foreign Corporation.**—The charter of "the Southern Baptist Theological Seminary" authorizes it to hold, possess and enjoy all property, real and personal, which may be given, granted or devised to it; not to exceed at one time more than $500,000. A bequest to the institution made by a testator in Virginia is valid; it appearing that the bequest will not increase its funds beyond the prescribed limits.

4. **Same—Same—Same.**—A devise or bequest to an incorporated theological seminary, whether located within or out of the state, is not void as against either public policy or any statute.

5. **Same—Same—Same—Statute.**—The act of April 1839, ch. 12, § 11, entitled "an act concerning devises made to schools, academies and colleges," and the act, Code of 1849, ch. 80, on the same subject, refer to indefinite charities; and it is only in relation to these that theological seminaries are excepted out of the authority to make such bequests for literary purposes.

6. **Same—Bonds.**—A bequest of all testatrix's bonds, will include judgments obtained upon bonds, but not judgments obtained upon simple contracts.

This case is fully stated in the opinion of the court delivered by Judge Moncure.

600 *Meredith and Evans, for the appellants.

Montague, for the appellees.

MONCURE, P., delivered the opinion of the court.

Mrs. Mary J. Roy, late of the county of Essex, in this state, died without issue, leaving a will, which bears date on the 7th day of August, and was admitted to probate in the County court of said county on the 19th day of September 1870; and, on the latter day, the executors named in the will duly qualified as such in the same court. The 5th clause of the will is in these words: "5th. I give the proceeds arising from the sale of my carriage horses, mules, wagon, carts, and all my bonds now due me, to the Baptist Theological Seminary in South Carolina." The will contains several specific devises and bequests, but no residuary clause.

In February, 1871, certain persons, claiming to be heirs at law, and distributees and next of kin of Mrs. Roy, filed their bill in the Circuit court of said county against the said executors, in which they charge that there is no institution in South Carolina by the name of "The Baptist Theological Seminary in South Carolina," and that the bequest in the 5th clause of the said will is invalid: 1st, because it is too uncertain and indefinite as to the beneficiaries thereof; and, 2ndly, because if sufficiently certain and definite as to the beneficiaries, then it is clearly a bequest for the use and benefit of a theological seminary, which they are advised the laws of this commonwealth will not permit, but, on the contrary, prohibit and forbid. They further charge, that at the time of the death of the said testatrix she had considerable sums of money due her by judgments, as well as by bonds, 601 and they insist *that if the said 5th clause of the will be valid, then the said "Baptist Theological Seminary in South Carolina" can only take such of the debts due the said testatrix as are evidenced by bonds, and not such as are due by judgments; and that as to the said judgment debts, under any view the said testatrix died intestate, and the complainants are entitled to them. They therefore pray for a discovery, and suitable accounts and relief.

The executors filed their answer, to which the plaintiffs replied generally. The defendants in their answer, among other things not necessary to be stated, say that they are advised that the said bequest is not invalid, either because it is indefinite, or because of its being in violation of any law of this state; for while the bequest is in words to "The Baptist Theological Seminary in South Carolina," they say there is such a seminary in South Carolina, duly incorporated by an act of the legislature of that state, passed on the 21st day of December, 1858, a copy of which act is exhibited with the answer, by reference to which act it will appear that the corporate name of the said seminary is "The Southern Baptist Theological Seminary;" but they say further, that it is a Baptist Theological Seminary, situated in South Carolina; that it is the only Baptist Theological Seminary in South Carolina; and that hence it is the Baptist Theological Seminary in South Carolina. They say further, that they are fully satisfied and believe that it was the intention of their said testatrix to make said bequest to "The Southern Baptist Theological Seminary," and which she thus described as "The Baptist Theological Seminary in South Carolina;" and they are advised, under the facts hereinbefore stated, that the description is sufficiently definite to enable "the Southern Bap- 602 tist *Theological Seminary" to take the said bequest. They say further, that by the terms of the charter of "the

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and extraneous evidence is admissible not only to show the existence of the latent ambiguity, but also to remove it and disclose the testator's true meaning. See also, Hawkins v. Garland, 76 Va. 149; Wilson v. Perry, 29 W. Va. 169, 1 S. E. Rep. 302; Trustees v. Guthrie, 86 Va. 125, 10 S. E. Rep. 318.

***Charitable Bequests—Definition.**—In P. Episcopal E. Society v. Churchman's Reps., 80 Va. 718, it is held that a charity in the legal sense, is a gift to be applied, consistently with the law, for the purpose of benefiting an indefinite number of persons in any respect whatever, and it is not material that the purpose should be expressly designated as charitable. See also, upon this subject, Trustees v. Guthrie, 86 Va. 125, 10 S. E. Rep. 318; Gallego v. The Attorney General, 3 Leigh 450.

Southern Baptist Theological Seminary," it is empowered to hold, possess and enjoy all property, real and personal, which may be given, granted or devised to it, provided that the sum so held should not at any one time exceed in value the sum of five hundred thousand dollars; and they say that the full value of this bequest cannot by any possibility make the whole property now held by it exceed a small fraction of that sum. They say further, that they are not aware of any law of this state which is violated by the said bequest; that the provisions of the Code of 1860, chapter 80, section 2, may by implication (and, if at all, it is only by implication) make void bequests to theological seminaries in this state, but that "the Southern Baptist Theological Seminary" is not in this state, but in the state of South Carolina, and cannot by any fair construction, either of long usuage or law, be embraced within the prohibition of the statute referred to. They say that the provisions of the said statute were enacted for certain reasons of state policy, in order to prevent religious institutions from acquiring property, which might be used as an element of power in the state, and grew out of the strong feeling of opposition entertained by the people of this state to anything that might tend to a reunion of church and state, as it formerly existed in this commonwealth, and cannot by any sort of intendment be made to apply to a bequest to a theological seminary in another state, incorporated and authorized to hold property by the law of that state. And they say further, that they are advised that the bequest of "bonds" will embrace judgments which were obtained on said bonds prior to the death of the testatrix; and that 603 they believe that the testatrix *intended by this bequest to donate to this seminary all her private securities.

Exhibit A, filed with the said answer is a copy of the charter of the "Southern Baptist Theological Seminary," and corresponds with the description given of it in the said answer.

The following facts were admitted by the parties to the suit, to be considered by the court as if they had been properly proven by the depositions of witnesses regularly taken and filed, to wit: that there is an institution of learning situated at Greenville in the state of South Carolina, properly incorporated, and authorized to take and hold property by an act of the legislature of the state of South Carolina, and that its chartered name is the "Southern Baptist Theological Seminary." That the printed act of incorporation, referred to in and filed with the answer of the defendants, is a true copy of the said act of incorporation. That said seminary, as its name imports, is a "theological seminary"; that it is under the control and management of the Baptist denomination, and is a Baptist "theological seminary"; that, as already stated, it is the only "Baptist Theological Seminary" in the state of South Carolina; that the value of the property now held by the "Southern Baptist Theological Seminary" does not reach the sum of five hundred thousand dollars, nor would the bequest made by the testatrix, Mary J. Roy, to "the Baptist Theological Seminary in South Carolina," in controversy in this cause, if added to the property now held by the Southern Baptist Theological Seminary, make its value reach that sum. It was further admitted that the said testatrix, in making said bequest, had reference to "the Southern Baptist Theological Seminary," which, in the said bequest, is spoken 604 of and described as "the Baptist *Theological Seminary in South Carolina;" though this admission was made by the plaintiffs, subject to the operation of any rule of law respecting evidence in such cases, if there be such as would preclude the defendants from offering proof of this fact. It was further agreed that the Southern Baptist Theological Seminary, situated at Greenville, is duly and properly a party to this suit.

On the 17th day of July 1871, the cause came on to be heard on the bill, answer, replication, exhibits and agreement of facts. On consideration whereof the court was of opinion that the bequest contained in the fifth clause of the said will, to the "Baptist Theological Seminary of South Carolina," is, by the policy and laws of the state of Virginia, inoperative and void; and being so, that the said court could not give effect to said bequest, though the validity of such bequest be recognized and sanctioned by the policy and laws of the state of South Carolina, where the said Baptist Theological Seminary is located; and as to the subject embraced in and intended to be bequeathed by said clause of said will, that the said Mary J. Roy died intestate. The court being further of opinion that the term, bonds, used by the testatrix in the said fifth clause of her will, does not include judgments or simple contracts, therefore decreed that the defendants, the executors of said Mary J. Roy, should render before one of the commissioners of the court an account of all the estate of said testatrix which had come to their hands under the said fifth clause of said will, judgments and open accounts not being included, &c. From this decree the said executor applied to a judge of this court for an appeal; which was accordingly allowed.

Parol evidence is always admissible 605 and even necessary *to lead us to the person or object and subject referred to in a bequest. The court of construction, with the testator's will in hand, looks for the object of his bounty and the thing intended to be given, and expects them to answer precisely the terms of description given of them in the will. Generally they do, and there is no difficulty. Often they do not; and sometimes there are two or more objects or subjects which answer precisely or equally the description contained in the will. In such cases resort must be had to parol evidence and the surrounding circumstances to show what the testator

intended by the expressions which he used; and, almost always, his intention is thus ascertained with sufficient if not unerring certainty. If it cannot be, the bequest must then fail of effect; but the court is always reluctant so to declare. It will not require that the object or subject shall have every ear-mark given to it by the testator. Nay, it may in some respects have different ear-marks, and yet the description contained in the bequest may be sufficient to give it effect. Falsa demonstratio non nocet cum de corpore constat, is a maxim which expresses a rule of construction to which the court has frequent recourse in such cases.

According to these principles there cannot be a doubt but that "the Southern Baptist Theological Seminary," incorporated by an act of the legislature of South Carolina, ratified on the 21st day of December 1858, was the object of the bounty of the testatrix, Mary Juliet Roy, in the fifth clause of her will; in which the said corporation is described as "the Baptist Theological Seminary in South Carolina." This would have been the case had there been no express agreement of the parties, that the said corporation was referred to in the said
606 description. But the *"facts agreed" contain an express admission of that fact. To be sure, it is said that "this admission is made by the plaintiffs subject to the operation of any rule of law, respecting evidence in such cases, if there be such, as would preclude the defendants from offering proof of this fact." We have seen, however, that there is no such rule of law, but the contrary. It may therefore be regarded as a well established fact in this cause, that the said bequest is not void for uncertainty, but that "the Southern Baptist Theological Seminary" aforesaid is entitled to the benefit of the same, if it be otherwise a valid bequest. We therefore proceed now to consider whether it be so valid or not.

There can be no doubt but that generally a testator, domiciled in this state, may, by his will, duly executed and admitted to probate, according to the laws of this state, make a valid bequest to a corporation chartered by another state, and authorized by its charter to take and hold property.

The Southern Baptist Theological Seminary is a corporation chartered by the state of South Carolina, and authorized by its charter to take and hold property; and the bequest in question was made to it by a testatrix domiciled in this state, by her will duly executed and admitted to probate according to the law of this state. Why then is not the said bequest valid?

Certainly it is competent for the legislature of this state to prohibit altogether a bequest to a corporation of another state, and a fortiori to prohibit such a bequest in a particular or special case.

There has been no such prohibition generally, or altogether. Has there been any particular or special prohibition which applies to the case under consideration?

The appellees contend that there
07 has been, while *the appellants contend for the contrary; and this is the main subject of controversy in this case.

The appellees contend that our law prohibits any bequest to a theological seminary, whether it be in or out of the state, while the appellants contend that our law does not prohibit a bequest to an incorporated theological seminary, authorized by its charter to take and hold property, whether such corporation be in or out of the state.

The law on which the appellees rely is contained in the Code (of 1873), ch. 77, § 2, which declares that "every gift, grant, devise or bequest which, since the second day of April in the year one thousand eight hundred and thirty-nine, has been, or at any time hereafter shall be, made for literary purposes, or for the education of white persons within this state (other than for the use of a theological seminary);" and similar words are then used in regard to the education of colored persons within this state, after which the law proceeds: "whether made in either case to a body corporate or unincorporated, or a natural person, shall be as valid as if made to or for the benefit of a certain natural person," &c.

Certainly this is the only law of this state which can have the effect, if any can, of invalidating the bequest in question. Can this law have that effect?

It has been always settled as a general rule, that a devise or bequest, indefinite as to its object or purposes, was on that account void. In England the subject of charities has long, if not always formed an exception to that rule; either at common law or in virtue of the statute of 43 Eliz., commonly called the statute of charitable uses. But ever since the decision of the cases of the Baptist Association v. Hart's ex'ors, 4 Wheat. R. 1, by the Supreme
608 court of the United *States, and Gallego's ex'ors v. The Attorney General, 3 Leigh 450, by this court, it has been considered to be well settled that the English law of charities does not exist in this state, and that with the exception thereafter made by statute, which will be presently noticed, "charitable bequests," in the language of Judge Carr, in the latter case, "stand on the same footing with us as all others, and will alike be sustained by courts of equity." So that the bequest in the case now under consideration being to a corporation duly authorized to accept and hold the subject of the bequest, and being definite as to its object and purpose, is undoubtedly valid, although the legatee is a theological seminary, unless there be something in a subsequent statute, which makes it void. Whether there is or not is now the subject of our enquiry.

The law as thus settled, remained unaltered until April 2, 1839, when an act was passed entitled "an act concerning devises made to schools, academies and colleges." Acts of Assembly 1839, p. 11, chap. 12. That act contains eight sections, the last of which merely declares that it shall be in force from the passing thereof. The first

section enacts, "that all devises or bequests of lands, tenements, hereditaments, goods and chattels, stocks and choses in action hereafter given or made for the establishment or endowment of any incorporated school, academy or college within this commonwealth, for the education of free white persons, shall be good and valid in law and equity, except as is hereinafter provided." The remaining sections point out the mode to be pursued in such cases, to give effect to the charity; the validity of which is made by the seventh section to depend upon, whether the legislature will incorporate such school, academy or college, or not.

609 And that section concludes *in these words: "provided, that nothing in this act contained shall be so construed as to give validity to any devise or bequest to any theological seminary." On the 10th day of March, 1841, an act was passed entitled "an act concerning the estate of Martin Dawson, deceased, and for other purposes; Acts of Assembly 1840-'41, p. 52, chap. 26. The main object of that act was to give effect to Martin Dawson's will, making a devise and bequest for literary purposes; but the sixth section of the act is general in its nature, and is in these words: "That if any person shall hereafter (by gift in his lifetime or by his last will and testament) give any sum of money or other property, real, personal or mixed, to the president and directors of the literary fund for the use of any county or counties, or any incorporated city, town or borough, or directly to such county or counties, or to such city, town or borough, the same may be taken and held by the president and directors of the literary fund, or by the county or corporation courts, as the case may be, to be disposed of in manner and form, to all intents and purposes, as such donor or testator or testatrix may have prescribed: provided, however, that all such gifts or devises shall be restricted to literary purposes or purposes of education." In that act, it will be observed nothing is said about a theological seminary, and, like the said act of 1839, it is confined to the subject of indefinite charities for literary purposes. In the Code of 1849 these two acts are revised and digested; and chapter 80 of that Code contains such revision and digest, which are also contained in the same chapter of the Code of 1860. In the Code of 1873 they are contained in chapter 77, pages 667-670, which chapter embraces also the provision of the act of 1872-'3, chapter 265, page 243, in regard to colored

610 *persons. There is no material difference, so far as the principle involved in this case is concerned, between the acts aforesaid and the revision and digest of them contained in the several codes as aforesaid. In the codes, the subject of a theological seminary is referred to only in these words in brackets (other than for the use of a theological seminary). And thus stands our law on the subject now, and thus it stood when Mrs. Roy's will was made and recorded. Does that law invalidate the bequest made by her to the Southern Baptist Theological Seminary?

We are clearly of opinion that it does not. We think its only purpose was, and only effect is, to make valid a certain class of indefinite charities, to wit: charities for literary purposes; but to except from that class thus made valid an indefinite charity to a theological seminary. Why that exception was made it is not material to enquire, though it might not be difficult to point out the motive of the legislature. But certainly that exception to an exception cannot have the effect, and could never have been intended to make invalid a definite bequest to an incorporated theological seminary, expressly authorized by its charter to take and hold property given to it by bequest or otherwise. Such a bequest had always been valid in this state if not everywhere else. The purpose of the acts of 1839 and 1841 was to make valid a certain class of donations which had never been valid before, but to make an exception in that case only of a theological seminary. They were enabling acts, which were not to extend to a theological seminary; but certainly they were not intended, and cannot have the effect to disable an incorporated theological seminary to take and hold property according to its charter, which it had always before a perfect right to do.

611 A *bequest to a corporation, as a mere trustee for indefinite purposes, not embraced in the purview of the acts aforesaid, would be void for uncertainty, because there must in general be certainty as to the cestuis que trust, and as to the objects of the trust in every case of trust, in order to make it valid. Certainty only as to the trustee is not sufficient. But a bequest to a corporation, for the general purpose of its incorporation, is not indefinite nor uncertain in any respect. Such is the bequest in this case.

There is certainly nothing in the constitution which inhibits a bequest to a theological seminary; and we have seen that there is nothing in the statute law which inhibits a bequest to such a seminary if it be incorporated. Nor is there anything in the policy of our law, as has been argued, which can make such a bequest unlawful. The policy of our law on the subject extends no further than the law itself has extended. The law has extended only to this, that in giving effect to indefinite charities for literary purposes it has made an exception of a theological seminary, and that is the only extent of the policy of the law. The law has left unaffected the right to make a bequest for a certain and definite object, though it be a theological seminary; and if such a right be not in pursuance of the policy of the law, it is certainly not contrary to it. The sense of the legislature on this subject, as was well said in argument by the counsel for the appellants, appears from the act passed February 28, 1854, entitled "an act incorporating the Protestant Episcopal Theological Seminary and High School in Virginia." Acts of Assembly,

1853–'4, p. 65, chap. 107. Suppose the bequest in this case had been made to that corporation, instead of the corporation of "the Southern Baptist Theological 612 Seminary," *would anybody have doubted its validity? or, suppose the Southern Baptist Theological Seminary had been incorporated by the State of Virginia instead of South Carolina, and the bequest in this case had been made to it, would anybody have doubted its validity? These questions must be answered in the negative. What difference then can it make that the bequest was made to a theological seminary incorporated by a sister state, and fully authorized by its charter to take and hold property? None whatever, as what we have already said clearly shows.

Even if it could be said that the policy of our law forbids the execution of such a trust in this state there is certainly nothing in the policy of the law of South Carolina, where the trust created in this case was intended to be executed, which forbids it. And the will having been executed and admitted to probate, according to the law of this state, the domicil of the testatrix, the fund would have to be paid over to the foreign corporation to be administered according to the law of that state. The authorities cited by the counsel for the appellants fully sustain this proposition. Hill on Trustees, pp. 468, 457, and the cases cited in the notes, and Chamberlain v. Chamberlain, 43 New York R. 424, decided in 1871. If the law of Virginia prohibited a bequest to a theological seminary, wherever situate, and whether incorporated or not, then, certainly, such a bequest would be invalid, no matter where the object might be located, whether in or out of the state. But we have seen that our law prohibits such a bequest to no such seminary, except in the single case of a bequest which is indefinite and uncertain, and therefore void on the principles of the common law.

We are therefore of opinion that the 613 bequest in this *case is valid. And the only remaining question to be considered is, what was intended to be embraced by the words "all my bonds now due me," contained in the bequest? Were they intended to embrace bonds on which judgments had been obtained, or only bonds on which no judgments had been obtained by the testatrix. It appears to be conceded on both sides that there were bonds of each class, though the record does not show how many or what amount there are of each class. The words of the bequest are very comprehensive, as much so as general words possibly can be, "all my bonds now due me." If the testatrix had added the words "whether judgments have been obtained upon them or not," or "including those on which judgments have been obtained," her intention to embrace all would have been perfectly certain. But is not such intention expressed with sufficient certainty by the word "all," which is broad enough to embrace both classes of bonds, and which is not limited to one only of these two classes by any expression contained in the will. We know that a judgment is higher security than a bond, and that a lawyer in enumerating securities would be apt to call a judgment by that name though it had been obtained upon a bond. But a testator, who is often inops consilii when he makes his will, and generally unlearned, would not be apt to notice that distinction. He would be apt to speak of a bond as such, though it had passed into judgment, and he had thereby acquired a lien upon the debtor's land and a right at any time to sue out execution on the judgment. We can see no reason why the testatrix should have intended in her bequest to except from the words "all my bonds," &c., such as she may have obtained judgment upon, and as to them to die intestate. We therefore 614 think she intended *to embrace all her bonds then due her, whether judgments had been obtained upon them or not. But we do not think any debt due to her by simple contract is embraced in the bequest, whether judgment had been obtained on it or not.

We are of opinion, for the reasons aforesaid, that the decree of the Circuit court is erroneous and ought to be reversed and annulled, and the cause remanded to the said Circuit court for further proceedings to be had therein in conformity with the foregoing opinion.

The decree is as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the decree appealed from in this cause is erroneous; therefore it is decreed and ordered that the same be reversed and annulled, and that the appellees, the complainants in the court below, do pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this court proceeding to enter such decree as the said Circuit court ought to have entered, it is further decreed and ordered, and is hereby declared that the bequest contained in the fifth clause of the will of the testatrix, Mary J. Roy, deceased, to "the Baptist Theological Seminary in South Carolina" was intended by the testatrix to be made to "the Southern Baptist Theological Seminary," an institution of learning incorporated by an act of the legislature of South Carolina ratified on the 21st day of December 1858, in the proceedings in this cause mentioned; that the description given of the said corporation in the said bequest is sufficient; that there is nothing in the policy or laws of the state of Virginia which makes the said bequest inoperative or void, but, on the contrary, 615 the same is legal and *valid; that the said corporation is entitled to the benefit of the said bequest, and to receive the subject thereby bequeathed; and that the words "all my bonds now due me," contained in the said bequest, embrace, not only her bonds on which no judgments had been rendered, but also her bonds on which judgments had been rendered, to the benefit of which judgments the said corporation is

entitled under the said bequest; but do not embrace debts due to her by simple contract, whether judgments had been obtained upon them or not.

And as the complainants in their bill in this cause besides seeking to have the said fifth clause of the said will declared and decreed to be inoperative and void, and the property named therein distributed between them, also ask for an account of the transactions of said executors, and of all the property of which the said testatrix died seized and possessed, which she did not dispose of by her said will, and for general relief; it is ordered that this cause be remanded to the said Circuit court to be further proceeded in to a final decree, as may be proper and in conformity with the foregoing opinion and decree. Which is ordered to be certified to the said Circuit court of the county of Essex.

Decree reversed.

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616 ***Merch. & Mech. Savings Bank of Norfolk v. Dashiell & als.**

December Term, 1874, Richmond.

1. **Building Contracts—Mechanics' Liens—"General Contractor."*"**—The term "general contractor," as used in the act of July 11th, 1870, entitled "an act in relation to mechanics' liens," includes all persons furnishing materials for or doing work upon a building, under a contract made by such persons directly with the owner of the building.
2. **Same—Same—Subcontractors' Liens.**—If after contracts are made by the owner with the parties who are to furnish materials for or do the work upon the building, and they have commenced to perform their contracts, the erection of the building is stopped by the owner, so that it is not completed, the lien in favor of the workmen, and the parties furnishing the material for compensation for work done and materials furnished, is existing and valid, without their filing their claims in the clerk's office within thirty days from the time the work is stopped, or though they do not file them. And these liens will have priority over any liens upon the building created after work was commenced under said contracts.
3. **Same—Same—Verbal Contract.**—The lien exists where work is done under a verbal contract with the owner.

The Masonic Building Association of the city of Norfolk, in January 1871, entered into separate written contracts with Charles Dashiell, Spaulding & Guy and William Rosson, for the erection of a large building upon a lot in the city of Norfolk, owned by the association. The contract with Dashiell was for the furnishing the material for and doing all the wood work on the house; and he was to be paid from time to time as portions of the work was completed: Rosson, in like manner, contracted for furnishing the materials and doing the brick
617 work; to be paid as the *work progressed; and Spaulding & Guy contracted to do the plumbing and gas fitting. Charles E. Cassell was employed as the architect to furnish the plans and specifications for the building and superintend the work.

The contractors seem to have commenced their work in February 1871, and to have continued it until some time in February or March 1872. At this time Rosson had completed all the brick work, with the exceptions of some paving, and to have received payments from time to time, so that when this suit was instituted his claim amounted to $1,910.08; and there was claimed by Benjamin Hill, a sub-contractor under Rosson, for material furnished, $400. Dashiell seems to have completed the first four instalments of his work, and to have done considerable work on the remaining two. After crediting the payments made to him, he claimed that there was due to him $7,992.39. Spaulding & Guy claimed $723. And Cassel, who had no written contract with the Masonic Association, but was employed by them, claimed $1,375.

By deed, bearing date the 29th day of June, 1871, the Masonic Building Association conveyed to William T. Harrison the lot on which they were erecting the building above mentioned, in trust to secure to the Merchants and Mechanics Savings Bank of Norfolk the sum of $10,000, borrowed of that bank. And on 3d of July, 1871, the association conveyed to Charles Sharp the same lot, to secure a debt of $5,000 due to Myer Myers. Both of these deeds were admitted to record, the first on the 5th and the second on the 8th of July.

It appears that from the difficulty of providing the money to pay the contractors, the work was delayed, and at length, in March 1872, it was stopped by the
618 *inability of the association to carry it on. After the work was stopped, but probably not within thirty days from that date, Dashiell, Rosson, Spaulding & Guy and Cassell filed in the clerk's office of the Corporation court, their respective claims of lien upon the property; and Hill gave notice of his claim to the Masonic Building Association.

In April 1872, Harrison, the trustee in the deed to secure the Merchants and Mechanics Savings Bank, advertised the property to be sold; and thereupon Dashiell and the other above named contractors applied to the judge of the Corporation court of Norfolk for an injunction to stop the sale until the priorities of their liens and those of the claimants should be established; and that then the property might be sold.

All the parties were brought before the court as defendants, and separate answers were filed by the association and the trust

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***Mechanics' Lien.**—The principal case is cited, as authority upon this subject, in the following cases: Boston & Co. v. C. & O. R. Co., 76 Va. 183; Shackleford v. Beck, 80 Va. 576; West Virginia Bldg. Co. v. Saucer, 45 W. Va. 483, 31 S. E. Rep. 965; Cushwa v. Improvement, Loan & Building Ass'n, 45 W. Va. 490, 32 S. E. Rep. 259. See monographic *note* on "Municipal Corporations" appended to Danville v. Pace, 25 Gratt. 1, for the immunity of public buildings from mechanics' liens.

creditors, in which several objections were made to the claims of the plaintiffs, both as to their amounts and the validity of their claims to a lien. But the last is the only question considered by this court.

The cause came on to be heard on the 23d of April 1873, when the court held that Dashiell, Rosson, Spaulding & Guy and Cassell were general contractors within the meaning of the act of assembly approved July 11th, 1870, entitled "an act in relation to mechanic's liens," and that Hill was a sub-contractor; that they were entitled to liens on the property for the work done and materials furnished by them, which were not impaired by the failure to complete their contracts; that being owing entirely to the default of the Masonic Building Association; and that these liens had priority to the liens under the trust deeds. And
619 *there was a decree in favor of the plaintiffs respectively, for the sums hereinbefore stated, with interest, except that of Cassell, which was reduced to $850; and commissioners were appointed to sell the property, if, &c.

From this decree the Merchants and Mechanics Savings Bank applied to a judge of this court for an appeal; which was allowed.

Wm. A. Swank, for the appellant.

Baker & Walke, for the appellees.

CHRISTIAN, J. The main question to be determined in this case is what is the true construction to be given to the first and second sections of the act approved July 11th, 1870, entitled "an act in relation to mechanic's liens." These sections are as follows:

"1. Be it enacted by the general assembly, that all artisans, builders, mechanics, lumber dealers and others, performing labor or furnishing materials for the construction, repair or improvement of any building or other property, shall have a lien, as hereinafter provided, upon such property, and so much land therewith, as shall be necessary for the convenient use and enjoyment of the premises, for the work done and materials furnished. But when the claim is for repairs only, no such lien shall attach upon the property repaired unless such repairs were ordered by the owner of the property or his agent.

2. "A general contractor wishing to avail himself of the lien given him by the preceding section, shall file within thirty days after the completion of the work, in the clerk's office of the County or Corporation court of the county or corporation in which the property upon which a lien is
620 sought to be secured is *situated, and in the clerk's office of the chancery court of the city of Richmond when the property is in said city, a true account of the work done or materials furnished, sworn to by said claimant or his agent, with a statement attached signifying his intention to claim the benefit of said lien, and setting forth a brief description of the property upon which he claims the lien. It shall be the duty of the clerk in whose office such account and statement shall be filed, to record the same in a book kept for that purpose; and from the time of such filing all persons shall be deemed to have notice thereof."

We have first to determine the meaning of the words "general contractor," used in the second section.

In the case before us, the "Masonic Building Association of the city of Norfolk" having determined to erect in that city a large and expensive building for the use of the association, made three separate and distinct contracts with certain builders and mechanics, one with Charles Dashiell for the carpentry or wood work, one with William Rosson for the brick work, and one with Spaulding & Guy for the plumbing and gas fitting, and also employed one Charles E. Cassel as the architect for designing and superintending the building.

It is insisted by the learned counsel for the appellant that none of these are "general contractors," and that therefore they cannot assert their liens under this act, and that the demurrer to the bill ought to have been sustained, and the bill dismissed. He maintains that a "general contractor" is one who contracts for the building of the whole house, that is, every part of it, and that it is only to such a contractor that the lien is directly given, and that when
621 contracts are *made, as in this case, with different mechanics or artisans, for the completion of different parts of a building, they can acquire no lien. Such a construction, I think, is too narrow and technical, and would, in the great majority of cases, defeat the very object of the statute. The title of the act is "an act in relation to mechanics' liens," and the whole scope and object of the act is to insure to this useful class of laborers the certain and speedy rewards of their labor, and to prevent the fruits of their daily toil, when matured, from being reaped by others. To confine it to the very small class of "general contractors," in the sense of these words, as construed by the appellant's counsel, would limit its effect to a decree never intended by the legislature.

The first section indicates the scope of the act, and enumerates those entitled to the lien, viz: "All artisans, builders, mechanics, lumber dealers, and others performing labor, or furnishing materials for the construction, repair or improvement of any building or other property." In this section, enumerating the class who shall be entitled to a lien, the words general contractor are not used; they are used for the first time in the second section. There being no words to limit the applicability of this term "general contractor" to the class enumerated in the first section, any one of them may be a general contractor, the lumber man who furnishes the material, as well as the mechanic who does the work. It is plain that the term "general contractor" is not restricted to the contractor who under-

takes to complete every part of the work, because the act in terms provides for the man who does no part of the work, but simply furnishes the material. He may be a "general contractor," for he is one of the enumerated classes. Upon the face of the whole act it is plain that the words 622 "general contractor" *are used in contradistinction to the word sub-contractor. This contradistinction runs through almost every section of the act. The general contractor is required to do certain things, and the sub-contractor is required to do certain other things: the general contractor acquires certain rights in one way, and the sub-contractor in another way. This view is made conclusive by the fact, that in the third and tenth sections the word contractor is used as synonymous with "general contractor," showing that the word "general" has no specific import, but only is used to make more palpable the distinction between the contractor and sub-contractor. It is obvious, looking to the whole act, that a "general contractor," in the meaning of the statute, is one who contracts directly with the owner of the property; and whether his contract be to construct a part of the whole of a building, if his contract is made with the owner he is a general contractor, in the meaning of the act. The usual mode of building houses in the cities is not by making one entire contract for the construction of the entire building, but different contracts for different parts: with the carpenter for the wood, with the bricklayer for the brick work, and so on; and any one of those who contracts directly with the owner is a general contractor, as distinguished from a sub-contractor. Any other construction would violate the very object of the act, in limiting its operation, and would lead to the grossest injustice and the most palpable absurdity. It would be to hold, that though a mechanic should build every part of a house, brick work, wood work, plastering and upholstering, he could acquire no lien, because a grate or gas fixture was put in by another; or, in a contract for repairs, if a painter has painted a whole house, 623 inside and out, *he could not acquire a lien for his work because another man had put on a lock, which was a necessary part of the repairs, and therefore the painter had not completed the whole work of repairs, and was consequently not a "general contractor." This would be the absurd consequence of a literal construction of the words "general contractor."

But it is further argued, in behalf of the appellants, that the appellees have acquired no lien, because the act requires that a party to avail himself of the lien, given by the act, must file within thirty days after the completion of the work, in the clerk's office, an account of his claim, with a statement signifying his intention to claim the benefit of said lien. He insists that by the terms of the act the work must be completed, and the claim filed within thirty days after completion, to entitle the party to a lien. Now, in this case, the Masonic Building Association failed to comply with their contract, and finally directed a discontinuance of the building, after a large amount in materials and labor had been furnished and expended by the appellees.

If the building was not completed it was no fault of the appellees. They were prevented by the owner from going on to its completion. They had performed their part of their separate contracts. Suppose the controversy was between the appellees and the Masonic Building Association. It is plain, from the whole scope and object of the act, that the mechanics' lien would attach to the building and the ground upon which it was in process of erection; and the owner could not deprive the contractors of the lien which the law gives, upon the ground that the notice of the lien had not been recorded within thirty days after the completion, when, in point of fact, the completion of the building had been 624 prevented by the owner *himself. This would be to allow a party to take advantage of his own wrong, and to offer a premium for the violation of contracts. How are the rights of the parties changed by the fact that the owner makes a contract with other parties, by which he creates a lien upon the same property to them? It appears in this case that on the 29th June 1871, long after the commencement of the building, the said Masonic Building Association made a deed of trust upon the lot and building to secure a debt of $10,000 to the Merchants and Mechanics Savings Bank of Norfolk (the appellants here) and on the third day of July 1871, made another deed of trust to Charles Sharp, trustee, to secure a debt of $5,000 to Myer Myers. Now, can the right of the mechanic be affected by any contract made by the owner and third parties after the commencement of the building? They were no parties to that contract, and if the owner could not deprive them of their lien because no notice of the lien was filed "thirty days after completion," because by his own act it was not completed, certainly his grantees, who take only such rights as he had, must hold subject to the rights which the law gives to the mechanics.

The seventh section of the act provides that "the lien created by this act shall be preferred to every other lien or incumbrance which shall have attached upon said property subsequent to the time at which the work was commenced or the materials furnished, and no incumbrance upon the land created after the making of the contract for the erection of a building upon such land, shall operate upon the building erected until the lien in favor of persons doing the work or furnishing materials shall have been satisfied."

I think it is plain that the true con- 625 struction to be *given to the act is this: that it creates a lien in favor of the class enumerated in the first section, "mechanics, artisans, builders, lumber dealers," &c., which lien attaches to the prop-

erty as soon as the work is commenced, which shall be preferred to every other lien or incumbrance made subsequent to that time. If the work be completed according to the contract, then the contractor (whether he be a contractor for a part or for the whole work, provided he makes his contract directly with the owner), in order to avail himself of the lien created by the act, must file within thirty days after the completion of the work, the account and statement required by the statute. This is required only where the work is completed; and the reason is obvious. As long as the work is progressing and incomplete the law gives notice to the world that the mechanic's lien attaches to the building from the time it is commenced, and which he may enforce by filing within thirty days after its completion the statement and account required by the statute. So that while it is in the course of construction no notice is necessary. After it is completed and delivered to the owner, the mechanic, in order to retain his lien, must, within thirty days, comply with the requirements of the statute. And this is required in order to notify all persons dealing with the owner that the mechanics' lien, to which the law gives preference, still attaches to the property. If the work is not completed by default of the owner there can be no loss of the lien by that default.

In Philips on Mechanics' Liens, page 194, the author says: "It is universally true, that no loss of lien is occasioned for the work actually performed in accordance with the contract when the work has been stopped or abandoned in consequence of the 626 default *of the owner." See also Bushfield v. Wheeler, 14 Allen's (Mass.) R. 139; Schwartz v. Saunders, 46 Ill. R. 18.

In this case, it seems that the appellees did each file in the clerk's office of the Corporation court of Norfolk a statement of their respective claims, and their purpose to assert their lien. This was done no doubt out of abundant caution. It was not necessary to secure their lien. This, as has been seen, is required only in a case where the work has been completed. The lien attaches without such action in a case where the work is not completed by the default of the owner. But having complied with their contracts, and established their just claims by sufficient proof, they are entitled to enforce their liens, which the law affixes to the property, in preference to all other liens or incumbrances which were created subsequent to the commencement of their work on the building.

I am therefore of opinion that the decree of the Corporation court of the city of Norfolk be affirmed.

STAPLES, J. I am not prepared to go as far as Judge Christian, in saying that the lien of the mechanic upon an unfinished building is preserved although the contract is never recorded. I have not examined that question, and do not wish to be understood as expressing any opinion upon it. Upon the other points I concur with Judge Christian.

ANDERSON and BOULDIN, Js., concurred in the opinion of Christian, J.

MONCURE, P., dissented, first on the construction given to the term "general contractor;" but second, and especially, on the ground that a lien is given without limit as to time.

Decree affirmed.

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627 *Higginbotham's Ex'x v. The Commonwealth.

December Term, 1874, Richmond.
Absent, MONCURE, P.

1. **State Debts.**—The present State of Virginia is bound to the creditors of the state for debts due before the division for the whole of their debts. And West Virginia is equally bound for them.
2. **Same—Suits to Enforce Payment.**—Under the statute, the State of Virginia may be sued for any debt or claim due, whether liquidated or unliquidated.

The case is stated in the opinion of the court delivered by Judge Bouldin.

Lyons, for the appellant.

The Attorney General, for the Commonwealth.

BOULDIN, J. delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of the city of Richmond, dismissing with costs a petition of the plaintiff in error, filed in said court, to recover a debt alleged to be due to the petitioner from the State of Virginia.

The case was briefly this:—The plaintiff in error, and petitioner below, is executrix of David Higginbotham, deceased, who was owner of twelve shares of stock in the Old James River Company. By an amendment to the charter of that company, passed on the 17th day of February 1820, and duly accepted by the company, the company 628 became the agent of the *state to carry on the work on state account, and under the direction and control of the general assembly; and it was agreed between the state and the company that in lieu of the annual dividends which might have been thereafter declared on the stock, the company should be allowed twelve per centum per annum on its stock for twelve years from the commencement of the amendatory act, and fifteen per centum per annum thereafter forever. This act was declared on its face to be "a compact" between this commonwealth and the said company, subject, however, at all times to such change and modification as the legislature may think proper to make: provided, that no such change or modification shall be made as will take from the James River Company their right to the dividends, or any part of the dividends upon their stock

allowed to them by this act. Here then we have a solemn "compact" between the state and the company, formally declared to be such on its face, that from and after the commencement of the amendatory act aforesaid, the dividend or annuity, as it is in effect, thereby secured to be paid on each share of stock, should be forever paid without abatement or diminution. Such was the solemn obligation assumed by the state as the price of the stockholders' property.

By the said act of February 17th, 1820, and by sundry acts passed thereafter, down to the 16th day of March 1832, the powers and duties of the James River Company, acting for the state, were from time to time extended and enlarged; but until the date last mentioned the company itself continued to exist under its own organization. On that day, however, a new company, with greatly extended powers, was chartered, called the James River and Kanawha Company, to which all the interest of the 629 state in the old James *River Company was transferred; but this transfer was made expressly "subject to the payment of fifteen per centum per annum forever to the stockholders of the old company." By this act the James River and Kanawha Company became the successor of the old James River Company, and the duty of providing forever for the dividend as it is called, of fifteen per centum per annum to the stockholders of the old company devolved, as we have seen, directly on the James River and Kanawha Company, under its agreement with the state; and by the act of March 22d, 1836, the state required the latter company to pay these dividends into the public treasury, to be disbursed among the stockholders of the old James River Company by the second auditor; thus again solemnly acknowledging the right of the stockholders to these "dividends," and the duty of the state to see that they were punctually paid, by requiring her assignee to pay them into the public treasury to be disbursed to the stockholders by a state officer.

Such was, in substance, (so far as is necessary to be here considered) the state of legislation on this subject when the act of March 23d 1860 was passed, by which the state became again directly bound to the stockholders of the old James River Company for the "dividends" aforesaid, having assumed the payment thereof in consideration of certain shares of stock in the James River and Kanawha Company, issued by said company to the state. We thus see that in March 1860, the state of Virginia again became directly bound to the stockholders of the old James River Company for an indebtedness, the justice and binding force of which she had often acknowledged, and which forty years before she had herself contracted and agreed to pay as the price of their property granted to her 630 *under a legislative contract which, on its face, is formally declared to be "a compact between the state and the said company," and by which the annuity aforesaid is secured to the stockholders without abatement or diminution forever; thus solemnly declaring the obligation of this "compact" on the state should be eternal.

It is unnecessary to discuss the question, whether the nature and original terms of this "compact" and the subsequent dealing of the state with it, add at all to its binding force as a "compact" between the parties. It is enough to say that it is a compact of the state with a portion of her citizens, entered into in terms of unusual solemnity; and that her action down to the close of the late war between the states indicates at all times a careful purpose on her part to preserve intact the rights of the stockholders under it. Accordingly we find that under all the changes of legislation on the subject, down to the first of January 1865, the appellant's annuity was regularly paid; but since that date there has been but a single payment of $120, leaving arrearages to the amount of $2,220, as of the 1st of July 1871. For that amount with its accruing interest, after applying for payment at the offices of the auditor of public accounts, and the second auditor, and being refused at both, this suit was brought by petition in the Circuit court of the city of Richmond, making the auditor of public accounts and the second auditor parties, and praying judgment against the state for the amount of the claim.

The second auditor made no formal answer to the petition, but there is filed in the cause a certificate from him, showing the arrearages of the annuity or "dividends," as he describes them, to be $2,220, as 631 of *the first day of July 1871, being the exact sum demanded by the petitioner.

The auditor of public accounts filed an answer to the petition, resisting payment of the petitioner's claim on several grounds, all of which will appear in the answer.

The Circuit court held, "that the plaintiff, at the time of filing her petition in this cause, had a valid and subsisting claim against the state for the arrears of said unpaid dividends, amounting to the sum of twenty-two hundred and twenty dollars; but the said claim of the plaintiff being for arrears of dividends upon a fixed, ascertained and recognized debt of the state, the time and manner of payment whereof necessarily depend upon considerations, addressing themselves to the wisdom of the general assembly; and by the constitution and the law is reserved for determination to its discretion; and the general assembly not only having failed to make any appropriation out of which either of the auditors could pay the claim of the plaintiff, but having affirmatively declared, that in the present financial condition of the state the said claim cannot be paid, nor any part thereof, except upon terms of compromise and abatement, which the plaintiff declines to accept, the court is further of opinion that it has no authority to grant the prayer of the plaintiff;" and the petition was therefore dismissed with costs.

From this order or judgment an appeal has been taken to this court; on which the case is now before us.

The questions which have been discussed in this court are in effect the following:

First. Does the state of Virginia now owe the entire debt claimed by appellants?

632 *Secondly. If she does, can she be sued for it by her own citizen in her own courts?

Unless the affirmative of both propositions can be maintained the judgment of the Circuit court must be affirmed.

The Circuit court held, as we have seen, that the appellant's claim for the entire debt was a "valid and subsisting claim"; but it has been earnestly contended by the attorney general that the dismemberment of the state of Virginia and the formation of a new state, called West Virginia, out of a portion of her territory, has discharged the state of Virginia from this debt as now claimed; that the old debt of Virginia contracted prior to her dismemberment, if not wholly extinguished by the events leading to, attending and following her dismemberment, is not now due from her but only ratably from the two states.

Were this a question between the two states alone, I should not question the concluding part of the proposition. My opinion is that justice, public law and common honesty alike require that the old debt of Virginia should be so adjusted between the two states that each shall bear her proper burden. Publicists tell us that "when a kingdom divides by common consent into two or more distinct commonwealths, the public patrimony, with all the debts and incumbrances upon them, ought to be equally shared among them." Puffendorf, book 8, ch. 12, p. 540.

In the case of Virginia, her partition (whatever the fact may be as to how it was accomplished, about which with honest and candid minds there can be no doubt) seems to have assumed the forms of consent. These forms, however, as already intimated, are not such as to mislead candid and honest minds, but the fact of partition, whether wrongful or not, has been

633 *acknowledged by both states and must be met as a fact. The principle as to liability for the old debt is the same, however, whether the new state was created by consent or by violence. It is therefore needless now to enquire, by what means the separation was effected. My own opinion is that it was accomplished by act of injustice and spoliation not exceeded in atrocity by the partition of Poland. These are matters, however, to be disposed of by the states inter sese, and are not properly before us as a judicial tribunal adjudicating a mere question of private right. We, as a court, are to deal with the contract before us; to construe its terms; to ascertain its effect, and to decide whether the state of Virginia, as between herself and her creditor, is bound thereby. This is the question for us to decide.

There can be no doubt that prior to the dismemberment of the state she was so bound. This has been denied by no one, and has been over and again acknowledged by the state herself, not merely by her solemn "compact" aforesaid, and her legislation to secure a faithful compliance with its terms, but also by her punctual payment of the "dividends" or annuity, down to the commencement of the war; by its continued payment after the war, and after the dismemberment of the state, down to the year 1865; by her recognition of the entire old public debt of the state as her debt, as between herself and her creditors in March 1866, by funding all the interest thereon required to be funded by creditors; by a like recognition of the old debt in the 19th section, 10th article of the constitution of the state, and by other legislation. I concur therefore entirely with so much of the opinion of the learned judge of the Circuit court as declares that the appellant "has a valid and subsisting claim"

634 *against the state for the amount of her claim ($2,220); that, as between the state and the creditor, the state still owes this debt and the whole of it.

But I do not think it proper to express this opinion as to the liability of Virginia for the whole of this debt, without saying at the same time, that my opinion is precisely the same as to the liability of West Virginia. She, too, as between herself and the creditor, is bound for the whole debt. A portion of a debtor state may not, in my opinion, by separating herself from the debtor state, and forming a new state (whether by fraud, force or consent), evade the payment of the just debts of the old state, or any part thereof. She cannot thus by her own separate action, or the combined action of herself and the old state, extinguish or even divide the claim of a creditor without his consent. Each of the new states thus formed, so long as they can be identified (even though they may each have assumed a new name), are bound to the creditor for his whole debt. So long then as the identity of the original state may remain, and the new state may be identified as part of the old, both are alike bound to the creditor for the whole debt. Both prior to the partition, owed the same debt under one name; each, after partition, holds portions of the goods and territory formerly bound to the creditor for a common debt, and each is alike bound to pay that debt. "For debts" (as Puffendorf says) "being founded in the commonwealth, not precisely as such commonwealth, but as possessed of certain goods, whoever is master of those, must take the debt with them." Book viii, ch. 12, p. 129. See also Grotius, book ii, ch. 9, § 9, pp. 340, 41. On the same principle, the publicists agree that when a state is conquered, its nationality extinguished, and its people and territory absorbed

635 by the *conqueror, the latter is bound for the debts of the former. And Mr. Dana in his edition of Wheaton's Int. Law, in a note to § 31, part 1, p. 49 (bottom),

says: "In the separation and rearrangements of nations in Europe, special provisions are usually made for the payment of public debts; and the principle seems admitted, that in case of a division of a state, each new state is bound for the whole debt contracted by the former."

In relation to the formation of a new state, out of two or more states, he announces in effect the same doctrine. He says (same note): "The formation of the new state so alters the nature of all the securities the creditor looked to, that the new state has a general obligation to see that he does not suffer by the change."

The principles above announced are just and reasonable in themselves, and are in strict analogy to the well established principles of law applicable to joint debtors. In such cases one debtor may owe the whole debt and the other nothing, as between themselves, but as to the common creditor each owes the entire debt; and no arrangement between themselves, without the creditor's consent, can sever the debt, or alter it in any respect as to him. Each is and must remain bound for all; and I understand this doctrine to be not only conceded but maintained by the present attorney general. It is, indeed, the only safe and just doctrine for the creditor, and is not at all unjust to the state. By the payment of the whole debt an equity at once arises in her favor to demand contribution from the other state, which she may enforce in the United States courts; a right secured to states but denied to citizens. She cannot suffer therefore by doing right. Virginia has not lost her identity by the loss of forty-eight counties and the inhabitants
636 thereof. *"Impoverished, crushed and dismembered," like a multitude of her faithful defenders, "but not dishonored," she is Virginia still, and so I trust she will long remain. I am wholly unwilling to admit that her identity has been lost. The state of Virginia is still a state. We are told by Mr. Wheaton that if a portion only of a state be separated from the original state by conquest and cession, the original state still continues. Lawrence Wheaton Int. Law, part 1, ch. 2, § 8, p. 32 (6th edi.).

And so with Virginia; she is still a state. It is true that a portion of her territory and population have been wrested from her; but she yet holds two-thirds of her territory, two-thirds of her population, her capitol, her archives, her traditions, an immense majority of her true-hearted sons and daughters, and her name, with its honored and hallowed memories. "These constitute a state!"

I am of opinion therefore with the Circuit court, that the state of Virginia is bound by her "compact" with her creditor for, and now owes the entire amount of the debt claimed in the petition, not only because she holds a large proportion of the goods and territory of the old state of Virginia, but because she is old Virginia herself. Her identity has never been lost.

It is scarcely necessary to add that in what has been said above it has not been my purpose to express or intimate any opinion as to the respective rights and liabilities of the state and those of her creditors who have accepted the provisions of the act of March 30th, 1871, commonly called the funding act. That question is not before us, even incidentally, and no opinion is expressed thereon.

On the second question involved in the cause, I am constrained to differ in
637 toto with the Circuit *court. I do not consider that the failure or refusal of the legislature to make provision for the payment of the appellant's claim, or the fact that the claim itself was for an acknowledged and liquidated debt, either, or both combined, constituted a sufficient reason for dismissing the appellant's petition. On the contrary, my opinion is that under the statutes of the state, she is liable to be sued in this case by petition against the auditor, and that judgment should have been rendered against her. I do not mean to intimate that a state can be sued in any case either by her own citizens or others, in her own courts, without her authority and against her consent. But it has ever been the cherished policy of Virginia to allow to her citizens and others the largest liberty of suit against herself; and there never has been a moment since October 1778 (but two years and three months after she became an independent state), that all persons have not enjoyed this right by express statute.

By the fifth section of the act of October 1778, 9 Hen. Stat., p. 540, it was enacted, that where the auditors, acting according to their discretion and judgment, shall disallow or abate any article of demand against the commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the high court of chancery, or the general court, according to the nature of his case, for redress, and such court shall proceed to do right thereon; and a like petition shall be allowed in all other cases to any other person who is entitled to demand against the commonwealth any right in law or equity."

Here then is the largest liberty of suit against the commonwealth which can well be conceived. It is allowed not only to all those persons whose claims may
638 *have been presented to the auditors according to law, and refused by them, but to all others "entitled to demand against the commonwealth any right in law or equity." I can conceive of no class of claimants not embraced by this law; and the privilege has never been taken away or curtailed by any subsequent statute. It will be found re-enacted in the revisal of 1819, with scarcely the change of a word. 2 Rev. Co. 1819, ch. 174, § 6, p. 2. And by the act of March 20th, 1838, entitled "an act concerning claims against the commonwealth," Sess. Acts 1838, ch. 14, p. 27, the same unlimited right of suit against the commonwealth is secured to all persons, in

language more in detail, but not more comprehensive than that already on the statute book. A portion of the first section of the act enacts "that it shall be lawful for all persons having claims against the commonwealth, legal or equitable, and whether the amount be liquidated or not, to present them to the auditor, and if the same be not allowed, to proceed according to the sixth section of the "act to reduce into one the several acts concerning the auditor and treasurer," which has been above referred to. And so the law remained until the revisal of 1849.

In their report to the legislature, the revisors recommended the adoption of a clause, the same in substance with the law then in force, and retaining the words "legal or equitable, and whether the same be liquidated or not;" but the committee on revision, and the legislature with a view to brevity, struck out those words as mere surplusage, and embraced the same idea in a more concise form, by using the words "any other claim" against the commonwealth. And so the law now stands. No language can be broader and more comprehensive; and I can see no reason for
639 *confining this general and unlimited authority to sue the commonwealth on any other claim to unliquidated claims alone.

To attain that result it will be necessary to interpolate a word which will alter the entire meaning of the sentence, viz, the word "unliquidated" before the word "claim," so as to make it read "any other unliquidated claim," instead of "any other claim." I see no justification for taking this liberty with the statute, especially when we consider that it would impose a restriction on her creditors at war with the time-honored usage and legislation of the state, with her established policy from the very dawn of her independence. That policy is and has been to allow to the citizens the same use of her courts against herself which she has against the citizen; the largest liberty of suit.

Some stress has been laid in the argument on the fact that under the law as it now stands, claims which, if allowed, would be chargeable to the literary fund, the fund for internal improvements, &c., &c., are excepted from those to be presented to the auditor of public accounts before suit thereon, and it is argued that the exception shows that the state did not design to be sued on that class of claims of which the petitioner's is one. A moment's reflection will show the fallacy of the argument. For more than forty years there was but one auditor's office in the state, filled first by a plurality of persons and afterwards by one alone. So long as this state of things continued, all claims required by law to be audited were presented to the auditors or auditor as the case might be; and during that entire period no such exception as is now referred to appeared in our legislation.

But in the course of time it was deemed
640 expedient by the legislature *to establish a second auditor's office, and to give to the second auditor charge and control of the particular funds, &c., mentioned in the exception we are considering; and in perfect harmony with his control of those funds, and to facilitate it, it was further enacted that claims which if allowed would be chargeable to those funds should be audited by the second auditor, and not the auditor of public accounts. This legislation rendered the exception under consideration absolutely necessary to harmonize the acts and prevent a conflict of duty between the respective auditors. It imposed no restriction whatever on the unlimited right of suit granted the citizen. Whenever the claim, whatever might be its character, shall have been presented to the proper officer and disallowed then the only redress left the holder is a suit against the auditor of public accounts, as allowed by law.

Were this a suit upon a state bond, for the principal of the debt, there might, perhaps, be some reason to sustain the view of the Circuit court. These bonds, I think, for I have not one before me, generally, if not always, provide on their face that the principal of the debt is irredeemable for a fixed number of years, and at the expiration thereof redeemable at the pleasure of the general assembly. On such bond it might perhaps be well argued that there could be no suit for the principal without special license from the state, because, on the face of the bond, she has provided that it is payable only at her pleasure. But I do not mean to express an opinion on that question, as the case is not before us. This is not such bonded debt; nor is it for the proceeds or accretions of such a debt, or of any established and liquidated liability, payable at uncertain and indefinite periods;
641 nor is it for "dividends," *properly so called. It is in fact a claim, which, before the last assumption thereof by the state, was payable, and had been paid at stated intervals by a party liable to suit for a failure, and which the state, on assuming the same, must be held bound to pay at the same periods. The question then is, whether the state being bound by her compact to pay this annuity at the times indicated, "forever," can be sued for failing and refusing to comply with her contract? My opinion is that she can; and that the unrestricted right to sue her in any such case has existed for very nearly a century. I am of opinion therefore, that the judgment of the Circuit court, dismissing the appellant's petition with costs, should be reversed and annulled, and that judgment should be entered for the petitioner for the amount of her demand with interest.

In so deciding, no power is claimed for this court to control, or in any manner to interfere with the discretion of the legislature in making provision for the payment of this debt. The court can only decide that the debt claimed is just and due, and ought to be paid; that the state has consented to be sued for it; and that judgment should be rendered against her as a matter

of course. The judgment being for more than three hundred dollars, the court has no authority to require the auditor of public accounts to issue his warrant for the amount. In such cases, the provision to be made for the judgment is expressly reserved to legislative discretion, and to that discretion we must leave it.

Moncure, P. being interested did not sit in the case; but expressed his hearty concurrence in the opinion.

Decree reversed.

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642 *Jones' Ex'ors v. Clark & als.*

January Term, 1875, Richmond.

1. **Executors and Administrators—Devastavit—Bona Fide Purchasers.**†—A *bona fide* purchaser for value, and without notice, of a portion of the assets of the estate, either directly or indirectly from the executor, will acquire a good title thereto, even though the executor commit a *devastavit* by making the sale for the purpose of converting the proceeds to his own use, and by actually so converting them.

2. **Same—Same—Mala Fides Purchasers.**—If the purchaser of a portion of the assets be privy to the intended *devastavit* of the executor, at the time of the purchase, or fraudulently contribute to such *devastavit* in any way, such purchaser will be liable for the loss sustained by creditors, legatees or others, by reason of such *devastavit*.

3. **Same—Same—Duties of Purchasers.**—A purchaser from an executor of personal property of the testator, for valuable consideration, need not enquire, and has no adequate means of enquiry whether the condition of the testator's estate require a sale of the property, and is not bound to see to the application of the purchase money, but may fairly presume that the sale is rightly made, and that the purchase money will be properly applied; and such purchaser can only be made liable on the ground of a fraudulent participation with the executor, in the commission of a *devastavit* of the testator's estate: The purchaser must be guilty of a fraud in that respect.

4. **Same—Same—Liabilities of Purchaser.**—In such a case the fraud of the purchaser, which will make him liable, may be either actual or constructive.

5. **Same—Sales of Decedent's Estate—Bonds.**—In 1857, E, the executor of W, sells the real estate of his testator, and for the deferred payments takes bonds payable to himself as executor. Of these, one is payable on the 18th of November 1859, with interest from the 18th November 1858, and another payable on the 18th of November 1860, with like interest. In June 1859 E sells these bonds
643 to N, at a discount of eighteen *per *cent.* In July N sells these bonds to J at a very moderate discount. At the time of the sale E was possessed of a large property, and his solvency was undoubted, and he so continued until 1862. He stated to N that he wanted the money to meet advances he had made for the estate of W, and his accounts, as then settled, showed him in advance; but there was no charge in them against him for money received from the sale of the real estate. The sale was not needed for the payment of debts. J was not connected with the purchase by N, and knew nothing of its terms—HELD:

1. **Same—Same—Same—Purchasers of Bonds.**—N was guilty of a constructive fraud in purchasing the bonds at so large a discount, which is sufficient to implicate him as a participant in the *devastavit* committed by the executor; and he is liable for the amount of the bonds.

2. **Same—Same—Same—Same.**—J was not guilty of a fraud in purchasing from N, and is not liable.

6. **Same—Same—Same—Same—Bankruptcy.**—In the suit brought to subject N and J for the amount of these bonds, N pleads that he is a discharged bankrupt—Held, the 33d section of the bankrupt act of 1867, which provides "that no debt created by the fraud," &c., of the bankrupt, "shall be discharged under this act," applies as well to implied as to actual fraud; and N is not discharged from the payment of this debt.

7. **Same—Same—Same—Same—Liabilities.**—The sureties of E, as executor of W, may maintain a suit to subject the purchasers from E to the payment of the amount of the bonds to the widow and legatee of W, in discharge *pro tanto* of their liabilities as the sureties of E.

8. **Same—Same—Same—Same—Laches.**—Though there has been great laches in seeking to subject the purchasers of the bonds, yet N will not be thereby relieved from his liability.

9. **Pleading and Practice—Demurrer.**—A demurrer to a bill in equity, in the form given in the statute, is sufficient.

10. **Same—Bill—Multifariousness.***—The bill filed by the sureties of E, against him and the several purchasers of bonds from him, is not multifarious. It was proper and necessary that all the purchasers from the executor sought to be made liable, should be united in the same suit.

11. **Same—Records—Evidence.**—The record of the suit of the legatees of W against the executor and his sureties, if referred to as an exhibit in the bill of the sureties against E and the purchasers from him, and the evidence in that record is relied on in the Circuit court without objection in the suit by the sureties. It is too late to object to it in the appellate court.

644 *This was an appeal by the executors of Richard Jones, deceased, from the decree of the Circuit court of Pittsylvania, rendered on the 7th of June, 1871, in a cause in which William T. Clark and John W. Holland were plaintiffs, and said

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*BOULDIN, J. was absent on the first hearing of the case. He was present on the rehearing.

†**Executors and Administrators—Devastavit—Purchasers.**—In Boisseu v. Boisseau, 79 Va. 77, the court said: "It has been long settled that whenever a fiduciary does any act in violation of his duty or commits a breach of trust, that he and all who wilfully and knowingly aid him in the execution of these purposes, are, in the eyes of the law, participants in the offence, and all stand upon the same footing. Fisher v. Bassett, 9 Leigh 119; Jackson v. Updegraffe, 1 Rob. 107; Pinckard v. Woods, 8 Gratt. 140; Jones v. Clark, 25 Gratt. 658; Asberry v. Asberry, 33 Gratt. 463." See also, on this subject, Mills v. Mills, 28 Gratt. 442, and *note*.

***Multifariousness in Bill.**—See collection of authorities on this subject, in Nulton v. Isaacs, 30 Gratt. 726, and *note*.

executors and others were defendants. Clark and Holland were the sureties of Edmund Fitzgerald, as the executor of William Fitzgerald, deceased; and suit having been brought by the legatees against Edmund Fitzgerald and his sureties for the settlement of his accounts, and that suit having progressed so far as to show that he had wasted the estate to a large amount, and that he was insolvent, Clark and Holland filed their bill against Jones' ex'ors, Griffith D. Neal, Elisha Barksdale, Jr., and others, in which they sought to subject them for the amount of certain bonds, which they alleged had been sold by Edmund Fitzgerald at a great sacrifice, and for which he had not accounted to the estate of his testator. The decree of the Circuit court was against Jones' ex'ors and Neal; but the bill was dismissed as to Barksdale. The case is stated in the opinion of the court, delivered by Judge Moncure.

Grattan and Carrington, for the appellants.

Royall, for Barksdale.

Page, for Neal.

J. Alfred Jones, for Clark and Holland.

MONCURE, P. delivered the opinion of the court.

The main, if not the only substantial question involved in this case is, as to the liability of persons on the ground of having participated in a devastavit committed by an executor, in selling a portion of 645 the assets *of his testator and converting the proceeds of sale to his own use.

There can be no doubt but that an executor is invested with the legal title to the assets of his testator which come to his hands for administration, whether they arise from personal estate, or from real estate directed by the will to be sold for the payment of debts and legacies, and sold accordingly by the executor.

Nor can there be any doubt but that a bona fide purchaser, for value and without notice, of a portion of such assets, either directly or indirectly from the executor, will acquire a good title thereto, even though the executor commit a devastavit by making the sale for the purpose of converting the proceeds to his own use, and by actually so converting them.

Nor can there be any doubt but that if the purchaser be privy to the intended devastavit of the executor at the time of the purchase, or fraudulently contribute to such devastavit in any way, such purchaser will be liable for the loss sustained by creditors, legatees or others by reason of such devastavit.

Nor can there be any doubt but that the executor in this case, Edmund Fitzgerald, Jr., committed a devastavit by selling and converting to his own use, bonds taken for the purchase money of land of his testator, William Fitzgerald, Jr., directed by the will to be sold for the payment of debts and legacies.

The only question remaining to be considered in this case therefore is, whether the purchasers of said bonds, claiming, directly or indirectly, from or under the said executor, were, at the time of their purchases respectively, privy to his intent to commit such a devastavit, or otherwise contributed to the commission of the same.

646 *And this question arises as to three different parties whose cases involve different facts, and somewhat different principles, and must, therefore, be considered separately. These three parties are G. D. Neal, Richard Jones and Elisha Barksdale, Jr. The court below decided the question against the first and second of these three parties, and in favor of the third. and pronounced a decree accordingly. This appeal was taken from that decree. Is it erroneous; and if so, in what respect?

We will consider the case of each party in the order in which he is above named; but before we do so, we will notice some matters of fact and law which apply alike to all the cases, and seem to be material to be stated; and

First, as to matters of fact: The testator died in September 1857, leaving, besides his slaves, which he directed not to be sold, an estate which exceeded in value the amount of his debts by about eight or ten thousand dollars, and leaving as the only objects of his bounty his wife and posthumous child, with the exception of a legacy of $20 to the Rev. C. C. Chaplin, and a contingent devise to his brother and executor Edmund Fitzgerald.

The executor, at the time of his qualification as such, in October 1857, was a man of large property and undoubted solvency, and it seems continued so to be until he removed from the state, in 1862. His executorial bond was in the penalty of $34,000, and his original sureties were Sexton W. Smith and Samuel Bradley. On the 19th of November 1857, he sold the whole estate, real and personal, which was subject to sale under the will, and returned an account of sales, which was duly recorded. The whole amount of the sale was $10,565.40, including two tracts of land, one of 647 *which was sold to Raleigh White for $3,982.50, and the other to Archer B. Womack for $4,293. The land was sold on a credit of one, two and three years, and the purchasers executed their bonds for the purchase money, payable to the executor as such. The assignments made of some of these bonds to the three parties before named, respectively, were all made in the spring and summer of 1859; and each bond had, at the time of its assignment, some time to run to reach its maturity; and the purchaser or assignee in each case paid less than would have been due upon the bond after abating the legal discount. Sometime in the last named year, 1859, the testator's widow, Martha W., intermarried with Caddis B. Luck. In March 1859, Commissioner Clark reported a settlement of the execu-

torial account of said executor, showing a balance due him on the 21st of that month of $765.41; and in 1860, the same commissioner reported another settlement showing a balance due the executor of $1,122.94. But these accounts did not embrace any credits to the estate on account of sales of realty, on which account it appears that the executor had received money which if brought into the said settlements would have made him a debtor instead of a creditor to the estate.

In September 1860, Luck and wife brought their suit in the Circuit court of Pittsylvania county, to obtain a settlement of the executorial account, and to recover their portion of the said testator's estate; making the said executor and Martha W. Fitzgerald, her child by the said testator, defendants to the suit, but not making the sureties of the said executor parties. In May 1861, the said executor having, it seems, been ruled to give a new executorial bond, with sureties, accordingly gave one in the same penalty of $34,000, with John W.
648 *Holland and Wm. T. Clark as his sureties. In November 1862, the said Luck made oath before a justice of the peace of said county, that he believed that the said executor was indebted to him and his wife and the said Martha W. Fitzgerald, in at least the sum of $10,000, which they would recover in the said suit, and that he had probable cause for believing and did believe that said executor, Edmund Fitzgerald, was about to quit the state unless he was forthwith apprehended, and therefore the said justice ordered the said executor to be held to bail in the said suit in equity, in the sum of $10,000. The said Luck, with said Holland and Clark as his sureties, entered into a bond before the said justice in the penalty of $10,000, reciting that the said Luck was about to sue out a writ of capias ad respondendum against the said Edmund Fitzgerald in the said suit in equity, and conditioned for the payment of all costs and damages which might be awarded against said Luck, or sustained by said Fitzgerald by reason of the arrest of the latter under said writ. And the same having been accordingly issued, was executed on the said Edmund; who thereupon gave as his bail, in the sum of $10,000, A. L. H. Muse. The said bail, it seems, was insolvent when taken, and has ever since remained so, but no proceeding has ever been had to subject him to liability on his recognizance, nor to subject the sheriff or his securities to liability for taking insufficient bail. Soon after giving said bail it appears that the said Edmund left the state, and he has never since resided therein. About that time he ceased to be executor of William Fitzgerald, whose estate was thereupon committed to Coalman D. Bennett, sheriff of said county, for administration de bonis non with the will annexed,
649 who *never received any assets and has since died, and the estate has since been unrepresented, there being in fact, no unadministered estate.

In June 1868, the said Luck and wife amended their bill, making the said sureties, Holland and Clark, defendants thereto, in addition to the original defendants. In October thereafter, the said sureties filed their answer; in which, among other things, they say that "at the time of their joining in said bond, said executor was deemed by them, and was generally considered, able to pay his debts and liabilities, and he satisfied these respondents that he owed nothing or very little to the estate of his testator. Indeed, his accounts as personal representative, settled by the proper officer, showed this."

In February 1869, the said sureties, Clark and Holland, brought their suit and filed their bill in the same court, to which they made the said Luck and wife, Martha W. Fitzgerald, C. D. Bennett, late sheriff, and as such administrator as aforesaid, Edmund Fitzgerald, late executor as aforesaid, G. D. Neal, Richard Jones and Elisha Barksdale, Jr., and John Cannady, administrator with the will annexed of said Raleigh White, defendants. The complainants set out in their bill an account of the proceedings which had been had in the aforesaid suit of Luck & wife v. Fitzgerald &c., and exhibit a copy thereof. They "charge that the proceeds of the sales of said lands were, in fact, never collected by said executor; but the bonds executed by the purchasers of said land were sold at a very heavy discount to the persons hereinafter mentioned, at a time when there was no necessity for so doing, the estate being abundantly able to pay all the debts of the testator without any sacrifice of the assets, the executor not being then in advance to any
650 *considerable amount to said estate; and if he had been, said estate being able to pay him said amount without sacrifice of the assets, and said executor holding no debt against the estate; all which facts were well known to the purchasers of the assets hereinafter mentioned, and to each of them." The complainants then set out in detail what are charged to be the facts in regard to each purchase; after which they say they "are advised that by reason of the premises the said executor has committed a devastavit in the disposal of said bonds, and that said Neal, Jones, Barksdale and White have participated therein, and are each, and the estate of said White, responsible to your orators for the amount of the bonds purchased by each as aforesaid, in consequence of the participation which each of them has had in the devastavit aforesaid, they having applied to said Bennett to recover the same, who refuses to do so, having no assets to pay costs, and is willing that your orators should sue therefor. They are advised that they may be substituted to the rights of the devisees and legatees under the will of the testator, to charge the parties aforesaid for the assets so as aforesaid unlawfully appropriated to their own use, and that because your orators fear they may be subjected to a charge of said devisees and legatees, they may call

the parties aforesaid to account for said assets, as a necessary step in the settlement of the administration of said executor, and to aid them in the defense of the suit aforesaid of Luck and wife, &c.; "to which bill they file this as a cross-bill, and pray that both cases may be heard together, and that any decree which may be rendered against your orators, as sureties as aforesaid, in favor of said Luck and wife and said Martha W. Fitzgerald, may be rendered, first to be satisfied by said Neal, Jones, 651 *Barksdale," &c., "to the extent of any amount of testator's assets which they or either of them may have illegally acquired as aforesaid."

The complainants then, after making the persons before named defendants to their bill, propound special interrogatories to said Neal, Jones, Barksdale, &c., and pray for special and general relief, suitable to the case made out in their bill. The two suits separately progressed to final decrees; answers and depositions having been filed, accounts settled, and orders made from time to time, which it is unnecessary now further to refer to. The final decree, in Luck & wife v. Fitzgerald, was entered on the 7th of November 1870, by which the said Fitzgerald, and Clark and Holland, his sureties as aforesaid, are decreed to pay the balances ascertained to be due from said Fitzgerald, ex'or as aforesaid, to said Luck and wife and Martha W. Fitzgerald respectively, the balance due to the former being $2,172.56, and that to the latter $6,022.68, with interest on each from the 20th day of October 1862, and also to pay to the plaintiffs their costs expended in the prosecution of the suit. The final decree in Clark & Holland v. Luck, &c., was entered on the 7th day of June 1871, by which the plaintiffs' bills were dismissed with costs as to the defendants, Barksdale and Cannady; "and the court being of opinion that the bonds of $1,000, executed by A. B. Womack and J. M. Adams to Edmund Fitzgerald, executor of William Fitzgerald, deceased, on December 1st, 1857, payable on or before the 18th day of November 1859, with interest from 18th November 1858, assigned by the said executor to the said G. D. Neal on the 15th day of June 1859, and by him to the aforesaid Richard Jones on the 2d day of July 1859, and of $2,293, executed by the said Womack and Adams 652 to the said executor *on the 1st day of December 1857, payable on or before the 18th day of November 1860, with interest from November 18, 1858, and assigned to the defendant, Neal, on the 15th day of June, 1859, and by said Neal to the aforesaid Richard Jones, deceased, on the 21st day of June 1859, were each illegally transferred by the said Edmund Fitzgerald, executor as aforesaid, to the defendant, G. D. Neal, by which transfer a devastavit of said assets was committed by the said executor, in which the said Neal illegally participated; that said transfers by said Neal of the said bonds to the said Richard Jones in his lifetime were also illegal, in consequence of the knowledge of the said Jones at the time of the transfers to him of the illegal transfers thereof to the said Neal;" and the court being further of opinion that said Edmund Fitzgerald and G. D. Neal, and the defendants, Scruggs & Smith, executors of said Jones, out of the assets of their said testator, are liable to pay the amount of said bonds, including principal and interest, to those entitled thereto. The court accordingly decreed such payment to be made in exoneration of the plaintiffs, Clark and Holland, as sureties aforesaid, and on account and in part discharge of the decree rendered against them in Luck & wife v. Fitzgerald, &c., on the 7th of November 1870 as aforesaid. And it appearing to the court that the defendant, C. D. Bennett, late sheriff, and as such administrator de bonis non with the will annexed of William Fitzgerald was dead, and that no further administration had been taken on the estate of said Fitzgerald; and it further appearing that all the debts due from the said estate had been provided for, and that all the debts due to the said estate had been collected except those mentioned in the said decrees; the court did not deem it proper to delay the cause for the 653 appointment *of a personal representative of said Fitzgerald, and for making him a party to the suit. And the defendants, Fitzgerald and Neal, out of their own estates, and Smith and Scruggs out of the assets of their testator Jones, were decreed to pay the plaintiff's costs of suit. From this decree the appeal in this case was taken.

In stating the material facts of the case which apply to all the parties sought to be made liable as participants in the devastavit of the executor, the following additional facts may be worthy of observation. The executor was the brother, and probably the only brother, of the testator, who reposed great confidence in him, by appointing him his executor, and investing him with ample powers as such, over his whole estate, real and personal. The executor, as we have seen, was "a man of large property and undoubted solvency," and so continued to be until he removed from the state in 1862. Though the sale of the bonds was made by the executor in 1859, and it must have been generally known to the parties concerned that such sale had been made, and that the money had been received by the purchasers from the obligors in the bonds, yet no question appears ever to have been raised as to the liability of the purchasers, until about ten years after the purchases were made, seven years after the executor had removed from the state, and four years after the end of the war, which had reduced him to utter insolvency; and then, to wit: in 1869, they were sued, not by the creditors or legatees of the testator, nor by his administrator de bonis non with the will annexed, but by the sureties of the executor, who became such in 1861, after the suit of Luck and wife had been brought against him, and after he had been ruled to give a new

bond with surety. Even then, it appears, the executor was still "a man of large property and undoubted solvency;" 654 *and non constat, that if he had not given a new bond with sureties, he could not and would not have been compelled to account for and pay what he owed to the legatees of his testator. The sureties became such long after all the bonds for the purchase money of the land sold by the executor had become payable, and no doubt after all or nearly all of it had been actually paid. It does not appear that the legatees, or any other persons interested in the subject, have sustained any damage from the sale of the bonds; or that if the executor had received the full amount of them from the obligors, or from the purchasers, which he certainly had a right to do, he would have accounted for the same to the legatees.

Having noticed such matters of fact as are applicable to all the cases alike and seem to be material, we proceed now to make a statement in the same general way.

Secondly, as to matters of law: All the cases agree in the principle, that a purchaser from an executor, of personal property of the testator, for valuable consideration, need not inquire, and has no adequate means of inquiry, whether the condition of the testator's estate requires a sale of the property, and is not bound to see to the application of the purchase money; but may fairly presume, that the sale is rightly made, and that the purchase money will be properly applied; and that such a purchaser can only be made liable on the ground of fraudulent participation with the executor in the commission of a devastavit of his testator's estate. In other words, that the purchaser must be guilty of a fraud in that respect. The only diversity in the cases seem to have arisen from the different views of judges as to the nature of the fraud, within the meaning of the principle; that is, 655 *whether there must be actual fraud, or whether it is enough that there is implied or constructive fraud, or gross negligence on the part of the purchaser which may be equivalent to fraud. The older cases seem to have required that there should be actual fraud. Leading among them were the cases of Nugent v. Gifford, 1 Atk. R. 463; and Mead v. Lord Orrery, 3 Id. 235; decided by Lord Hardwicke; and Whale v. Booth (cited in 4 Term. Rep. 625, note), decided by Lord Mansfield. In the first named case, the executor assigned over a mortgage term of his testator to C, in satisfaction of a debt which the executor owed him; yet Lord Hardwicke held it a good alienation against the creditors and heirs. He said "the court would follow the assets in case of fraud, but not where the executor disposed of them for a valuable consideration, and without fraud; and that it would be very mischievous if the court were to control this power of alienation, as no person would venture to deal with executors." "There was no difference between the power of the executor to dispose of legal and of equitable assets." To the same effect are the other cases.

But subsequent cases have modified and restrained the extent of this doctrine in some respects: leading among them are the cases of Bonney v. Ridgard, 1 Cox R. 144, Scott v. Tyler, Dickens 712, and Hill v. Simpson, 7 Ves. 152. In the first of these cases Lord Kenyon, master of the rolls, admitted that in general the purchaser from the executor of the testator's assets was not bound to see to the application of the money; but that if upon the face of the assignment of the property, it appeared to have been made in satisfaction of a private debt of the executor, the sale was fraudulent against the persons interested under the will, and equity would relieve. It would be a 656 case of implied *fraud; and he accordingly condemned the decision of Lord Hardwicke before mentioned, and said he would have made an opposite decision in that case. In Scott v. Tyler, Lord Thurlow held that where an executor pledged bonds specifically devised, as a security for his own debt, the pawnee must deliver up the bonds for the benefit of the specific legatees. He admitted that in general the purchasers of the assets had no concern with the application of the price, and that the rule applied equally to mortgagees, bonds and leases. But if one concerted with the executor to obtain the effects at a nominal price, or at a fraudulent undervalue, or in extinguishing the private debt of the executor, or in any other manner contrary to the duty of the office of executor, the purchaser or pawnee will be liable. In this case bonds of the testator were delivered to the bankers as a security for the private debt of the executrix, and they were ordered to be delivered up and the bankers to account for the interest received; and though the bankers believed the representation of the executrix, without looking at the will, it was not sufficient to protect them. They knew that the bonds could not be so appropriated until all the debts and legacies were paid; and the chancellor must have proceeded on the ground of gross negligence or implied fraud in the bankers. In Hill v. Simpson, Sir William Grant made a similar decree, by setting aside the transfer of assets by an executor to secure his own debt under circumstances of gross negligence, though not of direct fraud in the creditor to whom they were transferred. These and other cases on the subject are fully reviewed by Chancellor Kent, in Field v. Shieffelin, 7 John. Ch. R. 150, a leading case, and one which goes very far in favor of a bona fide purchaser in such cases. That was a case 657 of *a purchaser from a guardian.

After getting through with his review, he thus concludes: "I have thus looked pretty fully into the decisions in the analogous case of a purchase from an executor of the testator's assets; and they all agree in this, that the purchaser is safe if he is no party to any fraud in the executor, and has no knowledge or proof that the executor intended to misapply the proceeds, or was, in fact, by the very transaction, applying them to the extinguishing of his own private debt. The great difficulty has been to

determine how far the purchaser dealt at his peril, when he knew, from the very face of the proceeding, that the executor was applying the assets to his own private purposes, as the payment of his own debt. The latter and the better doctrine is that in such a case he does buy at his peril; but that if he has no such proof or knowledge, he is not bound to enquire into the state of the trust, because he has no means to support the enquiry, and he may safely repose on the general presumption that the executor is in the due exercise of his trust."

In Graff &c. v. Castleman &c., 5 Rand. 195, Judge Carr, in an opinion in which Judges Cabell, Coalter and Green concurred, reviewed the cases on the subject, at the conclusion of which review, he said: "The latest English case that I have met with is Keene v. Robarts, 4 Mad. Ch. R. 332. There the vice-chancellor gives the result of an examination of all the cases, thus: 'Every person who acquires personal assets by a breach of trust or devastavit in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying or receiving as a pledge for money advanced to the executor at the time, 658 any part of the *personal assets, whether specially given by the will or not; because this sale or pledge is held to be, prima facie, consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust, by buying or receiving in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt; because this sale or pledge is, prima facie, inconsistent with the duty of an executor. I preface both these propositions with the words generally speaking, because they both seem to admit of exceptions."

Other cases on the subject have been decided by this court, but it will be necessary to notice only a few of them, which have a strong bearing upon the case now under consideration. They are, Fisher v. Bassett, &c., 9 Leigh 119; Pinckard v. Woods, &c., 8 Gratt. 140; and Cocke v. Minor, &c., supra.

In Fisher v. Bassett, the case is thus stated by the reporter: "An administrator takes a bond to himself individually for a debt due to his intestate's estate, payable at a distant day, and then sells the bond at a discount of twenty-five per cent. to an assignee, who knows that the consideration of the bond was a debt due to the intestate's estate, but is informed, and so informed, as to justify him in believing that the administrator has acquired the full property in the bond in his own right—Held, this is such a dealing with the assets of the intestate's estate, such a concurrence of the assignee with the administrator in his appropriation of the assets to his own use, as to throw the burden of proof of the fairness of the administrator's conduct on the assignee; and if the administrator had not purchased the claim from the next of kin, or had not made such advances as to justify him in appropriating it to himself, the assignee cannot in equity 659 *avail himself of the transfer." "The sale of the bond at so large a discount," said Tucker, P., "was itself prima facie a devastavit, and the burden of proof is upon Scott or Fisher, that the necessities of the estate, and not those of the administrator, required the sacrifice." He spoke of the sale as having been made "at the ruinous rate of twenty-five per cent., without evidence, as far as yet appears, of the necessities of the estate requiring such a sacrifice." Parker, J., agreed in the opinion that there was such a dealing with the assets as to render the transfer of the bond prima facie void. "When Fisher bought the bonds," said the judge, "at so much less than their value under the circumstances existing in the case, he took on himself the risk of showing either that Scott was the real owner of them, or that the necessities of the estates justified the sacrifice."

In Pinckard v. Woods, &c., the case is thus stated by the reporter: "An executor, who is also a legatee of one moiety of his testator's estate, sells the property and purchases about one-half of it himself. He takes bonds from the other purchasers of the other part of the estate, which show upon their face that they are executed to him as executor. Afterwards, he sells these bonds at a discount of from eighteen to twenty per cent., the purchaser knowing that the liabilities of the estate of the testator were very inconsiderable, and that the sale of the bonds was not necessary for any purposes of the administration. At the time of the sale the executor was solvent, and his solvency was not questioned; but he afterwards failed, without paying the legatees of the other moiety of the estate. Held, that the sale of the bonds at such a discount, when the circumstances of the estate did not require it, was a devastavit by the executor; and that the purchaser, having 660 *purchased with a knowledge of the fact, will be compelled to pay the amount of the bonds (if they do not amount to more than the devastavit of the executor) to the legatees. Or if they have been paid by the sureties of the executor, the sureties are entitled to be substituted to the rights of the legatees." Baldwin, J., delivered the opinion of the court, in which all the members of the court, four in number, concurred. He said: "It is the duty of an executor not to sell, but to collect, the debts due to the estate of his testator, including those arising out of sales of goods made by the executor in the course of his administration; and if he sells such debts at a price below their value, he thereby commits a devastavit, unless he makes it appear that such sale was manifestly required by the interests of the estate; and this he can never do without showing, in the first place, that the proceeds thereof have been applied to the purposes of the estate." * * "And the purchaser himself so acquiring such

debt at a profit, if he has reason to believe, at the time, that the same belongs to the estate, and is so disposed of by the executor for his individual uses, thereby concurs in such fraudulent breach of trust by the executor, and therefore incurs the like liability." The bonds were on their face payable to the administrator in that character. "The appellant had, therefore, the best reason to believe that the bonds belonged to the testatrix's estate when he purchased them from the administrator at a discount of eighteen or twenty per cent.; and from the profit he was thus allowed to make, he had good reason to believe that the administrator was selling them for his own individual uses, a fact which the result and the condition of the estate have abundantly shown. Under these circumstances, it was incumbent on the appellant to stay his hand until he should ascertain, by
661 *the requisite enquiries, that the sale was to be made for the purposes of the estate, and the sacrifice to be incurred indispensably necessary to prevent some still greater sacrifice." "If he had made the enquiry, he would have ascertained that the condition of the estate did not require the sale of the bonds. But, in truth, he knew it, without the necessity of enquiry," &c. "It is no valid defence for the appellant, that at the time he purchased the bonds it was his belief, and that of the public generally, that the administrator was then in solvent circumstances. Such belief may have induced him to look to the individual responsibility of the administrator as a guarantee against the failure of his speculation, and to that responsibility he must still look; and it having proved abortive, furnishes no reason for throwing the consequent loss upon those whom he has aggrieved by his intermeddling with the affairs of the estate, from no other motives than the desire of gain to himself, and careless as to its effects upon the rights of others."

In Cocke v. Minor, &c., the question was as to the liability of a purchaser from a trustee at a heavy discount (twenty per cent.) of bonds belonging to a trust fund. Judge Bouldin in delivering the opinion of the court said: "That the conversion into money by a trustee of well secured bonds belonging to a trust fund by a sale thereof at a large sacrifice, to a purchaser with full notice of the trust, does constitute such an improper dealing with, and devastavit of, the trust subject, as will render both trustee and purchaser prima facie responsible therefor, is a proposition about which, at this day, there can be no doubt;" and the cases of Fisher v. Bassett, &c., and Pinckard v. Woods, &c., supra, were referred to in support of the proposition, and fully stated in the opinion. After referring to an
662 allegation *in the answer of the purchaser, that from such information as he had he believed the trustee wanted the money for proper purposes, without stating what that information was, or, indeed, that he had any, except from the trustee himself; the court further said: "Admit it all to be true, and admitting further, what is neither shown nor even alleged, that this information was of such character as to justify the belief arrived at, still, under the principles established in the cases referred to, that belief, however it might acquit him morally, would not be enough to discharge him from legal responsibility. He was acting at his own risk, and would be bound to show that what he thus believed was in fact true. Vague impressions of that character cannot be received as a ground on which the right of others are to be bartered away."

The case of Hunter v. Lawrence's adm'or, &c., 11 Gratt. 111, is an important case, and was much referred to in the argument. There may be occasion to state the purport of it, but for the present, at least, it is not deemed necessary to do so.

We will now consider the case of each of the said three parties, Neal, Jones and Barksdale, separately; and,

First, as to Neal. His case comes within the principle laid down in the cases of Fisher v. Bassett, &c., Pinckard v. Woods, &c., and Cocke v. Minor, &c., and he is clearly liable for the amount of the bonds purchased by him, unless he is discharged from such liability by laches and lapse of time, or his certificate in bankruptcy, a question which will be considered presently. He was not guilty of actual fraud in making the purchase; but, according to the cases referred to, he was guilty of constructive fraud, which was sufficient to implicate him as a participant in the devastavit,
663 certainly *committed by the executor. The bond was payable to the executor in that character, which gave express notice to the purchaser that it belonged, in its origin at least, to the testator's estate; and he bought it from the executor at a discount of eighteen per cent. Nothing but the necessities of the estate could have justified the executor in making such a sale, unless the bond had become the individual property of the executor by his advancements made on account of the estate or otherwise. To be sure, the purchaser did not know the condition of the estate, and was informed, and no doubt believed, that the estate was indebted to the executor, and that the sale was made on that account. But the purchaser, having made the purchase under the circumstances aforesaid, made it at his peril, and subject to the risk of the sales having been properly made, or of the amount of the bonds being fully accounted for by the executor to the estate. Neither of which turned out to be the case. If he had made enquiry before he made the purchase, he could easily have ascertained that the sale would be a breach of trust and a devastavit by the executor. He ought to have made such enquiry, but he did not do it. He relied on the solvency of the executor, and his ability and willingness to make everything right; and he did not think it worth while to trouble himself in making enquiries about the estate. Having been disappointed in that expectation, he cannot justly com-

plain that he must be regarded as particeps criminis in the wrong of the executor. In a controversy involving the question of a devastavit by the executor in a sale of bonds belonging to his testator's estate, and of the participation of the purchaser therein, the burden of proof devolves on the purchaser to show that the duty of the executor required the sale on the terms on which
664 it *was made, or that the bonds belonged to him individually, or at least that he has fully and properly accounted for the amount of the bonds, &c., to the persons entitled thereto. We cannot distinguish this case from that of Pinckard v. Woods, &c., upon the question whether the purchaser participated in the devastavit committed by the executor in the sale of the bonds; and we therefore decide that he did so participate, and is liable accordingly, unless he is discharged from such liability by laches and lapse of time, or his certificate in bankruptcy. Whether he be so discharged or not, we will now enquire; and

1st, as to laches and lapse of time. Upon this question we have had some difficulty. The sale of the bonds was made in 1859. The executor was then a man of large property and undoubted solvency; and so continued to be till he removed from the state, in 1862. There can be no doubt but that during that period he had ample means to pay the amount of the bonds, and could have been compelled to do so, either by the legatees, or by the purchasers, if the former had claimed to hold the latter liable. If the appellees, Clark and Holland, had not become sureties of the executor in his new executorial bond, it is not improbable that the executor would have been compelled to account for and pay the amount with which he was chargeable to the legatees. Had Luck and the said sureties who caused the executor to be held to bail in Luck and wife's suit, in November 1862, enforced the liability of the sheriff and his securities for taking insufficient bail, the debt of the executor to the estate of his testator might, in that way, have been satisfied. It does not appear and it is not probable that it was pretended by anybody that the purchasers of any of them had incurred any
665 *liability to the legatees, or anybody else, by reason of their purchases, until about the time the suit was brought against them by Clark and Holland, in 1869, nearly ten years after the purchases were made, and seven after the executor had removed from the state. Nor does it appear that during that period an idea of any such liability occurred to any of the said purchasers. It does not appear that they concealed the fact that they had become such purchasers, or that the fact was unknown to the public. Shortly after the maturity of the bonds respectively, or those assigned to Neal (the one assigned to Barksdale having been paid), actions were brought upon them and judgments recovered in the County court of said county, in the name or for the benefit of said Neal or said Jones. It must have been known both to the legatees and the sureties, Clark and Holland, at least before the said executor was held to bail as aforesaid, that he had received, or become accountable for the amount of said bonds. If the executor had not sold the bonds he would no doubt have collected them at or after maturity, and the same loss would probably in that case have occurred as has actually occurred to the legatees or sureties, on account of the default of the executor in regard to the said bonds. It may reasonably be said, therefore, that the loss is due rather to the laches and neglect of the legatees or sureties, or both, than to the acts or defaults of the purchasers.

But in view of all the circumstances of the case, we have concluded that the purchasers, if they have made themselves liable on account of their purchases, ought not to be discharged from such liability by reason of the supposed laches and neglect of the legatees and sureties. If they are liable, it is because they are wrong-doers, and
666 they cannot thus apportion their *own wrong, or escape liability therefor by thus throwing the loss upon those who have been guilty only of neglect at most. The purchasers ought to have taken care of themselves, and not to have trusted, as they did, to the ability and willingness of the executor to save them. One of the legatees continued to be an infant until after the institution of the suit against the purchaser, and to her, at least laches is not imputable. The intervention of the war, the existence of stay laws, and the legal suspension from time to time, of the act of limitations, seem to obviate the effect of lapse of time in the case. In Pinckard v. Woods &c., the court said: "Nor does the statute of limitations afford protection to the appellant, for the appellees have no remedy but in equity, which will not allow its application to such a case as this." The same may, perhaps, as well be said in regard to the defense of laches and lapse of time in this case.

2ndly, as to Neal's certificate in bankruptcy. The 33d section of the Bankrupt Act declares, "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, should be discharged under this act." The purchaser, Neal, can be made liable in this case only upon the ground of his having fraudulently participated with the executor in a devastavit committed by the latter. He must, therefore, have been guilty of fraud, to make him liable. A debt due by him on that account must be a debt created by fraud; whether the fraud be actual or implied. The act does not say "actual" fraud, or "moral" fraud; or qualify the word by any other adjective. It uses only the generic word fraud, which we must construe in its general sense, unless the context require a different construction, which we think it does not. Certainly
667 *if the purchaser had actually colluded with the executor to commit a devastavit, his fraud would have come within

the meaning of the act. Why does it not come within the meaning, as it certainly does within the letter of the act, when he has so dealt with the executor, in regard to the assets of his testator, as to make him liable for the amount of those assets, upon the ground of his having been guilty of an implied or constructive fraud? It has precisely the same effect with actual fraud, in regard to the measure of his liability therefor. Why has it not the same effect in regard to his discharge in bankruptcy? Can this question of discharge be made to depend upon the degree of aggravation of the fraud? We therefore think that this is a "debt created by the fraud of the bankrupt," within the meaning of the bankrupt act, and that it is not discharged under the said act. This makes it unnecessary to decide, and we do not decide, whether it is a debt created by the bankrupt while acting in a fiduciary character, in the meaning of the act.

It may be proper, in this connection, to notice further the case of Hunter v. Lawrence's adm'r, &c., before referred to, in which it was held that even if the party who had received the bond from the guardian in that case could be made responsible to the ward, he was not responsible to the sureties. From which it may be, and indeed was, argued in this case that the purchaser, even though answerable to the legatees, is not answerable to the sureties. It seems to be a sufficient answer to that view to say, that the party who had received the bond from the guardian in that case was guilty of no fraud, actual or constructive, and was a bona fide purchaser for full value and without notice. In Pinckard v. Woods, &c., the suit was by the sureties, who had paid the amount of the bonds 668 to the legatees; and this *court held that the sureties were entitled to be substituted to the rights of the legatees. For the same reason, they would have been entitled before payment, to maintain a suit quia timet.

Secondly, as to Jones. His case differs from that of Neal in several important respects. Like Neal, he considered the executor a man of large property and undoubted solvency, and that he would be able and willing to meet all his engagements; and, like Neal, he knew nothing about the condition of the testator's estate, nor whether its emergencies were such as to require or authorize the executor to sell the bonds of the testator at a discount. But, unlike Neal, he did not deal with the executor, nor see how the executor could have anything to do with the sale of the bonds by Neal to Jones. There was no connection nor understanding between Neal and Jones in regard to the purchase of the bonds by Neal from the executor. They were certainly not so purchased for Jones, nor, so far as the record shows, with his knowledge; nor had Jones any interest whatever in that purchase. He found the bonds in the hands of Neal, with an assignment thereon to him from the executor, expressed to be for value received. Neal proposed to sell them to him; and believing, and having good reason to believe, that they belonged to Neal, and that Neal had a perfect right to sell them, he accordingly bought them at a moderate discount, and they were regularly assigned to him "for value received" by Neal; and, after their maturity, he promptly brought action upon them for his benefit, and recovered judgment for, and received the money, without being questioned by any body as to his right to do so until 1869, when this suit was brought.

When Jones bought the bonds of 669 Neal he did not *know on what terms Neal had acquired them from the executor. They might, for aught he knew, have been assigned at their par value, in payment of a debt due by the testator's estate to Neal; or the emergencies of the estate might have required them to be sold at their market value by the executor; or they might have become the property of the executor in payment of a debt due to him by the estate or the legatees, or of advances made by him for either of them. That they were payable to the executor as such, did not show that he did not part with them lawfully. The legal title to them was vested in him, and he had the right, and it might have been his duty, to sell them, as it certainly would have been to collect them at maturity, if not sold before. The duty of a purchaser from an executor, of a bond payable to him as such, to make enquiry as to the propriety of the sale does not arise from the fact that the bond is so payable. The only effect of that fact is to inform him that the bond is a part of the assets of the testator. And an executor may lawfully sell the assets, whether they consist of a bond or anything else; and a fair purchaser cannot be held responsible, though he make no enquiry as to the propriety of the sale. That is a question to be decided by the executor, to whose discretion the testator and owner of the property has referred it, and persons may lawfully trust him, and purchase assets from him without any enquiry, if the conduct of such persons in the transaction be fair. Confidence being placed in the trustee "by the person who had the sole right to dispose of the property at his will," as was said by Marshall, C. J., in Garnett v. Macon &c., 2 Brock. 185, 231, "no other can question the correctness of his proceeding, or can be justifiable in suspecting an intention to violate the trust. He has 670 no *right to suspect that the person who has been selected by the testator for its execution, will violate the trust reposed in him, and no collusion between him and the trustee ought to be implied from equivocal acts." Davis v. Christian, &c., 15 Gratt. 11, 46.

If a person buying a bond from an executor, payable to himself as such, have good reason to believe that the executor intends to misapply the proceeds of sale, and thus commit a devastavit, it is incumbent on him to stay his hand, until he can ascertain by the requisite enquiries that the sale

is to be made for the purposes of the estate, and is such a one as the executor may make consistently with his duty. If such a bond be offered to be sold by an executor at a heavy discount, as, for instance, eighteen or twenty per cent., that fact affords to the person, to whom the offer is made, good reason to believe that the sale is intended to be made for the use of the executor, and not for the benefit of his testator's estate; and such person cannot safely make the purchase until he has first ascertained that it will be proper for the executor to make the sale. It has been decided in no case that a sale of a bond, at a discount however small, will afford sufficient reason to believe that a devastavit is intended by an executor. A sale of a bond at par, or abating only the legal discount for the time the bond has to run to its maturity, would certainly afford no reason for believing that a devastavit is intended; nor, we imagine, would a very small additional discount. It is often to the interest of an estate, and agreeable to the legatees, for such a sale to be made, especially in a case in which a bond has a long time to run. Suppose a bond, which would probably have to be collected by suit, is sold at a discount, not more than equal to the ordinary expenses of collecting such a bond, would such
671 a sale be a devastavit *in the executor? The rule in regard to the sale of any property by an executor, including, we suppose, as well bonds as other property, is that if it be sold at such a gross undervalue as to afford good reason to believe that the executor intends to commit a devastavit, the purchaser will buy at his peril, and ought, for his own safety, to make the necessary enquiries. But who can say that a sale of a bond at a very small discount, the smallest at which it could possibly be sold, would be a sale at a gross undervalue? In the three cases before referred to, which are the only cases we have seen on the subject of a sale of bonds by an executor, the sale was spoken of as at a "sacrifice," and sometimes as at a "ruinous sacrifice." In Fisher v. Bassett, &c., the sale was at a discount of twenty-five per cent. In Pinckard v. Woods, &c., it was at a discount of eighteen to twenty per cent. In Cocke v. Minor, &c., it was at a discount of twenty per cent. In this case, the sale to Neal was at a discount of at least eighteen per cent. But the sale by Neal to Jones was at a very small discount; not as much probably as one-half of the last named sum; and Neal proves that it was low. If therefore the bonds had been bought by Jones of the executor, instead of Neal, we could not say that the bonds were sold at a gross undervalue, or at a sacrifice. Both of the bonds had some time to run when sold, and one of them, the larger, more than a year. Actions had to be brought upon both of them. A ong time elapsed before they were collected; and, after paying the expenses of collection, Jones probably received but little if any more than six per cent. interest on his money. To make him now pay the whole amount of the bonds with interest till payment, would be to impose a very heavy penalty upon him, certainly one exceeding his offense, whatever that may be, and
672 far *exceeding any loss which anybody can have sustained from his act, for nobody, in fact, can have sustained any such loss at all. The cause of the loss was complete before Jones became a purchaser. But Jones did not buy the bonds from the executor, and therefore does not come within the principle of the cases referred to. He was a bona fide purchaser for value and without notice from Neal, who was apparently a bona fide assignee for value from the executor, and had possession of the bonds, and duly assigned and delivered them to Jones. He, Jones, gave full value for them, as much as could possibly be gotten in the market, and had no notice whatever of any imperfection in the title. He obtained judgments on the bonds, and collected the money without any question as to his title. Having the legal title to and possession of the subject, and at least as much equity as anybody else can have. there can properly be no recovery against him on account of the bonds. The only evidence which can be said to tend to implicate him in the breach of trust of the executor is, that Neal was in the habit of buying bonds at a greater discount than legal interest, and that Jones knew the fact. A vague suspicion arising from such a circumstance, is certainly not constructive notice, much less is it sufficient to make out a case of constructive fraud. If Jones was bound to make enquiry, so also would have been any subsequent assignee, however remote, and even the obligors themselves, in order to be safe in paying the bonds. An assignee of a bond for value and without notice, takes it subject to all equities of the obligor, but not to any equity of a third person; and even the equities of the obligor must be asserted in due time, and before the recovery and collection of the money.

We therefore think the decree against
673 Jones' executors *is erroneous, and that as to them the bill should have been dismissed.

Thirdly, as to Barksdale. A bond of Raleigh White for $1,000, dated the 19th day of May, 1858, payable on the first day of July 1859, to Edmund Fitzgerald, Jr., executor of William Fitzgerald, Jr., being one of the bonds given by White for the land bought by him of said executor, was, on the 21st of March, 1859, assigned by the said executor to said Barksdale, who paid the full amount of the bond to the said executor, abating legal discount for the time the bond had to run, and deducting five per cent. on the balance; and on the day after said assignment, to wit: the 22nd of March 1859, the amount of said bond was paid by said White to said Barksdale, abating only the legal discount as aforesaid. Barksdale says in his answer, that "the said assignment was made to enable this respondent to collect the said bond. The said Edmund

Fitzgerald and Raleigh White were upon unfriendly terms. The said White was a singular man, and preferred the bond to be assigned to this respondent. This respondent agreed to collect the bond for a commission of five per cent.," &c. "The said Edmund Fitzgerald was at that time possessed of a good estate, and in good credit, and this respondent had no suspicion that he intended to misapply the assets of his testator." "This respondent was, and is at this time, a practicing attorney, and supposed that he had a perfect right to collect any debt for the said Edmund Fitzgerald, and pay it over to him," &c. The foregoing is the substance of the transaction, as stated in the answer of Barksdale, upon which statement the question of his liability depends. The court below decreed that he was not liable, and dismissed the bill with costs as to him, and we think there is no error in the decree in
674 *that respect. There was no contrivance between the executor and Barksdale to commit a devastavit in regard to the bonds of White. If White had paid the money directly to the executor, instead of paying it through Barksdale, that would certainly have been a lawful payment; and yet the same loss would in that case have occurred as has occurred to the estate from the conversion of the money to the executor's own use. But the executor and White were on unfriendly terms, and the latter preferred not to settle the matter with the executor in person. Barksdale, an attorney, was therefore employed by the executor, on the usual terms, to collect the bond; and White, being "a singular man," preferred that the bond should be assigned to Barksdale; no doubt considering that that would be the best evidence of Barksdale's right to receive the money. This may have been an unreasonable and awkward mode of settling the matter, but certainly the evidence is not sufficient to convict Barksdale of a fraud; which is necessary to make him responsible as a party to the devastavit of the executor. A fraud should not be presumed, but must be plainly proved. The most that can be said of the evidence is, that it may raise a question, whether the five per cent. allowed to the attorney for collection ought to be allowed as a credit to the executor in the settlement of his account. Even if the transaction be considered as a sale of the bond by the executor to Barksdale at a discount of five per cent., it does not follow that Barksdale committed a fraud, actual or constructive, which would render him liable; as what we have already said in regard to Neal and Jones sufficiently shows.

There are some technical questions in this case which ought to have been before noticed; but as they were not, they will now be briefly disposed of.

675 *1st. We think the court erred in striking out the demurrer to the bill, which was sufficient in form and substance. Code of 1860, p. 712, § 30, and p. 752, § 1. But this error was not to the prejudice of the defendants, as they were entitled to all the benefit at the hearing which they could have derived from action on their demurrer.

2dly. The bill was not multifarious. It was filed by the sureties of an executor against the executor and the different purchasers from him, to compel them to account for the assets of the testator in regard to which it was charged that the executor had committed a devastavit to which the purchasers were parties. It was obviously proper, and indeed necessary, that they should be united in the same suit, though the purchases were different.

3dly. The bill is not a cross-bill, but an original bill, quia timet; which the sureties had a right to file, though they had paid nothing, and nothing had been recovered against them, as such. They had been made parties to the suit brought by the legatees against the executor, and a decree was about to the obtained in that suit against both principal and sureties. In this state of danger and apprehended loss, the sureties, considering the purchasers of the bonds from the executor liable to account for the same, by reason of their fraudulent participation in a devastavit charged to have been committed by the executor in regard to the sale of the bonds, had an unquestionable right to file their bill, quia timet, against the said executor and purchasers, to compel them to pay the amount for which they might be liable as aforesaid, in ease and exoneration of the sureties.

4thly. Though the bill of the sureties was an original, and not a cross-bill; yet
676 the court did not err, in *regarding the proceedings in the suit of the legatees against the executor and his sureties as evidence in the suit of the sureties against the executor and purchasers. The record in the former was made an exhibit in the latter suit, and the purchasers were called on in the latter suit to aid the sureties in the defense of the former suit, in which the executorial accounts had not been finally settled, nor any depositions taken. There was a prayer in the bill in the latter suit that both cases might be heard together, and that any decree which might be rendered in the former suit, in favor of the legatees against the sureties, might be rendered first to be satisfied by the purchasers, to the extent of any amount of testator's assets which they, or either of them, might have illegally acquired. And though the cases were not actually heard together, yet they might, and no doubt would, have been if any party had desired it. No objection was made to the proceedings in the former suit as evidence in the latter until the case came before this court; when it was too late to make the objection for the first time. If it had been made in the court below, it would at once have been obviated by retaking in the latter suit the accounts and depositions which had been taken in the former.

5thly. Coalman D. Bennett, administrator de bonis non, with the will annexed, of William Fitzgerald, having died before the

final decree was rendered, and all the debts of said testator's estate having been paid or provided for, and there being nothing due to it, except what was recovered in this suit, the court did not err in making a final decree without having a personal representative of said testator's estate before the court.

Having noticed and disposed of all
677 the questions, *both of form and substance, arising in the case, we think the decree appealed from ought to be reversed in part and affirmed as to the residue, in conformity with the foregoing opinion.

The decree was as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that Richard Jones, the testator of the appellants Langhorn Scruggs and Mansel T. Smith, did not participate in, nor become accountable for, any devastavit committed by the appellee Edmund Fitzgerald, executor of William Fitzgerald, deceased, of the assets of the latter in regard to the bonds of Archer B. Womack and James M. Adams to said Edmund Fitzgerald, executor as aforesaid, assigned by him to Griffith D. Neal, and by said Neal to said Jones, and in the decree appealed from mentioned; that the said Scruggs and Smith, as executors of the said Jones, are not liable to pay the amount of the said bonds or any part thereof, out of the assets of their said testator or otherwise, to any person or persons whomsoever; and that the said decree so far as it is in conflict with the foregoing opinion, is erroneous; but there is no other error in the same. Therefore it is decreed and ordered, that the said decree, so far as is above declared to be erroneous, be reversed and annulled; that in all other respects it be affirmed; and that the appellees, Clark and Holland, pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this court proceeding to render such decree as the said Circuit court ought to have rendered, in lieu of so much of the decree of said court as is hereby reversed as aforesaid, it is further decreed and ordered that the

bill of the complainants in the court
678 below be dismissed as *to the said Jones and his said executors; and the said complainants pay to the said executors the costs by them and their said testator about their defense in this suit in the said Circuit court expended.

Which is ordered to be certified to the said Circuit court of Pittsylvania county.

After the decision of the case, Neal and Clark and Holland applied for a rehearing; when the court made the following order:

The court, in view of the "novelty and great importance" of the question mentioned in the petition of Griffith D. Neal, as to the "effect of his discharge in bankruptcy in bar of the demand preferred against him" in this cause, is of opinion that the case ought to be reheard upon that single point before a full court; but the court is of opinion that the case ought not to be reheard upon any other point arising in the cause. Therefore it is ordered that a rehearing be granted upon the first named point as aforesaid, but that the petition for rehearing be denied in all other respects.

The rehearing was before a full court, and was argued by Carrington and Page, for Neal, and J. Alfred Jones, for Clark and Holland.

MONCURE, P. This case now comes up for decision on a rehearing granted on a single point, viz: as to the effect of the discharge in bankruptcy of Griffith D. Neal in bar of the demand preferred against him in this cause. It has been ingeniously and elaborately argued by counsel, and, my opinion upon it, in addition to what is said on the same subject, in the opinion of the court already delivered in the case, is as follows:

Neal was decreed to be liable for the demand, on the ground that he fraudulently participated in a devastavit
679 *committed by Edmund Fitzgerald, executor of William Fitzgerald, in the sale of certain bonds due to the said testator's estate, and payable to the said executor as such, which bonds were purchased of the said executor by the said Neal at a heavy discount, not warranted by any emergency of the estate; the proceeds of which discount were converted and applied by the said executor to his own use.

The only ground on which a purchaser can be made liable in such a case, according to the authorities referred to in the said opinion, is that of fraud. By fraudulently participating in the devastavit of an executor he commits a fraud, which makes him liable for the value of the wasted assets to those who are injured by the waste.

Neal has been declared a bankrupt, and has received a certificate of discharge in bankruptcy, which he contends entitles him to protection from this demand.

On the other side, it is contended that this case comes within the 33d section of the act of bankruptcy of 1867, which provides, "that no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act." The debt in this case having been created by the fraud, and only by the fraud of the bankrupt, it is contended that the case comes within the literal terms of the act of congress.

In reply to this view, it is contended in behalf of Neal, that though the debt was created literally by the fraud of the bankrupt, yet it was not such a fraud as the act of congress contemplates. It was only an implied or constructive fraud, and not an express or actual fraud, which latter alone, it is contended, is within the contemplation of the act.

680 *For this court so to construe the act, would be, I think, to take great liberty with its language, and would be judicial legislation. There is nothing in the act to warrant such a limitation of the

meaning of a plain word, which congress did not see fit to limit in terms, as it might easily have done, and no doubt would have done, if it had intended to use the word in a limited sense. Having used the word generally, I think it ought to be construed in its general sense, and as embracing both actual and constructive fraud. They belong to the same family, and differ only in degree. They both possess one common feature of criminality or culpability. It could not have been contemplated that the court should, in every case, have to enquire into and ascertain the degree of the fraud, in order to determine whether it comes within the meaning of the 33d section of the act of bankruptcy. Congress would have said "actual fraud," if it had so intended, in contradistinction to "constructive fraud;" but it seems not to have contemplated any such distinction or classification.

It is argued by the learned counsel for Neal, that because the words, "while acting in any fiduciary character" in the said section have been construed not to include an implied or constructive trust, therefore the word "fraud," in the same section, should be construed not to include an implied or constructive fraud. But this, I think, is plainly a non sequitur.

The words, "while acting in any fiduciary character" or "capacity," occurred in the bankrupt act of 1841, and there they followed certain enumerated cases of trust. They were therefore construed, as intended to be confined, to trusts of a like description with those expressly enumerated in the same connection. That construction
681 was well settled while that *act was still in force. In the act of 1867, the general words, "while acting in any fiduciary character" were retained, without repeating all the specific enumerations of trust which had preceded those words in the act of 1841: such as "executor," "administrator," "guardian" or "trustee." The general words having received a settled construction, which made them embrace the said specific enumerations, and at the same time exclude cases of implied or constructive trust, it was considered sufficient to use them alone in the act of 1867, and under that act they have received the same construction which they had received under the act of 1841. They brought that same meaning along with them into the new act, although they did not bring also with them all their old associates.

I have examined the cases referred to by the counsel in support of his argument, except one or two to which I could not obtain access, and they fully confirm my view of the case.

In Chapman v. Forsyth &c., 2 How. U. S. R. 202, decided by the Supreme court of the United States in January 1844, the case arose under the act of 1841, and Mr. Justice McLean delivered the opinion of the court. It was held that a factor who receives the money of his principal is not a fiduciary, within the meaning of the act. "If the act embraces such a debt," said the court, "it will be difficult to limit such an application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a dis-
682 regard *of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied but special trusts, and the 'other fiduciary capacity' must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not therefore within the act."

In Williamson v. Dickens, 5 Ired. L. R. 259, decided by the Supreme court of North Carolina, in December 1844, the same year in which was decided the case just referred to, the case also arose under the act of 1841, and the opinion of the court was delivered by Nash, J. It was held that the words, "fiduciary character" in the act extend only to special trusts, and not to implied trusts, such as those of agents, factors, &c. "What," said the judge, "is the fiduciary character or capacity embraced by the act? Does it extend to all cases in which money has been received to the use of another? If so, few debts would be left on which the law would operate; for in all such cases the money is received in faith or trust to be paid over; in other words, in a fiduciary capacity. Surely it could not have been the intention of the national legislature, in passing an act with a view to the relief of bankrupt debtors, to restrict its operation. But the act shows us itself what was meant in the use of the words 'other fiduciary capacity.' Taken in connection with the words preceding them, it is evident that only such trusts were meant as are special, and not simply implied, as 'the defalcation of a public officer,' or of an 'executor,' or 'administrator.' Upon the principle then of reddendo singula in singulis, the
683 words 'other fiduciary capacity' *must refer to trusts of the same class, to wit, special and not implied trusts."

These are the only cases to which we are referred arising under the act of 1841. We are referred to several arising under the act of 1867.

In Cronan v. Cotting, 104 Mass. R. 245, decided by the Supreme court of that state in March 1870, the case arose under the act of 1867, and Wells, J., delivered the opinion of the court. It was held that the phrase "fiduciary character" in the act does not include the obligation of a creditor to whom the debtor delivered property, with directions to sell it and apply in satisfaction of the debt so much of the proceeds as might be necessary for the purpose, and to pay over to the debtor a balance of the proceeds

of the sale remaining after such satisfaction; but, it seems, implies a fiduciary relation existing previously or independently of the particular transaction from which the excepted debt arises. "If the phrase, 'while acting,' &c.," said the court, "be referred to that which immediately precedes, it implies something in the nature of a defalcation. If it be referred to the first branch of the provision, its association with fraud and embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or at least breach of trust. The debt in this case arose exclusively out of a single transaction between the parties. Its creation involved no element other than that of contract. The existence of the liability did not spring from any breach of trust. The only default consisted in the non-payment of the balance due to the plaintiff after satisfying the purpose of the pledge." * * "It is simply a debt by contract, like any other which results from the rightful possession of money that belongs to another. We 684 are of opinion, therefore, *that this debt does not come within the meaning of the clause of the bankrupt act above quoted." The court then referred to the construction which had been put by the Supreme court of the United States on the same words used in the act of 1841, and concluded that this provision of the act of 1867, was framed in view of and with the intent to adopt the same construction.

In Jones &c. v. Knox, 46 Alab. R. 53, decided in 1871, it was held, among other things, that the liability of the surety of a guardian is not of a fiduciary character from which the discharge in bankruptcy of the surety does not release. The judge in his opinion in this case uses this language, which is quoted in the argument of the counsel for Neal, and on account of which, no doubt, the case is referred to: "The exception from discharge under the thirty-third section of the law, of debts created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, from its very comprehensiveness, conveys as a reason for the exception the idea of some moral turpitude or culpable neglect of duty." * * "The sureties of a guardian," proceeds the judge, "have no control of his conduct. Their obligation is entirely different from his. They undertake to pay money on his account, while he, in addition, engages to be honest and faithful and careful. It is for failure in this latter respect that the law refuses to release him from his debt. The liability of the sureties was not of a fiduciary character."

In Flanagan v. Cary, 37 Texas R. 67, decided in 1872-3, the case was this: On a replevin bond for certain slaves claimed by heirs adversely to L. and wife, F. became surety for L. and wife, and 685 from *them obtained possession of the slaves as an indemnity against his liability on the bond. Pending the litigation between the heirs and L. and wife, F. retained the possession and use of the slaves, and in the meantime purchased from two of the heirs their undivided interests in the slaves. The heirs recovered judgment against L. and wife for the slaves, and demanded them from F., who refused to surrender them except upon terms not conceded by them; and they then (in January 1865) sued F. for the value and hires of the slaves. This suit was protracted until the enactment of the bankrupt law of 1867, under which F. obtained a discharge from his debts, and pleaded the same in bar of the suit. It was held that though F. may have been indebted to the plaintiffs for their proportion of the hires of the slaves which accrued prior to emancipation, yet his indebtedness was not tortious or fraudulent within the meaning of the 33d section of the bankrupt act, and therefore his discharge was a bar to the action. "We see nothing in the possession of these slaves on the part of the appellant," said Walker, J., "which can be regarded as tortious or fraudulent. His possession of the slaves, after his purchase of an interest in them, was that of one tenant in common. He was liable to his co-tenants for their share of the rents, issues and profits of these slaves, and incurred a debt to them, which might have been proved under the bankrupt law." "To bring a case within the rule of fraud, as provided in section 33 of the General Bankrupt Law, it is well stated in Re Whitehouse, 4 B. R. 15, that where the record of the action shows a material and traversable allegation of fraud as its sole foundation, the demand or debt may be said to be one founded in fraud. The lia- 686 bility of *the appellant for the hire of the slaves did not depend upon good or bad faith."

I have noticed all the cases referred to which are accessible to me, and they are all cases mainly, if not entirely, in regard to the construction of the words, "while acting in a fiduciary capacity," and having little or no reference to the construction of the word "fraud" in the bankrupt act. Certainly the construction of that word is not directly involved in any of the cases, and it is very clear that not one of them was considered to be a case of fraud, while it was contended in regard to each one of them that it was a case coming within the words, "while acting in a fiduciary capacity" in the meaning of the act. These cases therefore can have little or no application to the question we are now considering as to the true construction of the word "fraud" in the act.

The words "No debt created by the fraud or embezzlement of the bankrupt," were not in the act of 1841, but were introduced for the first time into the act of 1867; and therefore it is, that we have few or no decisions in regard to the construction of those words, if, indeed, there be any room for construing them. There is a case referred to in 37 Texas 67, 72, supra (in Re Whitehouse, 4 B. R. 15), in which it is said to be stated, as before mentioned, "that where

the record of the action shows a material and traversable allegation of fraud as its sole foundation, the demand or debt may be said to be one founded in fraud." This is the only reference I have seen to any case in regard to the meaning of that word in the act, and I have not access to the book containing it. But if that case does not tend to show that the fraud in the case now under consideration comes within the 687 meaning of *section 33 of the act of 1867, I think it certainly does not tend to show the contrary.

But without referring to any other authorities, I will again refer to one which is a binding authority, and is conclusive of this case in all its aspects—I mean Pinckard v. Woods, &c., 8 Gratt. 140. That was a unanimous decision of this court; Cabell, P., being absent. It is in all its material features as much like this case as one case can well be like another. Baldwin, J., delivered the opinion of the court. It is so strong, and to the point, that I cannot do better than again to repeat some portions of it.

"It is the duty of an executor," he said, "not to sell, but to collect, the debts due to the estate of his testator, including those arising out of sales of goods made by the executor in the course of his administration; and, if he sells such debts at a price below their value, he thereby commits a devastavit, unless he makes it appear that such a sale was manifestly required by the interests of the estate; and this he can never do without showing, in the first place, that the proceeds thereof have been applied to the purposes of the estate. The appropriation by the executor of the proceeds of such a sale, to his own individual uses, presents the case of a fraudulent breach of trust on his part, for which, of course, he is personally liable to creditors, legatees and others, injuriously affected by such improper diversion of the assets. And the purchaser himself, so acquiring such debt at a profit, if he has reason to believe at the time that the same belongs to the estate, and is so disposed of by the executor for his individual uses, thereby concurs in such fraudulent breach of trust by the executor, and therefore incurs the like liability.

"In this case the bonds purchased 688 by the appellant *from Newbill, the administrator with the will annexed of Mary Crafton, deceased, were executed by the obligors for the prices of certain slaves belonging to her estate and sold by the administrator under the authority of her will; which bonds are on their face payable to Newbill, in his character of administrator. The appellant had, therefore, the best reason to believe that the bonds belonged to the testatrix's estate when he purchased them from the administrator at a discount of eighteen or twenty per cent.; and, from the profit he was thus allowed to make, he had good reason to believe that the administrator was selling them for his own individual uses; a fact which the result and the condition of the estate have abundantly shown. Under these circumstances it was incumbent upon the appellant to stay his hand until he should ascertain, by the requisite enquiries, that the sale was to be made for the purposes of the estate, and the sacrifice to be incurred indispensably necessary to prevent some still greater sacrifice. He must have known that it was not in the usual course of administration for an executor to sell debts due the estate at a sacrifice, and he was bound to know that such a sale cannot be tolerated unless under very peculiar emergencies of the estate. If he had made the enquiry he would have ascertained that the condition of the estate did not require the sale of the bonds.

"It is no valid defence for the appellant, that at the time he purchased the bonds, it was his belief, and that of the public generally, that the administrator was then in solvent circumstances. Such belief may have induced him to look to the individual responsibility of the administrator as a guarantee against the failure of his speculation, and to that responsibility he must still look, and its having proved ab- 689 ortive, furnishes no reason *for throwing the consequent loss upon those whom he has aggrieved by his intermeddling with the affairs of the estate, from no other motive than the desire of gain to himself, and careless as to its effects upon the rights of others.

"Nor does the statute of limitations afford protection to the appellant; for the appellees have no remedy but in equity, which will not allow its application to such a case as this."

What was said of Pinckard in that case might, as well, be said of Neal in this. It might well be said to him, "nomine mutato de te fabula narratur."

If the learned judge had been writing an opinion in this case, instead of that, he would have used almost identically the same language that he used in that. The case is an express authority, to show not only that Neal participated in the devastavit, and concurred in the fraudulent breach of trust committed by the executor Fitzgerald, and therefore incurred a like liability, but also that he thereby committed a fraud within the meaning of the thirty-third section of the bankrupt act of 1867. And by the express terms of the act, "no debt created by the fraud of the bankrupt shall be discharged under this act." If that be not a fraud in the meaning of the section, I know not what would be. If it be said for Neal that at the time he purchased the bonds, it was his belief and that of the public generally that the executor was then in solvent circumstances, and that a loss to the estate by his future insolvency was not apprehended, the same was said for the appellant in Pinckard v. Woods, and the same answer may be given here that was given there, "It is no valid defense," &c. If it be said for Neal that he was informed and believed that the estate was indebted 690 to *the executor, who had therefore a right to sell on his own account, it

may be answered, as was said in that case, that it was the duty of Neal before he purchased of the executor bonds payable to him as such, at a ruinous sacrifice, to have staid his hand and made enquiry, by which he would easily have ascertained that the executor was in debt to the estate, and intended to convert the bonds to his own use. If the unfounded belief of Neal, who did not choose to make the proper enquiries to inform himself of the facts, can have the effect to palliate his moral offense, it cannot relieve him of the legal consequences of the fraud of which he is plainly guilty. If there be any error in the opinion heretofore delivered by the court in this cause it is only in calling the fraud a constructive instead of an actual fraud; but surely that is not an error to the prejudice of Neal, who cannot therefore justly complain of it.

I am of opinion that it is a fraud within the meaning of the thirty-third section of the bankrupt act, and therefore that the decree heretofore rendered by this court against him should be re-affirmed.

CHRISTIAN and STAPLES, Js., concurred in the opinion of MONCURE, P.

ANDERSON, J. concurred in the result of it.

BOULDIN, J. dissented.

The decree on the rehearing was as follows:

The court is of opinion for reasons stated in writing and filed with the record, that the demand recovered against the said Griffith D. Neal by the decree appealed from in this case, is a debt created by the fraud of the said Neal, within the meaning
691 of the thirty-third *section of the act of congress approved March 2d, 1867, entitled "an act to establish a uniform system of bankruptcy throughout the United States"; and that the said debt is not discharged under the said act. Therefore it is decreed and ordered that the said decree appealed from, and the decree rendered by this court in this cause on the 7th day of January 1875, be both re-affirmed upon the point as to the effect of the discharge of the said Neal in bankruptcy in bar of the demand preferred against him in this cause, on which point a rehearing was granted by an order made in this cause on the 15th day of February, and such rehearing has been had accordingly.

Which, together with the decree and order of this court above mentioned, is ordered to be certified to the said Circuit court of Pittsylvania county.

The decree of the Circuit court as to Jones' executors reversed, and affirmed as to Neal and Barksdale.

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692 *Hannah's Adm'r v. Boyd & Wife & als.

January Term, 1875, Richmond.

1. **Wills—Executors—Infants—Equity.**—In 1859 testator gives his estate to his widow and six children as in case of intestacy; but those of his children who had not been educated, he wished to be educated out of the general fund at the charge of his estate. At the end of the year the executors turn over the land, slaves and other personal estate to the widow, one daughter who is of age and the guardian of the five minor children, who agree to hold it all together, to be managed by the guardian for the support and maintenance of the widow and children, and the education of the minor children, so far as necessary for these objects; the widow and children to live on the land. And they act on this agreement until 1868. This is an agreement obviously beneficial to the infants, and a court of equity would have approved and confirmed it.
2. **Personal Representative and Guardian—Accounts.**—The guardian of the minor children was the acting administrator *de bonis non* with the will annexed of the testator; and the commissioner who takes his account, blends his receipts and payments as administrator, with his receipts and payments, under the agreement between himself as guardian and the widow and the daughter who was of age.
   HELD:
   Same—Same.—This is error. The account as administrator should embrace only his receipts and disbursements as such. His receipts and disbursements under the agreement are made, not as administrator, but as guardian of the minor children and agent of the widow and daughter, and are to be stated on different principles.
3. **Commissioners' Reports.**—In taking the account of the widow and the several legatees, the commissioner made a conjectural estimate of the amounts deemed necessary for the support and education of the younger children. Under the circumstances, the proper course would seem to be to ascertain the expense actually incurred in educating the infant children, and to allow the same, if not excessive, as a charge upon the estate, together with a reasonable allowance for their support and maintenance during the period of their minority.

693 *4. **Fiduciaries—Depreciated Currency.***—A fiduciary is not warranted in receiving payment in a highly depreciated currency, of a debt payable in gold or its equivalent, unless it be made to appear, either from the condition of the estate or of the debtor or other circumstances, that the collection of the debt was expedient and proper.

5. **Commissioners' Reports—Waiver of Exceptions.**†—An administrator having waived his exceptions to the commissioner's report, under the erroneous impression that the report would be sustained, and the case then finally disposed of, may withdraw his waiver, and renew his exceptions.

Samuel Hannah, of the county of Charlotte, died in 1859, leaving a widow and six children; and leaving a will, which was duly admitted to probate in the County court of Charlotte. By his will he directed his just debts to be paid out of his crops or debts due him, his stocks or other personal estate; and that his estate, real and personal, be divided between his wife and six

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***Fiduciaries—Receiving Depreciated Currency.**—See on this subject, Mills v. Mills, 28 Gratt. 442, and *note*: Patteson v. Bondurant, 30 Gratt. 94, and *note*.

†**Commissioners' Reports—Exceptions.**—See collection of cases on this subject, in Peters v. Neville, 26 Gratt. 549, and *note*.

children as the law directs in cases of intestacy. Those of his children who had not been educated he wished to be educated and supported out of the general fund, at the charge of his estate. Henry E. Edmunds, Hunter H. Marshall and George C. Hannah were appointed executors of the will, and qualified as such.

The testator owned a valuable tract of land in the county of Charlotte, on which he lived; and the personal property, including the slaves upon this land, was appraised at $46,894.88. He owned also a lot of ten acres near Charleston, in Kanawha county, and a house and lot in the city of Cincinnati. His bonds deemed solvent, amounted to $47,872; but of these $45,000 were due from John Morris and others for a tract of land sold to them by the testator; which on a sale of the land under the deed of trust given to secure the purchase money, made at the instance of the executors soon after their qualification, was purchased for the widow and children at $35,000. He
694 owned *also $12,700 of the stock of the James River and Kanawha Company guaranteed by the State of Virginia, beside some other property.

In 1859 George C. Hannah, one of the executors of Samuel Hannah, qualified as the guardian of the five minor children, and at the end of the year the executors turned over to the widow, the eldest child who had come of age, and to George C. Hannah, the guardian of the five minor children, the tract of land in the county of Charlotte, and all the personal property, including the slaves, except two horses which they had sold, and afterwards the crop made upon the land in 1859. And soon afterwards the executors were removed, and George C. Hannah and George B. Hannah qualified as administrators de bonis non with the will annexed.

By an agreement under seal bearing date the 8th of May 1861, George C. Hannah, Charlotte E. Hannah, the widow, and Mary E. Hannah, the oldest child, who was then of age, after reciting the death of Samuel Hannah, the estate he left in Charlotte county, the provisions of his will, and the turning over of the property as before stated, states that this property was delivered to the said Charlotte, Mary E. and George C. as the guardian of the minors, jointly; it having been deemed by the adult parties and said guardian, much to the interest of all parties, that the said estate should be kept together and worked for the joint benefit of all the parties interested, and the same having been desired by Andrew, George M. and Lucy L. Hannah, who have arrived at an age in which they are entirely competent to exercise a discretion in regard to such matters, although not 'legally bound. In view of his legal responsibility as guardian of said minors, the said George C. Hannah was unwilling to incur any
695 *hazard of loss either to himself or his wards, and therefore he would not have agreed to the arrangement unless the said Charlotte and Mary E. Hannah had undertaken to indemnify himself and each of his wards against any loss which either might incur by reason of the estate being so kept together. And they covenant so to indemnify both the guardian and the wards; and that this agreement may be enforced in behalf of said wards in the name of said George C. Hannah. The agreement then sets out the interest of the widow and the children in the property. And it is agreed that the said George C. Hannah shall have the exclusive control and management of the agricultural operations and disposition of the crops of said estate; but the said Charlotte to occupy the mansion house and curtilage, outhouses and gardens, &c., on said estate then occupied by her, with the servants then in her possession engaged in the service of the family. And it was further agreed that Mrs. Hannah should draw from said plantation the supplies for the support of the family; and the proceeds of the plantation were to be applied to the support and maintenance of Mrs. Hannah and her six children, and the education of such as were under age. And the said George C. Hannah, in the management of said plantation, was to be at liberty to keep in proper repair the barns, negro cabins, &c., and when necessary, to erect thereon out of the crops, such barns and other buildings as might be found necessary for carrying on the agricultural operations, &c., on said plantation.

At the foot of this agreement Andrew Hannah and George B. Hannah, two of the minor children, expressed their approbation of this agreement.

This arrangement seems to have been continued until 1868. In the mean-
696 time Andrew Hannah was *killed in the war soon after he attained the age of twenty-one years, and Lucy L., another of the children, died a minor.

In February 1867, Mary E. Hannah married Robert Boyd, her estate having been previously conveyed in trust to William Townes Boyd; and in August 1867 these parties instituted their suit in equity in the Circuit court of Charlotte, making Mrs. Hannah and the surviving children of Samuel Hannah, and George B. Hannah and George C. Hannah, administrators de bonis non &c., defendants, and asking for a division of the land in Charlotte; and that the administrators render an account of their administration. The parties all answered, the infants by guardian ad litem, concurring in the prayer of the bill. And at the August term of the court a decree was made appointing commissioners to divide the tract of land in Charlotte county, allotting to the widow her third as dower and her part of Andrew's share, and dividing the remainder among the four children, and the administrators were directed to settle their account before a commissioner of the court; who was directed also to report an account of all advances made and chargeable to any of the parties.

The commissioner returned his report on the 4th of August 1868. He states an account of George C. Hannah, acting executor

of Samuel Hannah, from September 1862 to February 4th, 1867, and of George C. and George B. Hannah, administrators de bonis non, from that time until April 6th, 1868. In the first account the proceeds of the land, and the expenditures for Mrs. Hannah and the children are included with the proper receipts and payments as executor, and there is a balance found in favor of H. H. Marshall as executor of $829.74, being one-
697 half the commissions *on the sale of the Mason land; and in favor of George C. Hannah, the acting executor, of $5,704.08. On the second account the balance against the administrators is $885.76, which the commissioner says is to be paid by George C. Hannah.

There is also a statement of advances made to Mrs. Hannah and the children for expenses and investments, coming down to 1870, in which allowances are made to three of the children on account of board and tuition, viz: to George B. Hannah $1,500, to Emmet Hannah $4,000, and to Samuel Hannah $4,500.

George C. Hannah excepted to the report because the commissioner has scaled the Confederate money received and disbursed by him at the end of the account, instead of at times during the time the account was running.

2d. Because he did not, at the least, scale the said Confederate money at the end of each year, instead of adopting the time of scaling which he did.

It appears that the amount ascertained by the report to be due in Confederate money to the executor George C. Hannah on the 10th of April 1865 was $7,862.10, which the commissioner scaled at sixty for one, and credited him with the sum of $131.03 as the scaled value of that sum.

The cause was removed to the Circuit court of Halifax county; and in April 1871 the devisees and legatees filed seventeen exceptions to the report.

The first, fifteenth and seventeenth exceptions are to the blending the executorial account with the accounts with the widow and the children, and the expenses of the family.

The sixth exception is to the allowance of commissions to the executor. It
698 appears that the account had *been regularly settled before a commissioner of the court of probate up to September 1st, 1866, and that the executor had laid his accounts for 1867 before the commissioner, but the commissioner died in 1867, before he made the settlement, and the papers were then put into the hands of another commissioner, who was engaged upon the account when the order for an account was made in this case.

The tenth exception was because the executor had received Confederate money in payment of a debt of Henry Edmunds for $1,000, which was contracted before the war. A bond of Edmunds for $1,000 is named in the inventory among the solvent bonds.

The other exceptions need not be set out.

The cause came on to be heard on the 13th of April 1871 when the court confirmed the report of the commissioners of the division of the land; and the executor waiving his exceptions to the report of the commissioner, the court overruled all the exceptions of the devisees and legatees, and having had a statement made showing the balance due to George C. Hannah, from the estate, after charging him with the balance due from him, decreed that George B. Hannah, the then acting administrator, should, out of the assets, &c., pay to the said George C. Hannah $5,927.24, with interest on $4,429.68, from the 6th of April 1871; and to H. H. Marshall the sum of $1,037.68, with interest on $829.74 from the same date. And George B. Hannah, administrator, &c., was directed to render before the commissioner an account of his transactions as sole administrator, &c. And the commissioner was directed to take an account of all the estate, real and personal, of Samuel Hannah, deceased, with a view to a further division, and also an account of any
699 further advancements *which may have been made to any of the legatees of said decedent. From this decree George B. Hannah, the administrator, applied for an appeal; which was allowed.

Jones & Bouldin, for the appellant.

Marshall & Johns, for the appellees.

STAPLES, J., delivered the opinion of the court.

The court is of opinion that the arrangement entered into on the 8th May, 1861, between the widow of Samuel Hannah, the guardian of his infant children, and the adult legatee, Mary E. Hannah, was an advantageous one to all the parties concerned, and such as a court of equity, under all the circumstances, would sanction. The testator having by his will directed that those of his children who had not been educated should be educated and supported out of the general fund at the charge of his estate, that object could not be more satisfactorily accomplished than by keeping the estate together, and appropriating the rents and profits of the farm, or so much thereof as was necessary, to the support of the family and the education of the minors, according to the respective rights of the parties.

This arrangement, although beneficial to the legatees, did not, however, justify the commissioner of the Circuit court in blending with the executorial transactions the accounts of disbursements for the children and supplies to the family of the testator. The law is too well settled either to be misunderstood or disregarded by the courts, that payments to legatees and advances to distributees should never enter into the general executorial accounts. In the
700 present case *there was the less reason for a departure from this rule, inasmuch as the executors who first qualified,

as early as the year 1859 delivered over to the parties entitled, the slaves, and nearly all the perishable property belonging to the estate. And thereafter the farm was managed, the crops sold, and the proceeds disposed of by the appellee, not as executor but as guardian of the infants, and agent of the widow and the adult legatee, under the arrangement of the 8th May 1861, already mentioned.

In this respect the report of the commissioner ought to be reformed, so as to separate therefrom the entire executorial transactions, which require for their settlement the application of different principles from those governing guardian's accounts and advances to the legatees. The Circuit court therefore erred in overruling appellant's first, fifteenth and seventeenth exceptions to said report.

The court is further of opinion that the said report being reformed in the manner just indicated, may be properly relied on as showing the disbursements and receipts of the appellee as guardian and as agent aforesaid, and also as constituting a proper settlement of his accounts as such guardian and agent, with the exceptions and modifications hereinafter to be stated. In taking the account of the payments made to the widow and the several legatees, the commissioner has made a sort of conjectural estimate of the amounts deemed necessary for the support and education of the younger children. It does not appear upon what principle he acted in fixing these amounts. Under the arrangement already mentioned the children resided in the mansionhouse with their mother, deriving their support from the entire estate, including her dower, from the year 1859 down to the year 701 1870, *and, it may be, for a longer period. And yet the commissioner has allowed one of them the sum of four thousand and five hundred dollars, and the other the sum of four thousand as a charge upon the estate for their support and education. This would seem to be clearly excessive. Certainly there is nothing now in the record to justify it. Under the circumstances the proper course would seem to be to ascertain the expense actually incurred in educating the infant children, and to allow the same, if not excessive, as a charge upon the estate, together with a reasonable allowance for their support and maintenance during the period of their minority.

The court is further of opinion that the Circuit court did not err in overruling the appellants' third, fourth, fifth and fourteenth exceptions to the report of the commissioner.

In regard to the sixth exception the court is of opinion that the facts are not presented by the record with sufficient certainty to enable the court properly to decide the question of the executor's right to commissions upon the sale of the land in Kanawha. The subject matter of this exception is therefore left open for such further evidence as either of the parties may desire to offer before the commissioner.

The court is further of opinion that the Circuit court ought to have sustained the tenth exception, so far at least as to recommit the report for further inquiry in regard to the circumstances under which the executor collected the debt mentioned in said exception. The doctrine of this court, as expressed in several cases, is that a fiduciary is not warranted in receiving payment in a highly depreciated currency of a debt payable in gold or its equivalent, unless it be made to appear, either 702 from the condition of the *estate, or of the debtor or other circumstances, that the collection was expedient and proper.

In the present case nothing appears by the record, except the collection by the executor in Confederate currency in the year 1863, of a debt contracted long anterior to the commencement of the war. The executor may have refrained from adducing any evidence upon the point, by the fact that no objection was made before the commissioner to the credit and by the failure of any of the parties for more than two years to file any exceptions to the report.

As the report is to be recommitted upon other grounds, no injustice can be done by permitting farther inquiry into the circumstances under which the debt was collected. And so with respect to the seventh, eighth, ninth, eleventh, twelfth and sixteenth exceptions, the court deems it advisable to leave them open for further investigation before the commissioner, if desired by either of the parties.

The court is further of opinion that so much of the decree of the Circuit court as directs the commissioner to take an account of all the estate, real and personal, of the decedent, and also any further advancements which may have been made to any of the legatees, should be executed in connexion with the provisions of this decree, with a view to a final division of the estate, and with a farther view to ascertain and settle the rights and liabilities of the several legatees with respect to each other, and with repsect to the appellee.

The court is further of opinion that the appellee having waived his exceptions to the report of the commissioner, under an erroneous impression that said report would be sustained, and the case then finally disposed of, ought now to be permitted to withdraw his said waiver and renew his exceptions if he shall desire so to do. 703 *It is therefore adjudged, ordered and decreed, that so much of the decree of the Circuit court as is in conflict with this opinion be reversed and annulled, and the residue affirmed; that the appellee, George C. Hannah, pay to the appellants their costs by them expended in the prosecution of their appeal here.

Decree reversed.

704 *Linke & Klepper v. Fleming.

January Term, 1875, Richmond.

1. **Sale of Lands—Lien on Profits.**—In November 1865 L & K sold to F an interest in the sawmill business in which they were engaged, for which F was to pay them $3000, which they advanced to his credit; and they retained a lien on his portion of the profits and his interest in the mill itself as security for its payment. In August 1865, at the request of L & K, F withdrew from the concern, and relinquished all his interest in the partnership effects; and in consideration thereof L & K assumed all the debts of the concern, and released F from all liabilities to them, and other persons, in all matters in any way connected with the partnership. And they further agreed, to pay F at the rate of $100 per month for his services during the 22 months he was with them, and $210 for his expenses in and about the business. F sued L & K for the compensation promised him, setting out the above facts in a special count, and adding the common counts; and there was a general verdict and a judgment for him. L & K then enjoined the judgment on the ground that F owed them the $3000, and was insolvent. F insisted the $3000 was discharged, and relied upon the record in his case as proof.—HELD:
   1. **Same—Same—Insolvency.**—QUAERE: If the insolvency of F gave the court of equity jurisdiction to enjoin the judgment.
   2. **Records as Evidence.**—The record is *prima facie* evidence of the facts stated in the special count of the declaration.
   3. **Contracts—Release.**—By the contract the debt of $3000 was released and discharged.

In October 1868 Linke & Klepper, partners, obtained from the judge of the Circuit court of the city of Portsmouth an injunction to restrain James Fleming from enforcing a judgment for $1,507.12, with interest from August 20th, 1867, which Fleming had recovered against them in the Hustings court of the said city. The grounds on which they asked for the 705 *injunction is, that Fleming was indebted to them by bond in the sum of $3,000, with interest from November 27th, 1865, on which bond they had instituted suit, which was then pending; and that Fleming was notoriously insolvent, had little property, and that was mortgaged for more than its value; and if their property was sold under Fleming's execution they would suffer irremediable injury.

Fleming in his answer denied that he owed the plaintiffs anything; insisted that the debt spoken of in the bill as due to them had been fully satisfied and discharged; and he set out the facts, and relied upon the record of the suit in which he had recovered his judgment against the plaintiffs as establishing said discharge.

In the suit referred to, which was an action of assumpsit, there were a special count, and the common counts. The special count stated that the plaintiff and defendants were equal partners in the manufacture of lumber, &c., and held property of great value as partners, and the defendants were desirous to purchase his interest in the property, and that he should withdraw from the partnership; and thereupon, on the 16th of August 1867, in consideration that the plaintiff would withdraw from the partnership and relinquish to the defendants all his right, title and interest in the partnership effects, they promised that they would assume all the debts of the partnership, and release him from all liability to them and all other persons in all matters in any way connected with the partnership; and further promised to pay to the plaintiff a sum equal to $100 per month, for twenty-two months of his connection with the defendants in said partnership business, viz: the sum of $2,200; and further, to pay him his 706 *expenses expended in and about said business, viz: $210.

The bill of particulars filed with the declaration stated items of account amounting to $2,590, and credited the defendants with $1,082.88, leaving a balance due the plaintiff of $1,507.12. The defendants pleaded non assumpsit; and on the trial of the cause the jury rendered a verdict in favor of the plaintiff for the said sum of $1,507.12, with interest from the 20th of August 1867; and there was a judgment in accordance with the verdict.

The debt claimed by Linke & Klepper as due to them from Fleming, was evidenced by a paper under his hand and seal bearing date the 27th of November 1865, in which he says: Linke & Klepper having this day advanced to my credit the sum of $3,000, it being the amount necessary to pay my portion of capital in joining them in the sawmill business, I therefore agree that said Linke & Klepper shall retain in their hands my portion of the profits which may arise from the sale of lumber, &c., from said mill, until the debt and interest, at six per cent. per annum, is paid, and also that said Linke & Klepper shall hold claim on my portion of said mill until the debt, &c., is paid.

Although the defendant in his answer denied that he was insolvent, before the cause came on to be finally heard, he filed in the cause a paper in which he stated, that since filing his answer he had been compelled to make a sacrifice of his house and lot to meet some demands, which would have been easily avoided had he realized his judgment against Linke & Klepper. But not having been able to do this, he acknowledged that aside from what was due to him from them he had not property enough to pay all his debts.

707 *The cause came on to be heard on the 23d of September 1871, when the court dissolved the injunction, and dismissed the bill, with costs. And thereupon Linke & Klepper applied to this court for an appeal; which was allowed.

Scarburgh, Duffield & Sharp, for the appellants.

Goodwin & Crocker, for the appellee.

STAPLES, J., delivered the opinion of the court.

A very interesting question has been raised and discussed by the learned counsel in this case. It is whether the insolvency of a judgment creditor is a sufficient ground for a court of equity to decree a set-off against him, upon which the debtor might have successfully relied by way of defense in the action at law; but which he failed to do without any circumstances of excuse for such failure. This question has never been decided by this court, nor can it be considered as settled by the decisions of foreign courts. We do not deem it necessary to express any opinion upon the point, as the case may be disposed of upon other grounds which do not admit of any very serious controversy. Conceding then that equity has jurisdiction to give relief in this class of cases, are the appellants entitled to such relief upon the merits?

The bond in controversy, executed by the appellee to the appellants on the 27th November 1865, establishes the fact that the appellants on that day sold to the appellee an interest in the "saw-mill business" in which they were engaged; that he agreed to pay them therefor the sum of three thousand dollars, which they advanced to
708 his credit; and that they retained *a lien on his portion of the profits and his interest in the mill itself, as surety for its payment. The appellant's claim is to recover this sum of three thousand dollars.

The appellee's defense is, that on the 16th August 1867, he, at the request of the appellants, withdrew from the partnership, and relinquished all his interest in the partnership effects; and, in consideration thereof, the appellants assumed all the debts of the concern, and released him from all liability to them and all other persons, in all matters in any way connected with the partnership; that they further agreed to pay him at the rate of $100 per month for his services during the twenty-two months of his connection with the concern, and the sum of two hundred and ten dollars for his expenses incurred in and about the business. And thus the debt of $3,000 was liquidated and discharged.

In support of this ground of defense the appellee relies upon the record of a suit in which he recovered against the appellants a verdict and judgment for the full amount of compensation and expenses as aforesaid. The only question to be determined is whether the record sustains this defense. The declaration contains three counts, one special and two common counts. The special count sets out in detail the facts already stated, upon which the appellee relies to establish the liquidation and settlement of the debt in controversy. The defendant pleaded non assumpsit, and there was a general verdict for the plaintiff. It is insisted by the counsel for the appellants, that as the verdict was rendered upon the entire declaration without reference to the special count, it cannot be relied upon to show that the averments made in that count are true.

709 *The rule upon this subject, as settled by the courts, is that the verdict extends to every allegation which having been made on one side and denied on the other, was at issue and determined in the course of the proceedings. When the recovery is on a contract the verdict establishes not only that the plaintiff is entitled to the amount awarded by the jury as damages or compensation, but that he did every act and performed all the stipulations that were conditions precedent to the right to maintain the action. 2 Smith's Lead. Cases, 761-'2.

If it appear by the record or by extraneous evidence, that the matters at issue in the second suit were litigated and determined in the first, the verdict will operate as an estoppel and be regarded as conclusive. On the other hand, where the pleadings present several distinct matters, and the verdict may have been rendered upon one or the other of them, without precisely indicating which, it will be inconclusive, because the verdict wants the certainty necessary to an estoppel. In such case, however, as the jury may have decided on both matters, the verdict is prima facie evidence, though not conclusive, and may be rebutted by evidence aliunde. Henderson v. Kenner, 1 Rich. R. 474, 480, and authorities there cited. For example, a judgment and verdict for the plaintiff in a declaration containing the common counts and also a special count will be prima facie but not conclusive evidence of the existence and validity of the contract set forth in such count. It is not conclusive, because the verdict may have been based upon the common counts. Washington, Al. & Georgetown Steam P. Co. v. Sickles et al., 24 How. U. S. R., 333, 340.

According to these views, the record of the action at law is prima facie evi-
710 dence of the matters relied *upon by the appellee, and as the appellants have not undertaken to controvert them, they must be taken as true.

The learned counsel for the appellants conceding this, insist that as the agreement or arrangement was merely to relieve the appellee from liability in all matters in any way connected with the partnership, it does not affect the debt in controversy, because that debt is for money loaned, and is an independent transaction, having no connection with the partnership. It does not appear that there was any other debt but this due the appellants from the appellee. It is not pretended there was any other. It is difficult to understand to what liability the parties had reference unless to the one now in controversy. The debt may not have been due to the concern as partners, but it was certainly connected with the partnership. It was contracted in the purchase of an interest in the concern, and the appellee's portion of the partnership effects and profits pledged as security for its payment. The phrase is, that the appellants "are to release the appellee from all liability to them, and all other persons, in all matters in any way connected with said partnership."

That this language is sufficiently comprehensive to embrace the claim of the appellants does not admit of a question. If it was not so intended, it is very remarkable that the appellants did not make some express reservation of a debt of so much magnitude.

It is still more remarkable, that the appellee should relinquish his entire interest in the partnership effects, and at the same time agree to continue liable for the three thousand dollars, the stipulated price for that interest. The facts disclosed by the record do not justify any such conclusion. The presumption is almost irresistible,
711 *that the real understanding of the parties was, that the appellee in severing his connection with the concern should be restored to his former position, and be compensated for his services and actual expenses during the period of his connection with the partnership For these reasons we are of opinion that the appellants are not entitled to the set-off claimed by them, and that the decree of the Circuit court must be affirmed.

Decree affirmed.

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712 *Adie & als. v. Commonwealth.

January Term, 1875, Richmond.

Identification.—A case of identification of a person.

In August 1872, Archibald Adie, or Eadie, and others, claiming to be heirs at law of James Adie or Eadie, who was a native of Scotland, filed their petition in the Circuit court of the city of Richmond, in which, after setting out their relationship as heirs and next of kin to James Adie or Eadie of Scotland, and that said James had come to Virginia and died in the county of Hanover about the year 1850, they state that in 1860 the estate of James Adie had been escheated for want of any known heirs or next of kin, and that there had been paid into the treasury of the State, in pursuance of said escheat, the sum of six thousand seven hundred and forty-eight dollars and one cent; which sum the petitioners claim as the heirs at law and distributees of said James Adie. And making the auditor of public accounts, the second auditor, and the board of education, parties defendants, they pray that the petitioners may have a judgment for the amount so paid into the treasury, with interest from the times it was so paid.

The defendants answered, denying that the money referred to in the petition was ever paid into the treasury of the present State government. That if the facts are as stated in the petition, they show that James Adie was an alien at the time
713 of his death; that his *property was found by a competent court to be derelict, and that the same was paid into the treasury of the then State government to the credit of the literary fund; and that at that time his heirs, if he had any, were aliens, and were not entitled to hold said property as such heirs. They deny that the present State government is bound to answer for any of the debts or obligations created in the name of the government that was in existence at the time the said payments were made into the treasury of the then existing State. And there having been a decree, as shown by the petitioners, declaring the property of the decedent derelict, this court cannot go behind said decree; and the same must be held valid and binding until reversed or annulled upon appeal or bill of review.

The cause came on to be heard upon the 17th day of February 1874, when the court held that the petitioners had failed in making out their claim as the heirs at law and distributees of said Adie or Eadie; and the petition was dismissed, with costs. The petitioners thereupon applied to this court for an appeal; which was allowed. The only question in this case is one of fact, and the evidence is given in the opinion of Judge Bouldin.

Henry R. Pollard for the appellants.

The Attorney General for the Commonwealth.

BOULDIN, J. In August 1850, one James Adie, a native of Scotland, and stonemason by trade, died near Hanover Junction, in Hanover county, where he was engaged in stone work on the Louisa railroad, now the Chesapeake and Ohio railroad. He died intestate, unmarried, and without known descendants; and under proceedings
714 instituted by the attorney for *the commonwealth of Hanover county, his estate was declared derelict, and escheated to the commonwealth for the benefit of the literary fund.

Under the decree in the cause, the administrator, on the 8th day of November 1860, paid into the public treasury the sum of six thousand dollars in part of the decree; and on the 1st of August 1863 the further sum of seven hundred and forty-eight dollars and one cent, balance in full.

On the 5th of August 1872 the appellants filed their petition in the Circuit court of the city of Richmond against the auditor of public accounts, the second auditor, and the board of education, as successor of the board of the literary fund, claiming to be heirs at law and next of kin of the said James Adie, deceased, and praying that the sums of money paid into the public treasury as aforesaid be paid over to them according to their respective rights.

The defendants answered the petition, denying the right of the plaintiffs to recover the money claimed in their petition on several grounds, which will be seen in the answer.

Testimony was taken in writing, both in Scotland and in this country, and the case coming on to be heard on the pleadings, exhibits and evidence, the petition was dismissed with the costs. From this decree

the petitioners have appealed to this court.

We do not understand that any question of law has been seriously pressed in the cause; none certainly in the argument. The question discussed, and on which the case rests, is one of fact merely, viz: whether the James Adie who died near Hanover Junction, in Hanover county, Virginia, in August 1850, was the same person with one James Eadie who was born in the parish of Dumblane and count of Perth, in
715 Scotland, *on the 28th of February 1807, under whom the appellants claim?

The onus is on the appellants to establish the affirmative to the satisfaction of the court. Have they done so?

My opinion is that they have, with as near an approach to absolute certainty as could be expected or reasonably required in such a case.

Without going into a minute examination of the testimony, I will merely notice in a very general way some of the facts which lead my mind to this conclusion—beginning with the American testimony. That shows that James Adie, the decedent, was a Scotchman, a stonemason by trade, between forty and fifty years of age at his death, and described by some of the witnesses as of medium height, and by others as taller; described by witnesses who knew him about the time of his death as being inclined to be fleshy, but by Tait, who knew him in 1836, as a spare but well developed man, five feet ten or five feet eleven inches high, fair complexion and light hair, and a scar or mark on one cheek. Came from New York to Washington; was there with one Robert Brown, builder, in 1834, and subsequently from 1837 to 1842; and afterwards came to Virginia to work on the Virginia railroads, and died; as we have seen, at Hanover Junction in August 1850, intestate, unmarried, without known descendants, and without kin or claimants to his estate in America, so far as we know, except the claimants from Chicago, who are appellants.

Most of the witnesses in America speak of the decedent as James Adie; but Tait, a very intelligent witness, who knew him well, and as far back as 1836, says he generally spelled his name Eadie, sometimes Adie.

716 *Such was the James Adie or Eadie who died in Virginia in 1850. How is he identified with the James Eadie or Adie who was born at Stone Hill Dumblane parish, Perth county, Scotland, under whom appellants claim?

They prove beyond all doubt, by written and documentary evidence, that they are the children and descendants of one James Eadie, farmer, who lived at Stone Hill, Dumblane parish, in the county of Perth, Scotland. By the register of the births and baptisms of all the children of said James Adie, duly certified by the parish clerk and by the depositions of witnesses, the appellants are proved beyond controversy, to be the surviving children and descendants of said James. By the same register it appears that on the 28th of February 1807, "James, son to said James Eadie, farmer at Stone Hill," was "born"; "and baptized 15th March 1807." And this is the James under whom the appellants claim. The decedent is proved by the witnesses to have been apparently between forty and fifty years of age at his death; none placing it as low as forty or as high as fifty. The appellants' relative, James Eadie, would have been, in August 1850, in his forty-fourth year. James Eadie, of Stone Hill, at the age of twenty-three, when he left Scotland for New York, in the year 1830, was a spare and thin young man about five feet ten or five feet eleven inches high, with fair hair, fair complexion, and a mark or scar on one side of his face. We have no witness that describes the Hanover Adie as early as 1830. He was then in New York, and in 1834 came to Brown, in Washington, whose letter does not describe him. But in 1836 Tait became well acquainted with him, and thus describes him: "I should think he was about twenty-five to thirty years of age when
717 I knew him. *(The Perth Adie would be twenty-nine.) He was a man about five feet ten inches, or perhaps five feet eleven inches, light hair, a flat face, a spare but well developed man. I have a recollection that he had some peculiar mark on one of his cheeks; whether it was a scar, burn or natural mark, I am unable to say. I am sure he had some such mark on one of his cheeks." "He was a Scotchman." This answers, in almost every particular, the descriptions by the Scotch witnesses of the Scotch Adie. The latter was trained a stonemason in Edinburgh, and went from that place to New York in 1830. The Hanover Adie was a stonemason—came from New York in 1834, to Brown, in Washington, and worked with him as a mason.

It is objected, however, by the attorney general that the Hanover Adie and the Scotch Adie cannot be the same, because Brown in his letter says that the James Adie who worked with him and died at Hanover Junction told him that his mother and sisters were in Edinburgh, "whilst the Scotch witnesses place the Eadie family at Dumblane, in Perth, and nowhere else."

The attorney general is under a misapprehension in two respects: first, in supposing that the Hanover Adie used the word "sisters"; secondly, in saying the Eadie family were placed by the witnesses at Dumblane, Perth, and nowhere else. In the statement made to Brown the word "sister" was used and not "sisters." He told Brown in 1834 that "his mother and sister" were in Edinburgh. There is no other proof in the record at all as to the mother's residence in 1834 and subsequently; but it does incidentally appear that the youngest living and only unmarried sister of said James Eadie—Isabelle Eadie—was then living in Edinburgh, and had
718 been for some time; and *that she died there in 1838. This latter fact is incidentally stated by Marion Dawson, her sister, in giving a general history of the family. It does not appear when she moved

to Edinburgh, but that she was living in Edinburgh as far back as October 1833, appears from a letter of hers of that date to her brother-in-law and said sister Marion. It is apparent from this letter that this youngest living sister, Isabelle, was living in Edinburgh in October 1833, and had been living there for some time past; and it is further proved, as we have seen, that she died there in 1838. The statement made to Brown then, that the "sister" was living in Edinburgh in 1834, is strictly accurate; and there is literally nothing in the record to impugn it as to the mother.

It is not invalidated by the erroneous statement that the Eadie family were placed at Dumblane, Perth. Their original homestead and births were there, but in progress of time and in the ordinary course of nature they were dispersed. Isabelle certainly lived in Edinburgh for some time prior to 1833, and died there in 1838. James, her youngest brother, acquired his trade there, lived there, working at it for several years, and in his twenty-fourth year went from Edinburgh to New York. Here are two of the family certainly traced to Edinburgh, and the residence of the mother, at that late period, is not otherwise known than by the statement of James to Brown, commented on by the attorney general. From the letter of Isabelle, already referred to, it would seem probable that she was then not at Stone Hill, but with her daughter, Mrs. Dawson, whether as a resident, or visitor merely, does not appear. As the old home was broken up, nothing would seem more natural than a desire on the mother's part to be near her youngest surviv-
719 ing daughter, *especially when we see that this daughter was unmarried. I see nothing in the statement to Brown to weaken the claim of appellants; but, on the contrary, much to sustain it.

Much reliance has been placed on the different spelling of the name. We should attach but little importance to the dropping of a single letter in the spelling of a name were the spelling uniform in one way in Virginia, and uniform the other way in Scotland. Such changes are too common to be of much weight in questions like that before us. But the spelling of the name in this case is not uniform in either country. Whilst the Scotch parochial register shows that the old people spelt the name "Eadie," the surviving son, Archibald, spells his name Adie, and one of the daughters uses both.

And as to the name in America, we learn from the witness Tait that whilst James Adie sometimes might have spelt his name Adie, yet when he knew him he generally spelt it Eadie. This witness, it will be observed, knew him at a much earlier period than that deposed to by the Virginia witnesses—only six years after he left Edinburg—who generally call him Adie. I am of opinion, therefore, that the diversity in the spelling of the name existed in both countries, and no importance should be attached to it.

I have reviewed the testimony in the cause in a general way; but as the question is purely a matter of fact, at greater length than is my habit.

There is no conflict in the testimony. Indeed, it is conceded by the attorney general that it was all one way, and no case for an issue; and such is my opinion. It is for this court, then, to pass on its sufficiency to establish the appellants' claim. And my opinion is, that it does establish, be-
720 yond all reasonable doubt, that *the James Eadie, stonemason, who was born at Stone Hill, Dumblane parish, Perth county, Scotland, and left Edinburgh for New York in 1830, was the same James Adie, stonemason, who died at Hanover Junction, Hanover county, Virginia, in August 1850; and that the appellants have clearly shown themselves to be the next of kin of said Adie. The claim of the appellants against the state should, in my opinion, have been established; and the decree of the Circuit court, dismissing their petition, is therefore erroneous, and should be reversed and annulled, and a decree entered in accordance with this opinion.

The other judges concurred in the opinion of Bouldin, J.

Decree reversed.

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721 *Chapman & als. v. Commonwealth.

January Term, 1875, Richmond.

I. **Sheriffs—Collectors of Taxes—Official Bonds.**—In April 1870 S was appointed sheriff of C, and gave bond and qualified; and he was to continue in office until his successor was elected and qualified. In November 1870 J was elected sheriff for the next year, but failed to give the bond. On the 13th of February 1871 the County court of C appointed S collector of taxes &c. of 1870, and he gave bond with sureties and qualified. HELD:

1. **Same—Same—Appointment by County Court.**—The County court was authorized to make the appointment and take the bond; and it is a valid bond, and binds the sureties.
2. **Same—Same—Same—Sureties on Bond.**—The County court having made the appointment, and S and his sureties having executed the bond, they are estopped from denying that it is valid and binding upon them.

II. **Collectors of Taxes—Deficits—Liability of Sureties.**—S collects a part of the taxes of 1870, and pays it to the auditor prior to the 13th of February 1871, directing it to be applied to his indebtedness for taxes of 1869, which is done by the auditor, he not knowing that the money was derived from that source. All the rest of the taxes of 1870 are properly accounted for; but there is a deficit in the account of S to the amount so collected and paid. The sureties are liable for the deficit.

III. **Payment of Debts—Application.***—A payment by a debtor who owes several debts to a creditor is to

*Debts—Application of Payments.—"Where a debtor owes various debts and makes a payment, the application of the payment may be made by himself at the time he makes it; and if he fail then to make it, the application may be made by the creditor; and if

be applied to one or the other of the debts as follows:

1. **Same—Same—By Debtor.**—The debtor may direct the application at or before the time of making such payment; and such direction may be given expressly or by implication.

2. **Same—Same—By Creditor.**—If the debtor gives no such direction, then the creditor may make the application according to his pleasure; and he may make it either at the time of such payment or afterwards, before the commencement of any controversy on the subject: but after he has once made the application, he cannot change it to another, without the consent of all the parties concerned.

3. **Same—Same—How Made.**—Such application by a creditor may also be made either expressly
722 *or by implication. If he enters the debits and credits in a general account, as they occur, this will be considered, in the absence of evidence to the contrary, as a general application of the credits to the debits, in the order of time in which the debits occur; thus paying first the debt first due.

4. **Same—Same—By Law.**—If neither the debtor nor the creditor make the application, then the law will make it according to the circumstances of each particular case; and if there be no other controlling circumstance, the application will be made according to the order of time, paying first the oldest debt.

5. **Same—Same—Same.**—But if the debts be due by a collector or other receiver of public money, under bonds with different sets of sureties, then the law will so apply the payments, if possible, as that the money collected under one bond shall be applied to the relief of the sureties in that bond. And the creditor in such a case, if he be informed as to the source from which the money with which a payment may have been made was derived, cannot apply it otherwise, even with the consent or by the direction of the principal debtor.

Alexander Scott seems to have acted as sheriff of the county of Caroline in 1869, under military appointment. On the 11th of April 1870, he was appointed by the County court, sheriff of said county, to continue in office until his successor should be regularly elected and qualified, and he executed his official bond with sureties, and took the oath of office; and John H. James, who was elected sheriff of the county in November 1870, having failed to give bond and qualify, Scott continued to be sheriff, and acted as such, until the 1st of January 1872. On the 13th of February 1871, the County court of Caroline made an order that a vacancy having occurred in the office of sheriff or collector of taxes, levies and officers' fees, by reason of his (John H. James') failure to give the bond required by the act of the general assembly, passed on the 6th day of last month, the court appointed Alexander Scott to be collector of taxes
723 and *levies for the last year, and of any officers' fees which may be placed in his hands for collection, collectible during the present year; and thereupon said Alexander Scott subscribed and took the oaths prescribed by law, and entered into and acknowledged a bond in the penalty of $30,000, conditioned according to law, with James A. Chapman (and eleven others named) as his securities, &c.

The condition of the bond is, that by reason of a vacancy in the office of sheriff of this county as collector of taxes, in pursuance of the act of the general assembly passed February 6, last, the court appointed Alexander Scott to be the collector of taxes, levies and officers' fees for the present year. Now if the said Alexander Scott shall faithfully discharge the duties of his said office, during his continuance in office, then the above obligation to be void, else, &c.

It appears that on the 20th of December 1870, the books of the commissioner were delivered to Scott; and that George W. Marshall, who was elected treasurer of the county on the 12th of December 1870, went into office on the 1st of January 1871, and continued in office during the entire year. And it further appears that Scott collected of the revenue of Caroline county for 1870, previous to the 13th of February 1871, the two sums of $2,915 and $380, which said sums were, during the month of January 1871, paid by Scott to the auditor, and credited by the auditor according to Scott's directions, the first upon his indebtedness for the taxes of 1869, and the other was put to his credit on license taxes; and that the bond of Scott as collector was not sent to the auditor of public accounts, by the clerk of Caroline county, until some time after the 3rd of March 1873. And it further appears that after the 13th of February
724 1871, *in the years 1871-'72 and 1873, Scott paid into the treasury $15,382, which, with the delinquent taxes for which he was allowed credit, made up the amount of the land, property and capitation tax of the year 1870, in the county of Caroline, except the sums above mentioned. And the liability of the sureties in the bond of the 13th of February 1871, for these sums collected and paid into the treasury before the execution of that bond, was the only question in the cause. It did not appear that the auditor knew that the money paid into the treasury by Scott, was from moneys collected for taxes of the year 1870.

In January 1874, the auditor of public accounts gave notice to Scott and his sureties in the bond of February 13th, 1871, that

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he fail to make it, the court before which the transaction comes may direct it to be made according as may, in the judgment of the court, appear to be equitable and just, under all the circumstances of the case." *Per curiam*, in Lingle v. Cook, 32 Gratt. 272. See also, Smith v. Loyd, 11 Leigh 512; Howard v. McCall, 21 Gratt. 205; Pope v. Transparent Ice Co., 91 Va. 84, 20 S. E. Rep. 940; Crawn v. The Commonwealth, 84 Va. 284, 4 S. E. Rep. 721; Grafton v. Reed, 34 W. Va. 179, 12 S. E. Rep. 769; Genin v. Ingersoll, 11 W. Va. 559.

The above cases are also in line with the principal case on the point that, if there be 'no other controlling circumstances, the court will apply the payment according to the order of time, paying the oldest debt first.

he would move in the Circuit court of the city of Richmond, for judgment against them on account of the land, property and capitation taxes of the year 1870, due from Scott, late collector of taxes of Caroline county, and also for damages and interest thereon according to law, and for costs.

The case came on to be heard on the 21st of February; and the evidence having been introduced, the defendants moved the court to reject said bond of Scott as collector, and dismiss the motion of the commonwealth on said bond, among others for the following reasons:

1st. Because the said bond was invalid, null and void; because the court, under the law, did not have the power and authority to appoint such collector, and take such bond for the collection of said revenue for the year 1870.

2d. Because the auditor had no evidence in his possession, and produced none to the court, showing that Scott, as collector as aforesaid, ever received the books of the commissioners of the revenue for the 725 taxes of *the year 1870, or that the auditor had ever known that said Scott had executed any bond as collector until after the month of March 1873, or that said Scott ever performed any duties or incurred any liability by virtue of his appointment and qualification as such collector, before the said auditor received said bond. This motion the court overruled; and the defendants excepted.

The defendants then moved the court to give to Scott, collector as aforesaid, credit, first, for the sum of $2,915, proved to have been collected by said Scott previous to the 13th of February 1871; second, by the delinquent lists and payments made to the auditor subsequent to the 13th of February 1871, on account of said land, property and capitation taxes of 1870. This motion the court overruled as to the $2,915; but having given the other credits rendered a judgment in favor of the commonwealth, against Scott and his sureties for $3,318.31, for the balance of the land, property and capitation taxes of the year 1870, with interest at twelve per cent. per annum from the 11th of August 1871, until paid, and 505.24 for damages according to law. The defendants again excepted; and all the evidence was spread upon the record. And thereupon James A. Chapman and the other sureties applied to this court for a writ of error and supersedeas to the judgment; which was awarded.

Meredith & Cocke, for the appellants.

The Attorney General, for the commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a supersedeas to a judgment of the Circuit court of the city of Richmond in favor of the commonwealth against the plaintiffs in error, Alexander 726 *Scott and others, for $3,318.31, balance of the land, property and capitation taxes of the year 1870, due from the said Alexander Scott, late collector of taxes, &c., for Caroline county, with interest, damages and costs.

The judgment was recovered by motion on a bond of the said plaintiffs in error, the said Scott and his sureties, dated the 13th day of February 1871, in the sum of $30,000, with condition thereunto annexed in these words:

"The condition of the above obligation is such, that whereas the above bound (Alexander Scott) by reason of a vacancy in the office of sheriff of this county, as collector of taxes in pursuance of the act of the general assembly passed February (meaning January) 6, last, the court appointed the said Alexander Scott to be collector of the taxes, levies, and officers' fees for the present year in this county. Now if the said Alexander Scott shall faithfully discharge the duties of his said office of collector as aforesaid during his continuance in office, then the above obligation to be void, else to remain in full force and virtue."

A bill of exceptions was taken by the plaintiffs in error (being the defendants in the court below) to opinions of the court given upon the trial of the cause, in which bill were set out, the facts proved upon the trial.

The grounds of defence, which were relied on in the court below, and which are also the grounds of error relied on in this court are: 1st, that the bond is null and void; and, 2dly, that if the bond is valid, the condition of it was fully performed. We will consider these two grounds in their order; and

First, that the bond is null and void.

The order made by the County court 727 of Caroline at *the time of the execution of that bond, to wit: on the 13th day of February 1871, is in these words:

"A vacancy having occurred in the office of sheriff as collector of taxes, levies and officers' fees, by reason of his failure to give the bond required by the act of the general assembly passed on the 6th day of last month, the court appointed Alexander Scott to be collector of the taxes and levies of the last year, and of any officers' fees which may be placed in his hands for collection, collectible during the present year, and thereupon said Alexander Scott subscribed and took the oaths prescribed by law, and entered into and acknowledged a bond in the penalty of $30,000, conditioned according to law, with James A. Chapman," &c. (naming them), "as his securities, who verified in solemn form as to their sufficiency."

The act passed January 6, 1871, referred to in the said order, is entitled "an act supplemental to the act providing for the collection of the state revenue and county levies for the year 1870." Acts of Assembly 1870-71, p. 14, chap. 23. It contains four sections. The first enacts, "that the sheriffs of this commonwealth, and other officers heretofore charged with the collec-

tion of taxes, whose term of office expired on the 31st day of December 1870, are authorized and directed to proceed with the collection of the state revenue and county levies, which have been or may be assessed for the year 1870, in like manner as the same have been heretofore collected: provided, that it shall be the duty of each county and corporation judge to examine the bonds of such sheriff or other officer within his jurisdiction, and if he deem it necessary, require such sheriff or other officer to execute a new bond, in such penalty, and with such securities, as he may deem sufficient: provided, that such
728 penalty shall not be less *than double the amount which may go into the hands of such sheriff or officer." The second section need not be set out. The third enacts, that "in the event that any such sheriff or other officer shall fail or neglect to execute the bond provided for in the first or second section, within thirty days from the passage of this act, it shall be the duty of such sheriff or other officer, or of the commissioners of the revenue, in case the books aforesaid shall not have been so delivered, to deliver the same to the treasurers of their counties, cities or towns, after they shall have executed a new bond, in such penalty and with such security as the judge of the county or corporation may deem sufficient: provided, that such penalty shall not be less than double the amount which may go into the hands of such treasurer, who shall then proceed to collect and account for the same in the manner prescribed by the act approved July 11th, 1870, entitled an act prescribing the duties and compensation of county officers." The fourth section declares that "this act shall be in force from its passage."

The act referred to in the one last mentioned, which is supplemental thereto, is the act approved April 23, 1870, entitled "an act in relation to the collection of state, county and town taxes and officers' fees"—Acts of Assembly, 1869-'70, p. 71, chap. 65. Its first section enacts, that it shall be lawful for the sheriffs, and sergeants, charged with the collection of the public revenue in their respective counties, cities and towns, who were in office on the 26th day of January 1870, to continue to collect the same, and to levy and distrain for the same, as authorized by law, and also for county, city and town levies and officers' fees: provided, however, that where said officer has not given the bond required by the first section of the act passed
729 *March 5th, 1870, he shall not be authorized to collect, levy or distrain under this act until he shall have executed bond before the County court in such sum, not less than $20,000, as the judge thereof may require, with security deemed good by the court, payable to the commonwealth, and conditioned faithfully to account for and pay over all moneys which may have been or may be collected by him. The second section enacts that "where any sheriff or sergeant shall fail to give the bond required by the preceding section, or by the first section of the act of March 5th, 1870, it shall be lawful for him to deliver his uncollected tax tickets for state revenue, and for county, city and town levies, to his successor in office," &c.

The act of March 5th, 1870, above referred to, is commonly called the enabling act; and it is entitled, "an act to enable officers now holding offices in Virginia, by military appointment or otherwise, to hold over until their successors are elected or appointed and have duly qualified; to ratify and confirm the official acts of all such officers, and to provide for filling vacancies in the offices of justices and constables." Acts of Assembly 1869-'70, p. 16, chap. 18. It contains a preamble and thirteen sections. The first section enacts, "that all such officers who are eligible to office under the existing constitution and laws of Virginia, and who qualified on or before the 26th day of January 1870, and none others, be and they are hereby recognized as legal officers of this commonwealth, and authorized to continue to hold their said offices, and to exercise the rights and powers, perform the duties, and enjoy the privileges and emoluments appertaining to the same, as far as they may lawfully do so under the present constitution and laws of this state, and until their successors are appointed or
730 *elected and have duly qualified: provided that all officers, of whom bonds are now required by law for the proper discharge of their respective duties, shall give or renew their bonds with good security, in the penalty now provided by law, within thirty days after the passage of this act," &c. "If any of the officers mentioned in this section shall fail to give the requisite bond within the periods herein fixed, their said offices shall thereupon become vacant." The fourth section, after making a provision in regard to clerks of courts, enacts that "the offices of attorneys for the commonwealth and of sheriffs shall be vacant at the first term of the county courts hereafter held by judges elected under the present constitution in their respective counties; and such last named judges shall, at the said first term of their respective courts, appoint attorneys for the commonwealth and sheriffs for their respective counties, to continue in office until their successors shall be regularly elected and qualified under the present constitution. The sheriffs and clerks appointed under this section of the act, shall not enter upon the discharge of their respective duties until they shall have given bonds according to law, and if any of the officers mentioned in this section shall fail to give the requisite bond within thirty days after his appointment his said office shall thereupon become vacant, and shall be filled at the same or next term of the court during or after which such vacancy may occur," &c. It is unnecessary to state the remaining provisions of the act.

The county and corporation courts were reorganized in pursuance of the constitution under acts approved April 2, 1870. Acts of

Assembly, p. 35, chap. 38, and p. 39, chap. 40.

"An act to provide for a general
731 election," was approved *May 11,
1870. Id. p. 78, chap. 76. The third section enacts that "the term of office of all state, district and county officers, chosen at a general election, shall commence on the first day of January next thereafter, except it be otherwise provided by the constitution or by this act." The twelfth section enacts that "sheriffs, attorneys for the commonwealth, county treasurers and superintendents of the poor shall be chosen by the qualified voters of the respective counties, at the general election in November of the year 1870, and every third year thereafter, and shall hold their offices for the term of three years." The fifty-ninth section enacts that "the removal of any county, corporation or township officer, from the county, corporation or township in which such officer was elected shall vacate his office; or, if he fail to qualify and give bond (when a bond is required) in the time prescribed by law for the commencement of his term of office, his office shall, for that cause, be vacant." The fifty-eighth section provides that when a vacancy occurs in the office of sheriff, county treasurer, &c., the same shall be filled by the judge of the county court of the county in which the vacancy occurs.

"An act prescribing the duties and compensation of county officers" was approved July 11, 1870. Id., p. 257, chap. 179. The first section enacts that the duties, &c., of sheriffs, &c., "shall be the same as are now or may hereafter be prescribed by law, except that the sheriff after the year 1870 shall not collect the state revenue or the county levy, and except," &c. The second section enacts that "each officer mentioned in the preceding section, and every other county officer elected in November shall, on or before the first of January next
after his election, qualify by taking
732 *the oath of office prescribed by law,"
&c. And the third section enacts that "each officer mentioned in the first section shall, at the time of his qualification, enter into such bond with such condition and in such penalty as may be required by law, with sureties to be approved by the court or judge before whom he qualifies," &c. Sections from 4 to 33 inclusive, relate to the county treasurer; those from 20 to 33 inclusive, relating to his duty as to revenue. Section 20 enacts that "the county treasurer shall, in the manner hereinafter provided, receive the state revenue, and account for and pay over the same in the manner provided by law for the payment of money into the treasury of the state."

The foregoing is a summary of the acts passed after the adoption of the present constitution, and prior to the 13th of February 1871, the date of the bond on which the judgment in this case was obtained, and it is made with a view of showing the effect which those acts have on the question we are now considering. Alexander Scott, it seems, had been sheriff of the county of Caroline prior to the execution of the said bond, and in 1869. He probably was so when the enabling act was passed. Whether he gave bond under the first section of that act does not appear. He was appointed such sheriff under the fourth section of the act by an order of court made on the 11th of April 1870, and thereupon duly qualified as such by taking the oaths, and executing bond with security as required by law. Both in the order, and in the condition of the bond, it is expressed that he is to continue in office until his successor shall be duly elected and qualified. At the general election of officers in the county in November 1870, John H. James was elected
sheriff, but never qualified. George
733 W. *Marshall was elected county
treasurer, and qualified accordingly. In this state of things, on the 13th day of February 1871 the order of court was made appointing Scott collector of taxes and levies of the year 1870, and he thereupon duly qualified as such by taking the oaths prescribed by law, and entering into bond with security as before mentioned. And the question we are now considering is, whether that bond is valid.

It was evidently entered into, and taken, under the idea (for the order so expressly declares) that a vacancy had occurred in the office of sheriff as collector of taxes, levies and officers' fees, by reason of the failure of Scott to give the bond required by the act of the general assembly passed on the 6th day of January 1871 before referred to; and also under the idea that the court had the power to fill the vacancy by appointing a collector. Were these views of the court correct?

First, was there such a vacancy? Suppose that John H. James, who was elected sheriff in November 1870, had duly qualified as such; that the county judge, in pursuance of the act of January 6, 1871, had required the sheriff Scott to execute a new bond; and upon the failure or neglect of Scott to execute such bond within thirty days from the passage of the act, had required the county treasurer to execute a new bond, which the said treasurer also failed or neglected to execute, would not the office of the sheriff Scott, as collector, then have become vacant? The books of the commissioner of the revenue were not put into his hands until the 20th of December 1870, and it was impossible for him to have collected the revenue of that year, during the few remaining days of the year.
He could not have collected, certainly
734 he could not have distrained *for it,
after the expiration of that year, for he would then have been no longer sheriff. The revenue in that case could have been collected, neither by the old sheriff nor the new sheriff, nor the county treasurer. Not by the first nor the last, because of their failure to give the new bond; nor by the second, because the law expressly denied to him the power to collect the state revenue or the county levy. There would then have

been an absolute necessity for the appointment of a collector. If the power to make such an appointment would not result from the necessity of the case, could it not be found in the provision of the Code of 1860, page 282, chapter 49, section 18, referred to in the opinion of the learned judge of the court below? That provision is in these words: "In any case of vacancy, in the office of sheriff or sergeant, by other causes than the death of such officer, the court of the county or corporation in which such vacancy shall exist, may appoint a collector of the taxes, levies, militia fines and officers' fees, or any of them, in such county or corporation." That provision was not contained in the Code of 1849; but being found to be necessary, was embodied in an act passed March 29th, 1851, entitled "an act concerning commissioners of the revenue and for other purposes." Acts of Assembly 1850-51, p. 7, chap. 6—being the twentieth section of that act. It was afterwards embodied in the Code of 1860. It has not since been repealed, certainly not expressly; and we think, not by implication. Suppose the sheriff Scott had been required to give a new bond, and accordingly had given it, in pursuance of the act of January 6, 1871, would not the effect of the act, and the requisition and execution of the new bond, have been to have made him collector of taxes, levies, &c? The very object of that act was to make him such a collector;
735 *and not to make him sheriff for any other purpose. Can it make any difference that he is not called "collector," eo nomine, in the act, although he is described as such by unmistakable terms? Suppose that, notwithstanding the failure of Scott to give the bond required of him within thirty days from the passage of the act of January 6, 1871, he had, on the 13th of February 1871, just seven days after the lapse of the thirty days, given bond in strict and literal pursuance of the said act, would not such bond have been valid? According to the case of Monteith, sheriff & als. v. The Commonwealth, 15 Gratt. 172, it seems that it would.

But there was such a vacancy, at least so far as related to the collector of the taxes, levies, &c.; notwithstanding John H. James did not qualify as sheriff under his election in November 1870. The act of July 11, 1870, as we have seen, expressly declared "that the sheriff, after the year 1870, shall not collect the state revenue or the county levy." So that even if Scott continued to be sheriff for all other purposes, until his successor was elected and qualified, he certainly did not as to the collection of the state revenue, after the 31st of December 1870. So that the office of sheriff, as to that purpose, was, to all intents and purposes, vacant on the 13th of February 1871, when Scott was appointed collector and executed the bond in question.

But suppose we be wrong in all this. Did it not devolve on the court to determine whether there was or not a vacancy; and to fill it if there was? Was not this a matter within the jurisdiction of the court? and the court having exercised its jurisdiction, can its judgment be questioned in a collateral way? And, especially, we ask, can it be so questioned by Scott, who voluntarily accepted the appointment and executed
736 *the bond; or by his sureties, who voluntarily assumed their liability as such? Are they not all estopped by their act and by the bond from now raising such a question?

We think that all these questions are already decided by decisions of this court, some or all of which were cited in the argument: Pratt v. Wright &c., 13 Gratt. 175; Monteith v. The Commonwealth, 15 Id. 172; Gibson v. Beckham &c., 16 Id. 321, especially the last two cases. In Monteith's case, he was elected sheriff of Stafford in May 1854, and gave bond as such. In July 1856, he gave bond under the act of March 15th, 1856, extending the time for which sheriffs should hold office to January 1, 1857. In May 1856, he was re-elected sheriff for a regular term of two years, commencing the 1st of January 1857; but he did not give his official bond under that election within sixty days from his election, nor until the 12th of January 1857, when it was executed by himself and his sureties. This bond recited his election for two years from the 1st of January 1857, was acknowledged in open court and ordered to be recorded; and Monteith was permitted by the court to qualify as sheriff and act as such. It was held, first, that if Monteith was not sheriff de jure he was sheriff de facto, and as such was bound for his acts; secondly, that the sureties of Monteith on his last bond were estopped by the recitals thereof from saying Monteith was not sheriff, and the bond was binding upon them; and thirdly, that Monteith having professed to enter upon his office and act under his last election, it could not be held that he continued to hold over and act under his first election on the ground that his successor had not qualified, so as to subject his sureties in the previous bonds. Allen, P., delivered an opin-
737 ion in the case *which was concurred in by all the other judges. He reviewed the authorities and came to conclusions which are strikingly appropriate to this case; but we will not repeat them.

Gibson v. Beckham &c., is a strong authority to show the conclusive effect of a judgment of a court of competent jurisdiction in the case until it is reversed. There the court, by an erroneous judgment, appointed an administrator, c. t. a., who executed his official bond with sureties in the proper form. It was held, first, that the bond was valid, and bound the administrator and his sureties for his default; secondly, that where a court has cognizance of the subject matter, its judgment, though it may be erroneous, is not void; it is binding until it is set aside or reversed, and cannot be questioned incidentally; acts done and bonds taken under it bind the obligors. Thirdly, that where a court or officer has authority or capacity to take a bond, and

makes a mistake by omitting some condition prescribed, or inserting a condition not authorized or illegal; unless the statute, by express words or necessary implication, makes it wholly void, the bond is not void; the good will not be vitiated by the bad; and the bond may be sued on so far as the conditions are good, as a statutory bond; and fourthly, that when the court has cognizance of the subject matter, or capacity to take a bond, and takes a bond which on its face is valid, but contains a recital of facts necessary to its validity; as in the cases of the election and induction into office of a sheriff, the presence of the justices named as obligees and the like, the obligors shall be estopped from denying the truth of such recitals. Allen, P., also delivered an opinion in that case in which all the other judges concurred, and in 738 which he reviewed the *authorities. His views there, too, are strikingly appropriate to this case, but need not be here repeated.

In the case under consideration, the bond recites that "by reason of a vacancy in the office of sheriff of the county as collector of taxes, in pursuance of the act of the general assembly passed February (January) 6, last, the court appointed the said Alexander Scott to be collector of the taxes, levies and officers' fees for the present year in this county;" and the order of court made at the same time contains the same recital in effect. We must presume, therefore, that everything was done which was necessary to be done under the act of January 6, 1871, to create such a vacancy, and therefore that both the sheriff Scott, and the treasurer of the county, failed to execute a new bond, upon being required to do so by the county judge in pursuance of that act. And the court having thereupon adjudged that a vacancy existed, and having filled it by the appointment of Scott, and Scott having accepted the appointment, and entered into bond with sureties, the bond is therefore valid, and Scott and his sureties are estopped from denying the truth of the recitals therein contained.

We are therefore of opinion that the first assignment of error is not well founded, and will now proceed to consider the other, which is,

Secondly, that if the bond is valid the condition of it was fully performed.

Whether the condition was fully performed or not depends upon the right of the plaintiffs in error to two additional credits claimed by them, one for $2,915, and the other for $380. If they be proper credits, then the whole amount of taxes with which the sureties were chargeable under the said bond has been fully paid. The plaintiffs in error, in their petition for a 739 *writ of error, say the "defalcation for which this judgment was entered was produced by the misapplication of the sum of $2,915, collected by Scott of the revenue of 1870, prior to the 13th day of February 1871, and applied by him to the payment of the taxes of 1869, for which he was then in arrear." "This sum thus collected was paid by Scott to the auditor in January 1871, and as it was collected and paid to the auditor by Scott prior to the execution of the collector's bond, your petitioners, who are the sureties in said bond, are in no manner liable for it." "The defalcation was further increased by the sum of $380," which they say was also derived from the collection of the revenue under the said bond, but was improperly applied to the payment of the license taxes of 1870, in respect to which said Scott was in arrear, but which was not covered by the condition of the bond. The facts on which this claim to these two additional credits is founded seem to be fully sustained by the evidence certified in the record; and the question is, are the plaintiffs in error entitled to these credits?

Scott was charged by the auditor with the whole amount of the taxes of Caroline county for the year 1870, and he was credited with such payments as were made on that account, for which as made receipts were given from time to time, specifying on what account the payments were made. He was also credited with the amount of his commissions and his delinquent list, leaving a balance of $3,318.31, claimed by the auditor to be due on account of the revenue of 1870, for which, besides interest, damages and costs, he claimed and obtained judgment in behalf of the state against the collector and his securities. Did he do wrong in applying the two payments 740 of $2,915 and *$380 to prior debts due by Scott as aforesaid, for which the said securities were not liable?

Scott owed two debts to the commonwealth, for which different sets of sureties were liable. He made payments to the auditor on account of these different debts at different times, which payments were applied by the auditor according to the direction of the debtor. This was perfectly proper, if the auditor acted fairly. And it is not pretended that he did not. Certainly there is no evidence in the record tending to prove that he did not. If he had known that money applied by Scott to the payment of a debt for which his sureties as collector were not liable, was derived from the collection of revenue collected by him under the bond in which they were sureties, they might have had just ground of complaint. But he had no such knowledge, and the money had no ear mark. The law is well settled, that a man owing two debts to the same creditor, and making a payment to the creditor, may apply it to either of the debts, as he pleases. If the debtor fail to make the application, the creditor can make it, as he pleases; and if both fail to make it, the law will make it, according to the circumstances of the case. And in the absence of any other controlling circumstances, the payment will be applied first to the older debt. In this case the application was made by the concurrent act both of the principal debtor, who made the payment, and of the creditor. The balance remaining, after applying the credits which were properly applicable to

the discharge of the revenue of 1870, was a debt for which the sureties of the collector were chargeable, although a portion of the revenue of 1870 was collected prior to the execution of the collector's bond. The payments made by Scott on account of the
741 revenue *of 1870, were, at least without any direction of Scott to the contrary (and there was none), properly applicable to the payment of what he had collected, in the order in which it was collected, on the principle before stated. Thus leaving due that portion of the revenue for which the sureties of the collector were clearly liable. Therefore the case of Farrar & Brown v. The United States, 5 Peters. R. 388, relied on by the learned counsel of the plaintiffs in error, does not apply to the case. It might have applied if no payment had been made by Scott on account of the revenue of 1870, or not enough to discharge the amount which had been collected prior to the execution of the collector's bond. In this case the sureties might well have said, according to the case in 5 Peters. that they were not bound for money collected by their principal before they became liable as sureties. But here that portion of the revenue has been long since paid by Scott, and is not now sought to be enforced against his sureties.

We are therefore of opinion that there is no error in the judgment, and that it ought to be affirmed.

BOULDIN, J., concurred entirely in the last proposition discussed by Moncure, P., but he had great doubt on the first point. He was, however, disposed to yield to the united opinion of the judges; but on another ground; on the principle on which Corprew v. Boyle was decided.

Judgment affirmed.

After the judgment of this court had been rendered the appellees presented a petition for a rehearing of the case upon the last point discussed by the judge, on the ground that the principle as to the application
742 *of payments between individual creditors and debtors does not apply as between the state and her debtors.

MONCURE, P. After the opinion was delivered, and judgment entered by this court in this case, the learned counsel of the plaintiffs in error presented a petition for a rehearing of one of the points decided in the case, to wit: that the said plaintiffs are not entitled to the two additional credits claimed by them, one for $2,915, and the other for $380. We have carefully considered the grounds relied on in the petition, and the cases referred to therein, and come to the following conclusions concerning the same.

The petitioners contend "that the principle on which the court placed the decision of this point does not apply to the case of a receiver of public moneys, who has given a bond with security to account for it; that the officer and state do not stand in the relation of debtor and creditor, and that the sureties in the bond have a direct interest in the money, and that there can be no other application of the money than in accordance with the condition of the bond." The principle here referred to, as the one on which the court placed the decision of the point in question, is in relation to the application of payments, and is thus stated in the opinion of the court: "The law is well settled, that a man owing two debts to the same creditor, and making a payment to the creditor, may apply it to either of the debts, as he pleases. If the debtor fail to make the application, the creditor can make it as he pleases. And if both fail to make it, the law will make it, according to the circumstances of the case; and, in the absence of any other controlling circumstances, the payment will be applied first to the older debt."

743 *The petitioners seem to suppose that where a receiver of public money, appointed for successive periods, gives bonds with different sets of sureties, to account for his collections during those periods respectively, all his payments on account of such money are presumed, in the absence of evidence to the contrary, to have been made with money collected on account of the bond in operation at the time of such payments respectively, and must accordingly be applied to the credit of such bond until it is discharged, before they are applied to the credit of any of the other bonds. And some of the cases to which they refer seem to tend to sustain that view. But we think it will be found, on a critical examination of those cases, that the points really decided in them do not in fact sustain that view. And, if they do, we are of opinion that they are in conflict with a well settled principle, and are founded on a misapprehension of that principle.

The cases referred to, which seem to tend to sustain that view are, United States v. January & Patterson, 7 Cranch 572, decided in 1813; Postmaster General v. Norvell, Gilpin 106, decided in 1829; and Myers v. The United States, 1 McLean 495, decided in 1839. The first was a decision of the Supreme court of the United States. The latter two were decisions, one of a circuit and the other of a district court of the United States. The latter two were expressly founded on the first named case, as no doubt are all the opinions since expressed by courts or judges to the same effect. If the foundation falls, the superstructure, ramified as it may be, must also fall with it.

Fortunately, it does not remain for us to show what was really decided by the case in 7 Cranch 572; and that it certainly does not go to the extent which is claimed for it by the petitioners. That work has
744 *already been done by a master workman, no other than Mr. Justice Story, in two cases decided by him: Postmaster General v. Furber &c., 4 Mason's R. 333, decided in 1827; and United States v. Wardwell &c., 5 Id. 82, decided in 1828. In the former it was held, according to the re-

porter's marginal abstract of the case, that "where there are items of debt and credit in a running account, between the postmaster general and the deputy postmasters, in the absence of any specific appropriation by either party, the credits are to be applied to the discharge of the debts antecedently due, in the order of the account." Two bonds had been successively given by the same postmaster with different sets of sureties, and actions of debt were brought upon them. Sundry payments had been made to the general postoffice on account, which, if applied to the purpose would extinguish the balance due at the time of giving the second bond. The real contest therefore was between the sureties to the first and second bond; and the only question made by them and presented for the consideration of the court was, whether the payments so made generally on account, after the giving of the second bond, should be applied to extinguish the prior balance, or were to be applied indischarge of the balance of postages received since the second bond was given. Story, J., said: "The sums paid by the principal since the second bond was given, having been paid upon account generally, are to be applied to extinguish the balance antecedently due. Such, I understand, to be the general rule where there is a running account composed of successive items of debit and credit on each side. In such cases the payments are to be applied to extinguish antecedent debts on the debit side, there being no specific appropriation by
745 either party. *It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. This doctrine was very deliberately settled by the master of the rolls in Clayton's case, 1 Mer. R. 604; and it appears to me entirely consonant to equity and good sense, and the fair presumptions of intention as to appropriation, deducible from the nature of such transactions. The case of the United States v. January & Patterson, 7 Cranch 572, does not, according to my apprehension of it, inculcate a different doctrine. It is, indeed, somewhat difficult, from the facts of the case as reported, to give a very definite interpretation of the opinion of the court. I confess myself never to have supposed that it meant to go further than to reverse the erroneous opinions of the court below upon the points ruled by it." "It appears to me that if, in the absence of any other distinct appropriation, the rule be, as I suppose it to be, there can be no difference whether the case respects a principal or a surety. The rule supposes that payments generally made are to be applied to extinguish or reduce antecedent debits, according to the order of time, and when extinguished or reduced as to the principal they are necessarily so as to all other persons."

Now if Judge Story, in that case, correctly expounded the law, there can be no doubt about the correctness of our decision in this case.

In the other case decided by him and cited supra, the same principle, in its application to a similar case, was reaffirmed. There the contest was between different and successive sets of sureties of the same receiver of public money, in regard to the proper application of payments made by the receiver on general account. "It is," said Judge Story, "the common case of a
746 *running account, where there are various debits and credits on each side, and the question is, in such a posture of things, where there has been no specific application made of any payments by either party to any specific items, how the payments thus passed into general account are to be deemed, in point of law, to have been applied. My opinion is, that they are to be considered as applied in discharge of the items antecedently due, in the order of time in which they stand in the account." "The case of U. S. v. January & Patterson, 7 Cranch 572, has been supposed to justify a different doctrine. It appears to me that such is not the true explanation of the case.

It turned wholly upon its own particular circumstances, and the charge of the Circuit court, which, with reference to the facts, the Supreme court thought erroneous. The questions then were (1), whether the supervisor had any right to make a special application of any prior payments, made on general account; and if he had, then (2), whether the promise of the supervisor to make a particular application of the payments, after they had been passed into general account, was, per se, an application of such payments, unless followed by some positive act of appropriation. The Supreme court decided both points against the defendant, and overruled the contrary decision of the Circuit court. The case of the United States v. Nicholl, 12 Wheat. R. 505, in which the United States v. January & Patterson, is recognized, turned upon entirely distinct considerations. There the United States were supposed to have a right, like any other creditor, to apply payments made by the debtor to any account, where the debtor himself had made no application. I have had occasion to consider this point in the case of the Postmaster General v. Furber. and to the opinion there given I
747 *deliberately adhere." To the opinion of the court in the case reported in 5 Mason 82, pp. 87-94, Judge Story has appended a long note fully explaining the case reported in 7 Cranch 572, the statement of which, as to the facts apparent on the record, is, he says, inaccurately given in that report.

In the case of Boody &c. v. The United States, 1 Woodbury & Minot's R. 150, decided in 1846, which was the case of a postmaster who had given three successive bonds with the same sureties, on which bonds an action of debt was brought, and the question was, in regard to the proper application of payments made by him on general account; the materiality of the question arising from the fact that the act of limitation would bar any claim under the first bond; it was held that payment is to be applied to the oldest

debt, if the debtor give no directions; and it must be proved that the payment came from receipts accruing under a second bond, if that is relied on against the propriety of applying it to any balance still due under a prior bond. In that case, as in the cases decided by Judge Story, cited supra, the United States were held to be a creditor in such case within the meaning of the general principle in regard to the application of payments.

It may be proper here to refer to 1 American Leading Cases, marg. 268-295; reporting, The Mayor &c. of Alexandria v. Patten &c., 4 Cranch 317; Field &c. v. Holland &c., 6 Id. 8, with the notes of Hare & Wallace thereto appended, as containing a reference to most of the cases on the subject of the application of payments. Those learned annotators, on p. 292, note 4, refer to the case of U. S. v. January & Patterson, 7 Cranch 572, and other cases, and seem to think that they establish or recognize
748 an exception to the general *rule; and perhaps to the extent contended for by the learned counsel of the petitioners.

Upon the whole, however, we are decidedly of opinion that the rule is correctly laid down by Mr. Justice Story in the cases decided by him and before referred to, and that it applies as well to the government as any other creditor. It is very important to the interest of the government that the fact should be so, and it is just we think to public officers and their sureties. We think that the uniform practice in this state has conformed to that construction of the law. It has been very common for the same person charged with the duty of collecting taxes and other money to be reappointed to office, and to give new bonds with different sets of sureties. In such cases, we believe the auditor of public accounts has been always in the habit of applying any money paid him on the public account according to the direction of the person paying it, and in the absence of any such direction, and of any information as to the propriety of a different application, we believe that official has been always in the habit of applying a general payment on account, first to the discharge of the older portion of the account standing on his books against the person making the payment. It would certainly be productive of very great inconvenience, if not loss, to the public, or at least to the auditor, if it were necessary for him to ascertain at his peril, or at the peril of the public, that every application made by him, of every payment made to him on the public account, was such an application of such a payment as was proper to be made, in view of the source from which the money was derived, and in view of the conflicting interests of sureties. The auditor must, of course, act in good faith. He cannot legally apply to the benefit of A money
749 *which he knows ought to be applied to the benefit of B. If a sheriff receive money for which his surety B is liable, he ought to apply it to the discharge of such liability, and not to the discharge of a liability of A on his account. Such a misapplication would be a fraud on the rights of B; and if the auditor received the money, with knowledge of the fraud, he would be a particeps criminis. But if the auditor have no such knowledge he can incur no such liability, and the application of the payment thus made by him in good faith is legal and valid, even though the money so paid ought to have been differently applied by the sheriff. It is the duty of the auditor to collect every debt due to the public by the sheriff. If the latter offer to pay such a debt to the former, and the former does not know, and has no reason to believe that the money with which such payment is offered to be made is money which the sheriff has no right so to apply, it is the duty of the auditor to receive the money. It does not follow that the sheriff who is indebted to the commonwealth, on account of two successive bonds, can legally be in possession of and entitled to no money, which he did not receive under his last bond. He may have ample private resources. There may be money due to him under his old bond, on account of which he may have made collections after giving the new bond, as, indeed, is very often the case. Suppose a private creditor of a sheriff bona fide receive of the latter in payment of the debt money derived by the latter from the collection of taxes, not knowing that the money was so derived, would not the act be legal and valid on the part of the creditor? Why is not the effect the same when the creditor is the commonwealth? Is there any reason applying to the former which does not apply to the latter case? Is there not
750 *a special reason why the commonwealth and her auditor of public accounts should not be embarrassed with perplexing enquiries in regard to relative and conflicting rights of different sets of sureties of the same public debtor who may offer to make a payment on account of the debt? Does justice to the sureties require that they should be thus taken care of at the expense of so much public inconvenience? They voluntarily became sureties, knowing the nature of their undertaking. They trusted their principal, and enabled him to get the public money in his hands. Why cannot they watch over him, and take care that he applies it properly? Certainly their principal, in whom they trusted, and whom they accredited, has it in his power to protect them at least against a misapplication of any payment he may make of money collected by him, for he may direct and control the application at the time of the payment.

We think the following may be laid down as general rules of law, deducible from all the cases on this subject, viz: A payment by a debtor who owes several debts to a creditor, is to be applied to one or the other of the debts; first, as the debtor may direct at or before the time of making such payment; and such direction may be given expressly or by implication. Secondly, if the debtor give no such direction then the creditor may make the application, according to his

pleasure; and he may make it, either at the time of such payment, or afterwards, before the commencement of any controversy on the subject; though after he has once made the application, he cannot change it to another without the consent of all other persons concerned. Such application by a creditor may also be made either expressly or by implication. If he enter the debits and credits in a general account, as 751 they *occur, this will be considered, in the absence of any evidence to the contrary, as a general application of the credits to the debits in the order of time in which the latter occur; thus paying first the antecedent debts. Thirdly, if neither the debtor nor the creditor make the application, then the law will make it, according to the circumstances of each particular case; and if there be no other controlling circumstance, the application will be made according to the order of time, paying first the oldest debt. But if the debts be due by a collector or other receiver of money under bonds with different sets of sureties, then the law will so apply the payments, if possible, as that the money collected under one bond shall be applied to the relief of the sureties in that bond respectively. And the creditor in such a case, if he be informed as to the source from which the money with which a payment may have been made was derived, cannot apply it otherwise, even with the consent or by the direction of the principal debtor. Most of these rules were laid down to the same effect by Judge Christian, in delivering the opinion of the court in Howard &c. v. McCall &c., 21 Gratt. 205, 209.

Such being, in our view, the principles of law in regard to the application of payments, we think it is easy to apply them to this case. In regard to the sum of $2,915, paid and applied by Scott's directions upon his indebtedness for the taxes of 1869, it is certified in the record that the money with which this payment was made, was derived by Scott from collections made by him in January 1871, on account of the revenue of 1870, before he had given the bond of the 13th of February 1871; and we must therefore take the fact to be so. But it is not certified in the record, and does not appear, that the auditor knew that the money 752 *so paid to him was so derived; and we must therefore take the fact to be that he had no such knowledge or information. What, then, was he to do when this money was tendered to him in payment of this debt to the commonwealth? Plainly it was his duty to receive and apply it accordingly. But, according to the argument of the learned counsel, the sureties in the bond of the 13th of February 1871 were not liable for money collected in the preceding January, at least if it did not remain in the hands of the collector when the bond was executed; and therefore they could not have been injured by a previous misapplication of that money. In no view, therefore, was any injury done to them by the auditor in receiving and applying that money as he did. The same principle applies to the $380 charged to have been "illegally applied by the auditor to cover the arrearages of Scott on a prior account." He was wholly uninformed of the source from which that money was derived, whatever the source may have been. Thus far, certainly, nothing was done by the auditor of which the petitioners can rightfully complain.

But it is contended that all the payments made by Scott on account of the revenue of 1870, after the execution of the bond of the 13th of February 1871, ought to have been applied, first to the payment of that part of the revenue of 1870 which was collected after that day, and not to that part which was collected before that day; and that if such application had been accordingly made, nothing would be due upon the said bond. Now let us see how that matter is.

When Scott made the payment of his prior arrearages as aforesaid, he did not have himself charged on the books of the auditor with the same or any amount on account of collections of the revenue of 1870, or 753 *make any report, or give any information, to the auditor, of any such collections. The only charge against him on the said books, on account of the said revenue, was of the whole amount which was made on receiving the books of the commissioner of the county. And against that charge he was credited by the payments afterwards made by Scott on that account, in the order in which they were made. For these payments, as they were made, receipts were given by the auditor, on account of the taxes of 1870, without saying when they were collected. The first of these receipts bears date on the 14th of April 1870, two months after the date of the collector's bond, and is for $2,500. The other receipts bear different dates thereafter, running through the year 1871 into the year 1872, and one of them into the year 1873. All of them together amounted to nearly $16,000; and with the delinquent list and commission, would have been sufficient to cover the amount of the taxes for 1870, after deducting the amount which had been collected in January 1871, before the execution of the bond. The petitioners contend that these payments ought to have been applied, and must be considered as having been applied to the payment of that part of the taxes for which they were liable, to wit: the part collected after the execution of the bond. Whereas the commonwealth contends, that being general payments on account of the taxes of 1870, they should be first applied to the payment of that part which was first collected, to wit: the part collected in January 1871, that being the older debt. We think the commonwealth is right, according to the well settled principle of law before stated. Scott might have directed the application according to his pleasure. But he gave no direction on the subject. The right then to make the 754 *application devolved on the auditor, provided that he made it to some part of the taxes of 1870, to which the payments

were limited according to the terms of the receipts. He made it first to the older debt, according to the uniform usage of the office; and if he did not, the law, as we have seen, made that application. The bond of Scott as collector was not sent to the auditor until some time after the 3d of March 1873.

But there is not a particle of evidence in the record tending to show from what source Scott derived the money from which any of these payments were made. There is no presumption of law or fact that it was derived from the collection of taxes. It was not ear-marked. It was unmarked money which he paid to the auditor on account of the taxes of 1870, all of which he owed. We are not aware that according to any case which has been decided would these payments be applicable, first to the payment of the taxes collected after the execution of the bond, unless they were made with money actually derived from such taxes; and we have seen there is not a particle of evidence in the record tending to prove that fact.

In every view of the case, therefore, we are of opinion that there is no error in the judgment, and that the petition ought to be refused.

CHRISTIAN, STAPLES and BOULDIN, Js., concurred in opinion of Moncure, P.

ANDERSON, J., concurred in the result.

Rehearing refused.

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755 *Kelly v. Board of Public Works.

January Term, 1875, Richmond.

1. **Contracts—Board of Public Works.**—An action may be maintained against the present board of public works of the state, upon a contract made with the board as organized under the former constitution and laws.
2. **Same—Same—Actions against.**—A contractor has two claims against the state, arising out of the same contract, one for commission, and the other a percentage on his actual expenditures. He brings his suit, and recovers judgment for a certain amount which he alleges was the amount of the commissions. He brings another suit for the amount of the percentage on his actual expenditures; and the judgment in the first case is relied upon by the defense as having decided upon his whole claim. Parol evidence is admissible to prove that only the claim for commissions was involved in that case.

The case is sufficiently stated in the opinion of Judge Anderson.

Lyons and Parish for the appellant.
The Attorney General, for the appellee.

ANDERSON, J. This is an action of trespass on the case upon account, brought by the plaintiff in error against the Board of Public Works. The alleged ground of action may be succinctly stated as follows: That a contract had been made by the firm, of which the plaintiff is the survivor, with the Board of Public Works, to construct a section of the Blue Ridge railroad, including the tunnel and its approaches. That this contract was afterwards abandoned by mutual consent, and a new contract made by the Board with Kelly & Larguey, of whom the plaintiff is the survivor, 756 *by which the Board of Public Works agreed to pay them monthly their actual expenditure upon the work, an account of which was to be kept by a clerk to be appointed by the Board, who was to have free access to all books, papers and accounts throwing light upon the cost of execution, and to make return thereof monthly to the Board, and that upon the completion of the work, to the satisfaction of the Board, they were to be paid, in lieu of all other profits, "ten per cent. on actual expenditure, in conformity with their contract of $200,000, with a deduction of two per cent. on any excess over and above the expenditure of $200,000, or an addition of two per cent. also on any reduction from the same." That Kelly & Larguey had faithfully executed the work, and completed it to the entire satisfaction of the Board, but had not been paid the whole of their actual expenditure upon the work, and that there was a balance of $10,491.97, which had not been paid, and was still due and owing them from the said Board of Public Works; for the recovery of which this suit was brought. There was a general demurrer to the declaration, and to the amended declaration, and to each count thereof, which was sustained as to some of the counts, and overruled as to others; and the plaintiff took issue upon the pleas of non assumpsit, and non assumpsit within five years. There was a verdict and judgment for the defendant, and the case comes here upon a writ of error. The question which meets us at the threshold is, Will the action lie against the Board of Public Works? Is it a body corporate, capable of suing and being sued?

By the act of assembly of February 5, 1816, § 3, the Board of Public Works is created a corporate body, to be styled "the President and Directors of the Board of Public Works," with perpetual succession and 757 *capacity to sue and be sued, to plead and be impleaded, with all the rights and privileges of a corporation.

It is enacted, chap. 66, § 1, p. 339, of Code of 1849, "that the governor, treasurer, two auditors, and register of the land office, shall be a corporation under the style of the Board of Public Works, and be vested with all the rights and powers now vested in the president and directors of the Board of Public Works, or in any corporation composed of officers of government that has been created for any work of internal improvement of which the state is sole owner." This board is a successor to the Board of Public Works organized under the act of 1816, and expressly invested with its rights and powers; among which is the capacity of contracting, of suing and being sued, of pleading and being impleaded; and in addition, with all the rights and powers vested

in any corporation composed of officers of government, created for any work of internal improvement of which the state is sole owner. It was with the Board of Public Works organized under this statute that the contract in this suit was made by the plaintiff in error and his deceased partner.

Whilst said contract was being executed, a new Board of Public Works was organized under the constitution of 1851, with whom the execution of the contract was completed, and by whom it was virtually sanctioned and approved. This board was composed of three commissioners, elected by the voters of their several districts, into which the state was divided, and its organization was to be provided for by the general assembly. (Art. 5, § 14 and 15, of constitution of 1851.) In pursuance thereof it was enacted by the general assembly, "that the commissioners of public works and their successors 758 shall be a corporation under the *style of 'the Board of Public Works,' and be vested with all the rights and powers now vested in the Board of Public Works; shall in all respects conform to the provisions of the existing laws regulating the present Board of Public Works, except so far as said laws may be inconsistent with this act, and the act regulating the commissioners of the sinking fund; and the powers and acts of the Board of Public Works, as now organized, shall cease and determine so soon as the board elected under this act shall be organized, and be transferred to and vested in the Board of Public Works, organized by this act." This board is thus made the successor of the preceding board, and is invested with its rights and powers, among which was the capacity of suing and being sued, pleading and being impleaded. It was against the Board of Public Works thus constituted and organized, that the plaintiff in error brought his action, and which was defended by its successor, the board organized under the present constitution.

The constitution of 1851 declares "there shall be a Board of Public Works to consist of three commissioners," and then goes on to direct that the state shall be divided into three districts, and that the voters of each district shall elect one commissioner, &c. The existing constitution, like the former, declares there shall be a Board of Public Works; but, unlike the former, to consist of the governor, auditors and treasurer of the commonwealth, under such regulations as may be prescribed by law. We have seen that certain regulations had been prescribed by law for the Board of Public Works; such as that it should be a corporate body, having perpetual succession, and being capable of suing and being sued in its corporate name, &c. No changes have since 759 been made in *the law with regard to the Board of Public Works. No new regulations have been prescribed by law. It exists under precisely the same regulations that it did before the change of constitution, except that it is composed of a different class of public officers. It is the same Board of Public Works, invested with all the rights and powers with which it was invested, and subject to the same regulations to which it was subject before the change of constitution. By the schedule to the constitution, § 1, "the common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until altered," &c.

The practice has accorded with this construction. There are precedents of suits maintained against the Board of Public Works. Enders v. Board of Public Works, 1 Gratt. 364, 372. And it appears from this record that this plaintiff maintained an action against the Board of Public Works, and recovered judgment without question of his right to sue. I am of opinion, therefore, that this action lies against the Board of Public Works, and that the demurrer is not sustainable on the ground that it does not. And without indicating an opinion as to the authority of the Board of Public Works to make sale of state bonds, I cannot hold that any of the counts are bad upon general demurrer.

Upon the trial the plaintiff excepted to the ruling of the court, excluding parol testimony which he offered, to prove that the claim for which he brought this suit was not embraced in a former judgment.

The rule laid down in the Duchess of Kingston's case (20 Howell St. Trials 355, 538), is, that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, 760 upon the same matter, directly *in question in another court. The judgment in the former suit must be directly on the point which is in question in the subsequent suit, to make it a bar when pleaded, or conclusive when relied on as evidence. A judgment concludes the parties only as to the grounds covered by it, and the facts necessary to uphold it. Cowen & Hill's notes to Phillips' Ev., 4th volume, p. 826, note 587. In Seddon v. Tutop, 6 T. R. 607, it was held that when a plaintiff in a former action had declared on a promissory note, and for goods sold, but on executing the writ of inquiry gave no evidence on the count of goods sold, the judgment was not a bar to his recovery for the goods sold, in another action. The decision was upon the broad ground, that the cause of action in the second suit had not, in fact, been litigated in the first. And the judges refer to Hitchin v. Campbell, 2 Wm. Black. R. 827; 3 Wil. R. 304, where the principle is conceded, that if the real merits of the second action have not been decided in the first, the prior judgment is no bar. This principle is consistent with the rule laid down in the Duchess of Kingston's case, supra, and is reasonable and just. I am not aware that it has ever been seriously controverted.

But upon the question, whether parol proof is admissible to show what matters were litigated and decided in the former suit, the decisions have not been so uni-

form. But the great preponderance of American authority, as is said by the writer of the notes to Phil. Ev. supra, is in favor of the admission of parol evidence. Whenever a question is raised as to the identity of the matters litigated in the first suit, parol evidence is admissible, to explain what transpired on the former trial. Parker v. Thompson, 3 Pick. R. 490; Cist v. Zeizler, 16 Serg. & Rawle R. 282, 285; Stevens
761 *v. Payne, 2 Roots R. 83; Wood v. Jackson, 8 Wend. R. 9; Burt v. Sternburgh, 4 Cowens R. 559; Gardner v. Buckbee, 3 Id. 120. These cases are cited in support of this doctrine in Cowens & Hill's notes to Phillips on Evidence, 4th volume, p. 838-9, note 590. And it does seem to me, as the writer says it appears to him, that it is indispensable to the efficient administration of justice. As is said by Parker, C. J., in Parker v. Thompson, every fact which exists on record must be proved by the record; but when the question is as to the real subject matter of a suit, or to show a bar to another suit, or to lay the foundation of an action of indemnity, the identity of the cause of action may be proved by other than record evidence. But if the record shows that the first suit was apparently for the same cause of action litigated in the second suit, it will be prima facie evidence that such cause of action has once passed in rem judicature; and hence the onus will devolve upon the party against whom the record is used, to show the contrary. 4 Vol. Notes to Phillips on Evidence supra, and cases cited. And this should be done by clear and decisive testimony.

Now to apply these principles to the case in hand, the defendant had given parol testimony, tending to show a former recovery. To contradict which, the plaintiff read in evidence the judgment from the order book of the court, proved the loss or destruction of all the papers and other records of the case, and offered parol testimony to prove that the matter in controversy in this suit was not embraced in the former judgment; which testimony was excluded by the court. The order read in evidence shows upon its face the grounds of the judgment of the court, and what was the matter in issue between the parties in that suit upon the case agreed. It shows that the only
762 question *submitted to the court was the question as to what was due the plaintiff on account of the commission he was to receive as a compensation for his services in lieu of all other profits, and that that is the only matter covered by the judgment. The order shows also that it was a case agreed by the parties, in order to get the judgment of the court upon this question of commissions; that no proceedings were had at rules, but that the plaintiff by his attorney filed his declaration by consent of the attorney general, and that on his motion, and by like consent, it was ordered that the proceedings at rules be dispensed with, and the cause placed on the docket of the court. These statements of record justify the inference, that only the question of commissions was submitted to the court, and also that the only claim set out in the declaration was for the commissions, the facts agreed showing that that was the only matter submitted to the court for its decision, and the declaration being prepared at the time, and filed in court by consent, and not at rules, and the case being at once placed on the court docket, the presumption is, that the declaration, prepared with reference to the question agreed to be submitted, would only claim what was agreed to be submitted to the court. And I am inclined to think that it sufficiently appears upon the face of the order itself that the matter litigated in this suit was not in issue in that, and is not embraced in the former judgment; at least it is so prima facie, and the onus devolved on the defendant to show the contrary. The two claims might have been embraced in different counts in the one suit. But they are distinct divisible claims, depending on separate contracts, made at different times and upon different principles; and the evidence to support one is not necessary to support the
763 other, but much of it that *would be material to sustain the one would be irrelevant to the other. I do not think therefore that the plaintiff was bound to unite both causes of action in one. At any rate, if the adverse party was willing to agree a case as to one, and to submit it at once, and without the delay of formal pleading to the judgment of the court, and was not willing to submit the other, his withholding the other claim for subsequent adjustment ought not to debar him from the right of action afterwards to recover it. The case of Seddon v. Tutop, supra, which is a leading case, and is law now, is not as strong a case for the plaintiff as this. In that case the plaintiff declared for both claims—the promissory notes and the account for goods sold, but in different counts; and it being proved (I take it by parol) that he gave no evidence on the count for goods, in executing the writ of enquiry, his subsequent action for the goods was sustained, upon the ground that the matter therein controverted had not been litigated and decided in the former suit. The parol evidence, which was excluded from the jury in this case, I think removes all doubt, and fully confirms the inference which I draw from the judgment, which was read in evidence, and shows clearly that the matters involved in this suit were not involved in that, nor embraced in the judgment. The loss or destruction of the papers in the cause, and the whole of the record, except this order, as was proved, is a further reason why the parol evidence should have been admitted. I am of opinion that the Circuit court erred in excluding the parol testimony.

Upon the second bill of exceptions I am clearly of opinion that there is error in the instructions given to the jury, that the judgment in the former suit was a bar to any recovery by the plaintiff in this action, and that they must find for the de-

764 fendants. This conclusion *is a corrollary, from what has already been said with regard to the first bill of exceptions. Without intimating any opinion with regard to the merits of this controversy, I am of opinion, for the reasons given, to reverse the judgment, set aside the verdict, and remand the cause, with instructions to admit the parol testimony if it is again offered.

The other judges concurred in the opinion of Anderson, J.

Judgment reversed.

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765 *Ferrill v. Brewis' Adm'or.

January Term, 1875, Richmond.

1. **Pleading and Practice—Action on the Case.**—F put into the hands of B two notes, to be collected and the money paid to F. B does not collect or pay over the money; and though required, does not return the notes to F. F may maintain an action on the case against the administrator of B for the damage he sustained by the failure of B to collect or return the notes.
2. **Same—Declaration—Counts.**—The court will treat a count in a declaration as partaking of the nature of the action; so that if the action is *ex delicto*, the count will be intended as *ex delicto* also, unless there be something in its form and structure which plainly forbids such intendment.
3. **Same—Same—Consideration.**—It is not necessary that a declaration in an action on the case for tortious neglect shall contain an express averment of a consideration. The breach of a trust undertaken voluntarily is actionable; the pure trusting the party with the goods being a sufficient consideration.
4. **Same—Trover.**—Trover may be sustained against a personal representative as such, though the goods never came into his hands.

In January 1872, T. R. Ferrill instituted an action on the case in the Corporation court of the city of Alexandria against William H. Marbury, administrator of T. A. Brewis, deceased. The declaration contained four counts. The first set out that the plaintiff was the owner of two notes on persons named, for amounts stated; that the notes being due and unpaid, he delivered them to Brewis in his lifetime to be collected by him and paid to the plaintiff, or otherwise applied to his use. That afterwards, in the lifetime of Brewis, the plaintiff wishing to repossess himself of the said notes, demanded them of Brewis, but said Brewis, up to the time of his death, 766 refused to return *them or apply to plaintiff's use the amount thereof. By which actings and doings of him, the said T. A. Brewis, the plaintiff has been deprived of his property in and possession of the said notes, and effectually prevented from realizing any benefits from the said indebtedness of the said debtors, naming them. Whereby and because of which the plaintiff has been greatly damaged, and cause of action has accrued to the plaintiff to demand and receive of and from the said defendant as administrator aforesaid the amount of said damage.

The second count was in trover, the third in trespass de bonis asportatis, and the fourth trespass vi et armis.

The defendant appeared and demurred to the declaration, and pleaded non assumpsit. And the court sustained the demurrer, and rendered a judgment in favor of the defendant. And thereupon Ferrill applied to a judge of this court for a writ of error; which was awarded.

Smoot, for the appellant.

W. Arthur Taylor, for the appellee.

STAPLES, J., delivered the opinion of the court.

This is an action of trespass on the case, instituted in the corporation court of Alexandria, by T. R. Ferrill against T. A. Brewis' administrator. The defendant demurred generally to the declaration; the demurrer was sustained, and judgment given for the defendant.

The second, third and fourth counts being clearly good, and the demurrer being to the entire declaration, it ought to have 767 been overruled, unless the form *of the action is misconceived, or there is a misjoinder of counts.

It is claimed by the counsel for the defendant that the declaration is liable to both these objections. It contains five counts—the second in trover, the third in trespass de bonis asportatis, and the fourth in trespass. The only question is as to the first count. It is insisted that this count is in assumpsit and not in tort. It states a case of ordinary bailment without compensation; that is to say, a delivery by the plaintiff to T. A. Brewis, defendant's intestate, of two promissory notes, to be collected by Brweis and the proceeds paid to the plaintiff; the wish of the plaintiff to repossess the notes before they were collected; his demand for them, and the refusal or failure of Brewis either to restore the notes or pay the money; whereby the plaintiff was deprived of his property, and had sustained damage.

Now this count may be justly liable to all the criticisms of the defendant's counsel. It may be defective both in form and substance. With that we have no concern upon a demurrer to the whole declaration. Our only inquiry is whether it is in assumpsit or in case. If the latter, there may be properly united with it counts in trover or in trespass. At common law it is allowable to join with counts in trover, causes of action which are strictly appropriate to trespass on the case. And now, under our statute, counts in trespass may be joined to counts in action on the case. Parsons v. Harper, 16 Gratt. 64.

In determining the character of the first count in the declaration here, it is proper to bear in mind there is a class of cases (among them that of bailment) in which the foundation of the action springs out of the privity of contract between the par-

768 ties, but in which, *nevertheless, the remedy for the breach or non-performance is indifferently in assumpsit, or in case upon tort. Boorman v. Brown, 3 Adol. & Ellis 525; Southern Express Co. v. McVeigh, 20 Gratt. 264.

In all these cases the contract is of course referred to to ascertain the rights of the parties and the measure of redress; but the wrongful act of the defendant is relied upon as the gravamen of the action. This is peculiarly true with regard to attorneys, surgeons, carriers and the like. The principle is, however, not confined to employments of a public character, but to all bailees, whether public or private. In cases of mere gratuitous bailment, as no consideration is paid, it has been generally considered that an action ex delicto is peculiarly appropriate.

The case of Robinson v. Threadgill, 13 Ired. Law R. 40, is in point, and is almost identical with this. There, as here, the action was trespass on the case for failing to collect or return two promissory notes placed in defendant's hands for collection. It was objected that the plaintiff had mistaken his remedy; that he ought to have sued in assumpsit. Nash, J., speaking for the court, said that case was the appropriate remedy. Where the law from a given statement of facts raises an obligation to do a particular act, and there is a breach of that obligation and a consequential damage, an action on the case founded on the tort is proper. Here the law raised an obligation on the defendant to do a particular act, to wit: to collect or return the notes, and he was guilty of a breach of that obligation. The plaintiff was at liberty to consider the breach of duty as his gravamen, and case was his appropriate remedy, though he might have sued in assumpsit. Govell v. Radnage, 3 East's R. 62; Samuel v. Judin, Ibid 333; 3 Rob. Prac. 439.

769 *Another rule of the courts is to treat the count as partaking of the nature of the action. So that if the action is ex delicto, the count will be intended as ex delicto also, unless there be something in its form and structure which plainly forbids such intendment. And it is not unusual for the declaration to contain allegations sufficient to support it, either in tort or in assumpsit. And this upon the ground that the same circumstances which show a breach of duty constituting a tortious neglect, show also a breach of promise implied from the consideration of the hire. Gelston v. Burr, 11 John. R. 480.

The present count, however, whatever it may be, is clearly not in assumpsit. No consideration is laid for defendant's undertaking, and no averment is made of a promise or agreement on his part to return the notes when demanded. The plaintiff has treated the refusal or failure to return them as a breach of duty amounting to a tortious negligence. This he was at liberty to do. The count must therefore be considered in case and not in assumpsit.

It is not necessary, as the counsel seems to suppose, that a declaration in an action of this kind, shall contain an express averment of a consideration. The doctrine is well settled that the breach of a trust undertaken voluntarily is actionable—the bare trusting the party with the goods being a sufficient consideration. Therefore if the goods are delivered to one, and in consideration thereof he promises to redeliver them or to do something about them gratis, the bailee is liable for a breach of his undertaking. Coggs v. Bernard, 2 Lord Raym. R. 909. All the authorities sustain this rule.

The learned counsel, moreover, insists, that a count in trover cannot be supported against a personal representative

770 *without an allegation that the property had come into his possession. Whatever may have been the rule of the common law upon this subject, the action is plainly given by the 20th section, chapter 130, Code of 1860. That section provides, that "an action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods, or for the waste or destruction of, or damage to any estate, of or by his decedent."

It is inconceivable that the legislature intended to authorize trespass de bonis asportatis against a personal representative, but not to permit an action of trover; which in most instances is a concurrent remedy. The only difference between these is, that trespass will not lie where the goods are lawfully obtained; whereas trover will lie whether the goods be lawfully or tortiously taken. The plaintiff has only to waive the trespass, admit the possession lawfully obtained, and sue for the wrongful conversion. Indeed the action of trover was, in its original, an action of trespass on the case. So that it would seem not only within the equity but the letter of the statute. 2 Tucker Com., book 3, page 97.

For these reasons the judgment of the Corporation court must be reversed, and the cause remanded to be tried upon any proper issues to be made up by the parties.

Judgment reversed.

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771 *Commonwealth, by &c., v. Holmes.

January Term, 1875, Richmond.

Absent, STAPLES, J.

I. **Public Officers—Sureties.**—In July 1871 H became the surety of B as collector of township B. At that time the taxes for that year, by law, went into the hands of the collector on the 1st of September, and were to be accounted for to the county treasurer on the 1st of December. After the execution of the bond by H, there were several extensions, by joint resolutions and statutes of the general assembly, of the time in which collectors should make their settlements with the county treasurers. HELD:

1. **Same—Same—Release.**—That though it is true that the law at the date of the contract enters

into and forms a part of the contract, yet laws which are merely directory to officers of the government form no part of the contract; and the extension of the time, as aforesaid, does not release the surety H.

2. **Same—New Duties — Sureties.*** — Where new duties are imposed upon a public officer by statute after the execution of his official bond by his surety: the bond should be held good against the surety to the extent of the duties lawfully covered by it, though it may not be good as to the new duties imposed since its execution.

John Q. A. Barham, who had been appointed collector of the township of Berlin and Ivor, in the county of Southampton, having been required to give a new bond, he, with Peter J. Holmes, executed their bond, bearing date the 18th of September 1871, in the penalty of $2,000; with condition reciting the fact that said Barham has been required to give a new bond as such collector, and says, "Now if the said John Q. A. Barham shall faithfully discharge the duties of said office according to law, 772 then the above *obligation to be void, else to remain in full force and virtue."

In June 1873, James M. Corbitt, treasurer of Southampton, gave notice to Barham and Holmes, that in the name of the commonwealth he would move the County court of Southampton, on the first day of the July term 1873, for a judgment and award of execution against them for the sum of $910.28, with damages thereon at the rate of ten per cent. per month, from May 2d, 1873, until paid; which said sum was the balance due from John Q. A. Barham, collector of Berlin and Ivor township in Southampton county, on account of state taxes for the year 1872.

Before the day fixed for the motion to the court, Holmes applied for and obtained an injunction to the proceeding; on the ground that by several acts and resolutions of the general assembly which he refers to in his bill, time for the payment of the taxes had been allowed to the collector, and other duties had been imposed upon him, without the consent of the plaintiff; and that therefore and thereby he had been released from his liability as surety on the bond of Barham.

The cause was docketed by consent, and by like consent came on to be heard upon the bill and exhibits, upon a motion by the treasurer to dissolve the injunction. But the court overruled the motion, and made the injunction perpetual. From this decree the commonwealth obtained an appeal to the Circuit court of Southampton county; where it was affirmed. And then the commonwealth applied to this court for an appeal; which was allowed.

The Attorney General, for the Commonwealth.

Friend and Davis, for the appellee.

773 *BOULDIN, J., delivered the opinion of the court.

The appellee, Holmes, was surety for one Barham, who qualified as collector of Berlin and Ivor township, in Southampton county, for the year commencing July 1, 1871, and ending July 1, 1872. At the time of Barham's qualification, and when he gave the bond with Holmes as surety (which was a new bond required by the County court), the taxes for that year went into the hands of the collector on the 1st of September 1871, and were to be accounted for to the county treasurer on the first of December following, and for default of duty in this respect, legal proceedings were to be instituted by the said treasurer. Subsequent to the execution of the bond aforesaid, and whilst Barham was in office, there were sundry extensions by joint resolutions and by statutes of the general assembly, of the time within which the collector should make his settlements with the county treasurer, without the assent of his surety; and the question before us is, what is the effect of these extensions on the obligation of Holmes as surety?

It was contended for Holmes, and was held by the Circuit court, that all the provisions of the statute on this subject, existing at the date of his bond, entered into and formed a part of his contract as surety, and that the extensions referred to being made without his consent, discharged him from his obligation. Is this law?

It is unquestionably true, as a well established principle of equity law, that a surety can only be held bound by his contract as he made it, and that he will be discharged if, by any binding agreement for indulgence to his principal or otherwise, his contract is materially altered or varied by the 774 creditor without his *consent. And it is also true that this principle applies alike to sureties in official bonds and private obligations. The contract of the surety cannot be so varied or extended in either case without his consent. What the contract really is becomes then the all important inquiry. When that is ascertained the application of the principle is without difficulty.

In cases of suretyship, in private and individual obligations for the payment of money, there can rarely arise any serious difficulty as to the nature and extent of the surety's liability. But when, as here, his obligation is that a public officer shall discharge his duties according to law, the delicate and important question at once arises, what is that law according to which the officer is to discharge his duties? The appellee's counsel insist, and cite authority to show, that it is the law existing at the date of the contract, and that alone. No Virginia authority had been cited to that point; and a just interpretation of the words, and

*__Public Officers—New Duties—Sureties.__—The principal case is cited in the following decisions: Crawn v. The Commonwealth, 84 Va. 286, 4 S. E. Rep. 721; Loving v. Auditor of Public Accounts, 76 Va. 950; Richmond & Petersburg R. Co. v. Kasey, 30 Gratt. 230; Findley v. Findley, 42 W. Va. 372, 26 S. E. Rep. 433. See also, Sayre v. King, 17 W. Va. 562; Smith v. Commonwealth, 25 Gratt. 780.

a due regard to the nature and object of the bond and the office would perhaps justify us in holding that the condition of the bond was to secure the due discharge by the officer of all such reasonable duties germain to the office as might be imposed by law during his continuance therein; that the legislature could not have intended by taking bond to secure the public interest, to deprive itself of the power of otherwise contributing to the same end in a proper way without first obtaining the consent of the surety. It would perhaps not be unreasonable to hold, under such a bond as this, that the legislature had not intended to do, and had not done an act so inconvenient and indeed so prejudicial to the public interest.

But without deciding that proposition, and conceding, as a general rule, that
775 the law at the date of the *contract is the law, and the only law, which enters into and forms part of the sureties' contract, the question again arises, what part of that law is it which enters into and forms part of the sureties' contract?

For the purpose of this case that question may be more conveniently answered by showing what kind of laws do not enter the sureties' contract.

Laws, then, merely directory to the officers of government, requiring that settlements shall be made at short and stated periods "are provisions of law created by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract of the surety." Mr. Justice Story delivering the opinion of the Supreme court in United States v. Kirkpatrick, 9 Wheat. R. 720, 736-'7.

In the United States v. Vanzandt, 11 Wheat. R. 184, Mr. Justice Washington, delivering the opinion of the court, confirms the authority of the U. S. v. Kirkpatrick; and speaking of analogous provisions made in that case for the safety of the public, he says, p. 190, "The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by insuring punctuality and responsibility; but they form no part of the contract with the surety."

The same principle is reaffirmed in United States v. Nicholl, 12 Wheat. R. 509, and United States v. Boyd & others, 15 Peters R. 187, 208. In the last mentioned case Mr. Justice Catron says for the court: "The regulations requiring settlements to be made by its officers at short periods, are designed for the protection of the government, and merely directory to the officers, and form no part of the contract.
776 Such is the settled *doctrine of this court as holden in The United States v. Kirkpatrick, 9 Wheat. 720; The United States v. Vanzandt, 11 Wheat. 184; and The United States v. Nicholl, 12 Wheat. 509."

The force of these principles have been attempted to be averted by the counsel for the appellee, by showing that the question directly decided in each of the cases involved laches merely; and not a change or violation of the sureties' contract. That is true; but it is equally true, that in order to reach that question it became necessary for the court to inquire and decide what the contract of the surety really was; and it was held unanimously in all the cases, that these directory regulations for prompt settlements were regulations for the protection and security of the government, and formed no part of the contract of the surety. Forming no part of that contract, it follows as a necessary consequence, that like any other act of a like nature, the provision may be extended, altered or repealed at the will of the legislature, and without the assent of the surety, looking alone to the public interest. And we think, as a general rule, that what in such a case will advance the public good, will at the same time protect the interest of the surety. Indeed the indulgence granted to the officer by the extension of time in this case, is not a contract, but is an ordinary act of legislation for the public good, with no consideration for the extension moving from the officer; and is repealable at the will of the general assembly. Such extension was held, and we think correctly, by the Supreme court of Maryland, in the case of the State v. Carleton &c., 1 Gill R. 249, 258, not to operate as a discharge to the sureties. "The law was not considered as binding or obligatory upon the state, but alterable
777 *by the legislature at their pleasure, whenever the interest or convenience of the state might require it." And this we think is the law of the case.

Several cases in the English courts have been cited in seeming conflict with these views. Were that actually so, we would not hesitate to disregard their authority, however high may be our respect for the source from which they come. But when carefully examined, these cases will be easily distinguished from the case in judgment. They were cases in which such new and additional duties were imposed on the officer as to make the office itself, in the opinion of the court, a new office, to which, of course, the contract of the surety did not extend. This is merely the conceded doctrine that you cannot enlarge or materially vary the surety's contract without his consent.

Two cases from the Supreme court of Illinois, reported in first and second Gilman, which seem to be very much in point, have also been relied on for the appellee. On these cases we will only say, that they seem to be in conflict with the principles established by the Supreme court of the United States and the Supreme court of Maryland in the cases above cited; and we think the latter the better law, and approve them.

But it was further argued, that the act of the 19th of March 1872, superadded the duties of constable, in relation to the collection of small claims, to the duties of collector as existing at the date of the bond, and thereby

clearly varied the contract of the surety and discharged him, under the authority of Pybus v. Gibbs & als., 88 Eng. C. L. R. 902, and other English cases cited.

It may be enough to say that the act referred to was general, and in its nature prospective. But in the particular 778 *addition of duty relied on, it is so in express terms. It is provided expressly that in this respect the act shall be effective from the first of July thereafter, that being the date of the legal expiration of the then existing term of the collector's office, and the commencement of the term of a newly elected collector, whose bond would cover these new duties. This plainly manifests a purpose on the part of the general assembly to avoid interference with existing rights of sureties to the bond; and it will be found also that the duties thus devolved on the collector after the 1st of July 1872 were, from the same date, taken from the constable; both acts showing that existing obligations were not intended to be affected by the change of duties.

But it might perhaps be said that it may be reasonably concluded in this case that the old collector held over, as there is in the record no evidence of a new qualification of collector, and in that event his duties were, after the 1st of July, 1872, the duties imposed by the act of March 19, 1872; and these duties being such under the English authorities as would discharge the sureties, the surety in this case is discharged, whether the default was a failure to discharge the new duties not covered by the bond or the old duties which were protected by the bond. Such seems to be the result of Pybus v. Gibbs &c., and the other cases cited from the common law reports. The principle thus affirmed by the English decisions does not commend itself to the judgment of this court as just and reasonable, and we should hesitate to follow it were there no authority against it, but we have against it the opinion of the Supreme court of the United States in the case of United States v. Kirkpatrick, 9 Wheaton, already cited, in which in an analogous case 779 Judge Story says, *the bond should be held good to the extent of the duties lawfully covered thereby. This, we think, the more just and equitable rule. It would seem to be unreasonable to hold that an obligation ample and valid to secure the due performance of duties should be avoided as to those duties by reason of an ineffectual effort by statute to engraft on it other duties. It would seem reasonable in such case to hold the statute void and the bond good.

Decree reversed.

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780 *Smith & als. v. Commonwealth.

January Term, 1875, Richmond.

1. **Public Officers—Sureties—Discharge.**—The surety of a public collector or treasurer is not discharged from liability for his principal on his official bond by an act of assembly passed subsequent to the execution of the bond, without the surety's assent, extending the time within which, by the law in force at the date of the bond, the officer was required to settle his accounts and make payment of the public money in his hands.
2. **Same—Same—Same.**—The regulations prescribed by law for the settlement of such accounts at stated periods, being intended for the benefit of the government, to secure punctuality and promptness in its officers, are directory merely, and do not enter into and form part of the surety's contract, so as to prevent the legislature from altering the time of settling at pleasure, without the surety's assent; and therefore, from the nature of the officer's obligations and duties, and of the conditions of his bond, such extension does not operate as a discharge of the surety.
3. **Same—Accounts.**—Prior to the passage of the act of April 2, 1873, an outgoing county treasurer was not required or authorized to turn over to his successor in office any portion of the public revenue. He was to account directly to the auditor of public accounts as an outgoing sheriff.
4. **Same—Statute.**—The act of April 2, 1873, Sess. Acts 1872-'73, ch. 373, § 6, p. 372, whatever may be its operation upon cases arising subsequent to its passage, is only prospective in its operation, and does not apply to the case of a treasurer who went out of office on the 1st of January 1873.

This was a motion in the Circuit court of the city of Richmond, by the commonwealth against John Sheldon Jones, late treasurer of York county, and Sydney Smith and eleven others, the sureties of Jones, to recover the balance of land, property, capitation and license taxes of the year 1872, alleged to be due from Jones as treasurer of York county.

781 *On the hearing of the motion it appeared that at the February term 1872 of the county court of York, John Sheldon Jones was appointed treasurer of the county to fill a vacancy in said office caused by the resignation of Edward J. Gallagher, and to serve as such until his successor was duly elected and qualified to enter upon the duties of said office; and that he executed his official bond, with Smith and the other parties as his sureties, and took the oaths of office.

It appeared further that on the 5th of November 1872, Frederick C. Newman was duly elected treasurer of the county of York, to serve for one year, commencing the first of January 1873; and that he executed his official bond with sureties, and took the oath of office, and entered on his office on the said 1st of January 1873.

It appeared further, that on the 2d of September 1872, Jones delivered to the different township collectors of the county the state revenue tax bills in his township; and these collectors collected the taxes and paid them to Jones during the year 1873; the earliest the 1st of May and the latest on the 3d of June. And the amount of these taxes unpaid by Jones was $3,475.81.

Upon this state of facts the court rendered a judgment against Jones and his sureties for said sum of $3,475.81, with eight per

cent. interest thereon from the 22d of May 1873 until paid, and $521.22 damages and the costs. And thereupon Smith and the other sureties applied to this court for a writ of error and supersedeas; which was awarded.

Crump and Sydney Smith, for the appellants.

The Attorney General for the Commonwealth.

782 *BOULDIN, J., delivered the opinion of the court.

The question mainly discussed and relied on by the learned counsel for the appellants in this case, as showing error in the judgment of the Circuit court, is the same recently decided by this court in the case of the Commonwealth v. Holmes; a case argued and decided since this cause was heard, viz. whether the surety of a public collecting officer is discharged from all liability for his principal on his official bond by an act of assembly passed subsequently to the execution of the official bond, without the surety's assent, extending the period of time within which, by the law in force at the date of the bond, the public officer was required to settle his accounts and make payment of the public money in his hands.

This court held, upon abundant authority, that the regulations prescribed by law for the settlement of such accounts at stated periods being intended for the benefit of the government, to secure punctuality and promptness in its officers, were directory merely, and did not enter into, and form part of the surety's contract, so as to prevent the legislature from altering or extending the times of settling at pleasure, without the surety's assent; and therefore, and from the nature of the officer's obligation and duties, and of the condition of his bond, such extension did not operate as a discharge of the surety. We reaffirm that principle, and are of opinion that the sureties in this case are not discharged from liability for the official acts of their principal by reason of the extension of time for settlement granted to him by the acts of assembly referred to in the record.

The next and only other objection to the judgment of the Circuit court pressed
783 by counsel, is this, that at *the time when the portion of the public revenue which is the subject of this suit was received by the principal of the appellants, the latter's office of treasurer had expired, and his right to receive the money at all had ceased to exist; that his successor had been duly elected and qualified, and that by the statute law of the state, he was bound "to turn over to his successor in office all books, papers, &c., belonging to him as treasurer, taking his receipt for the same;" by which successor all the duties of treasurer required by law were to be performed, including the unfinished duties of his predecessor. To sustain this position, reference was made by the learned counsel for appellants to the 6th section of the 46th chapter of the Code of 1873, concerning "county officers, their duties and compensation," p. 427.

This section was not enacted until the 2d of April 1873, Sess. Acts 1872-73, and will be found, on examination, to be an amendment of the sixth section of the "act prescribing the duties and compensation of county officers," approved March 13th, 1872. Sess. Acts 1871-2, ch. 170, p. 222. Neither by that section of the act of March 13th, 1872, nor by any other section of that act, nor by any statute in force prior to the amended act aforesaid, was the outgoing treasurer required to turn over to his successor in office any portion of the public revenue, whether he had been appointed to fill a vacancy or had been regularly elected. As to that matter he was left, prior to the amendment, to account directly to the auditor of public accounts, as an outgoing sheriff; and if the law in that respect has been changed at all, it is conceded by the learned counsel for the appellants, that it is only by force of the amendatory act aforesaid of April 2d, 1873. He contends, however, that under that law the
784 *outgoing treasurer became, for all purposes, functus officio, as to the active duties of his office, all of which devolved at once on his successor in office; and that he had thereafter no power to receive any portion of the public revenue.

We do not deem it necessary to decide in the case before us what may be the effect of this amendatory statute in cases to which it may apply; but we are all of opinion that the act is plainly prospective in its terms and operation, and was not intended to affect, and does not affect, cases like that under consideration.

On the 1st day of January 1873, when the successor of Jones went into office, and the term of Jones expired, the latter held in his hands, payable to himself as treasurer, the receipts of township collectors for about $4,400 of the taxes for the year 1872, for which, as the law then stood, they were bound to account to him. The amendatory act relied on by appellant's counsel had not then been enacted, and as the law then stood it is not contended that it was the duty of the outgoing treasurer, nor, indeed, that he had the right to turn over these receipts, relating exclusively to the public revenue, to his successor in office. On the contrary, he remained charged with these taxes on the books of the auditor of public accounts like an outgoing sheriff, notwithstanding the expiration of the term of his office; and the law recognized both his right and duty to collect and account for them directly to the auditor. In no other way could he discharge his liability to the state. Very soon after the passage of the amendatory act he did receive them from the several collectors, but failed to account for a large portion thereof, for which he was sued.

Whatever may be the effect of the act on cases thereafter arising, about which
785 as we have already said, *we express no opinion, we all think that it is

prospective in its terms and operation, and does not affect this case. The consequence is, that Jones' duties as outgoing treasurer were not in any manner affected thereby, that the collections made by him of collectors, whose receipts he held, was legal and proper, and that the sureties in his official bond are bound for his default.

We are therefore of opinion that there is no error in the judgment of the Circuit court, and that the same be affirmed with costs and damages to the appellee according to law.

Judgment affirmed.

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786 *Power & Kellog v. Tazewells.*

January Term, 1875, Richmond.

1. **Oysters—Property in Oyster Beds—Action of Unlawful Detainer.**—T, having under the act of April 1st 1873, obtained an assignment of certain oyster beds, for the planting and sowing of oysters for one year; and having paid the tax and had the beds staked off as required before the 1st of May 1874, has such an exclusive interest in them, that he may maintain an action of unlawful detainer against a party who enters upon said beds and holds them against him.

2. **Same—Same—Statute.**—Though the act of April 18th, 1874, repealed the act of April 1st, 1873, the repeal could not defeat the interest which had been vested in T, and on which he had paid the tax before the repealing act was passed, though the beds were not staked off until after its passage.

This was a proceeding of unlawful detainer in the Circuit court of Northampton county, instituted the 3rd day of June 1874, by Sallie and Eliza Tazewell against Joseph P. Power and Benjamin Kellog, to recover the possession of certain oyster grounds situated on Old Plantation creek, opposite the lands of the plaintiff.

The case was submitted to the decision of the court; and the court rendered a judgment in favor of the plaintiffs. And the defendants excepted and spread the evidence upon the record.

From this evidence it appears, that on the 3rd day of August 1873, Orris A. Browne, inspector of the district in which these oyster beds lay, by his certificate reciting that the plaintiffs had applied to him for a reservation whereon to plant or sow oysters, designating two thousand bushels as the quantity proposed to be planted by them, and they having paid 787 him the *sum of $10.00 as the rent thereof, he had assigned to them the following reservations for that purpose, to wit: and he sets out the limits; and then says, the said Sallie and Eliza Tazewell to have the exclusive right of planting or sowing oysters thereon for the period of one year from the 1st of April 1874: provided they shall, on or before the 1st of May next, cause said reservation to be marked with suitable stakes. And they were required to pay him, when they shall sell the oysters planted or sown on said reservation, or any part thereof, on each hundred dollars value of those so sold, an amount equal to the tax imposed by the laws of the state for that year on one hundred dollars value of land.

On the 3rd of February 1874, there was a similar allotment of other adjoining grounds, on the same conditions, except that four thousand bushels of oysters were proposed to be planted or sown, and the tax paid was $20.00.

It was in proof that the grounds were staked off before the 1st of May 1874, and that the defendants entered upon the grounds so staked off, and that they were held by the defendants at the time of the institution of this proceeding.

Power and Kellog applied to a judge of this court for a writ of error and supersedeas; which was awarded.

Scarburgh and Duffield, for the appellants.

T. Taylor and Meredith, for the appellees.

ANDERSON, J., delivered the opinion of the court.

By an act of assembly, in force April 1st, 1873, the owner or occupier of land having a water front, suitable for planting or sowing oysters thereon, might have 788 *so much of the "beds or shores assigned to him by the inspector of the district, for his exclusive use and occupancy for the period of one year, as the inspector might deem necessary for the quantity proposed to be planted or sowed." (Sess. Acts 1872-'3, ch. 333, §§ 6, 7 and 8.) In pursuance of this act, Sallie and Eliza W. Tazewell, who were the owners of land having a water front suitable for such purpose, had a part thereof assigned to them by the said inspector; which, before the 1st of May 1874, they caused to be "marked by suitable stakes," in compliance with the requirement of the statute.

On the 3rd of June following, they had a summons issued from the clerk's office of the Circuit court for Northampton county, against Joseph P. Power and Benjamin Kellog, plaintiffs in error here, alleging that they were in possession of and unlawfully detained from them the land and oyster grounds therein described, which are the same that were assigned to them as aforesaid; in which action they obtained judgment, and an award of the writ of habere facias possessionem; to which judgment the defendants obtained a writ of error and supersedeas from one of the judges of this court.

It is contended for the plaintiffs here, that the defendants in error have acquired no rights under the act of April 1st, 1873; and that if they have, and the plaintiffs in error have interfered therewith, they have mistaken their remedy. That it is not a case for an action of unlawful entry and detainer. That the statute does not authorize a grant of the soil, or an estate or in-

*For monographic note on Oysters, see end of case.

terest in the soil; but only a license, which is an authority to do a particular act, or series of acts, upon the land of which the commonwealth is proprietor, without passing an estate therein; and which license is revocable.

789 *Whether the statute can be construed as authorizing a lease or a mere license, it gives to the lessee or licensee an exclusive right to the use and occupancy of beds or shores of creeks, &c., for the period of one year, for the purpose of planting or sowing oysters, which might theretofore have been used or exercised in common by the citizens of the commonwealth. And the court is of opinion that after he has acquired such exclusive right under the statute, he may resort to the summary action of unlawful entry and detainer, as an appropriate remedy to assert and enforce his exclusive right against any one who enters thereon and withholds from him the exclusive use and occupation thereof for the purpose aforesaid. And the court is further of opinion that the proof in this cause shows that the plaintiffs in error, when the summons was issued had such occupation and possession of the premises as was incompatible with the enjoyment by the defendants of their exclusive right, if such right existed, to the use and occupation thereof for the purposes aforesaid, and that they withheld from them such possession.

The whole case then turns upon the question, had they an exclusive right to the use and occupancy of the premises when the summons was issued in this cause? In Olinger v. Shepherd, Judge Moncure, in delivering the opinion, in which a majority of a full court concurred, said: "There is a material difference between an action of ejectment and an action of forcible or unlawful entry. The title or right of possession is always involved in an action of ejectment. * * And the defendant without having any right to the possession himself, may generally prevent a recovery by the plaintiff by showing an outstanding right of possession in another." In

790 the action of unlawful entry *and detainer he says, "if the defendant enters unlawfully, the plaintiff is entitled to recover without any regard to his right of possession." 12 Gratt. 462, 470. But it is necessary to show that the defendants' entry was unlawful, and that he unlawfully withholds the possession. And in this case, the defendants' entry and withholding the possession of the premises was not unlawful, unless the plaintiffs below had acquired the exclusive right to their use and occupancy, or had not lost their right to the priority. It would seem to be necessary therefore in this case, to entitle the plaintiffs below to a recovery, that they should show an exclusive right to the use and occupancy of the premises, or, at least, a right of priority over the defendants. Had they acquired that exclusive right?

It is contended that they had not, and that position is supported by the counsel for the plaintiffs in error in an argument of much ability and ingenuity. They insist that the act of 1873 only authorizes a license, which is revocable; and that the act of April 18, 1874, having repealed the act of April 1, 1873, it is a revocation of the license.

First, is it a mere license which is revocable? Licenses to do a certain act, but passing no estate in the land, may be pleaded without a deed. And this doctrine does not, we are told, trench upon the policy of the law which requires that contracts for the sale of real estate, or a lease thereof for more than one year, shall be in writing. And the reason is, because licenses amount to nothing more than an excuse for the act which would otherwise be a trespass, and render the party liable to damages. Cook v. Stearnes, 11 Mass. R. 538. Such is not the nature of this act. It is not merely a permission to do an act or series of acts upon another's land, which would

791 excuse him *from trespass. It is not a permission to do certain acts—that privilege was enjoyed independently of the statute—and the doing of those acts would have been no trespass. But the design and object of this statute was to give an exclusive right to the licensee or lessee, to use and occupy the land, for the period of one year, for his benefit, for a consideration payable to the state, the proprietor. It confers in fact an exclusive right to use, occupy or take the profits of land, by planting or sowing oysters upon it, which grow and fatten upon the soil and the salt water, and increase in value, I am informed, from seventy-five to one hundred per cent. Such a permission may be sometimes called a license. It is more in the nature of a lease. 1 Wash. on Real Property, 3d ed., p. 543, and cases cited. Licenses which in their nature amount to the granting of an estate for ever so short a time, are not good without deed (a lease for one year without writing is good by our statute), and are considered as leases, and must always be pleaded as such. And this is in fact the principle decided in the case of Cook v. Stearnes, 11 Mass. R., supra, cited by the counsel for the plaintiffs in error. In that case the defendant pleaded a license, and the court held that the plea was bad, because the interest claimed was not in the nature of a license, but of an estate, or at least an easement, in the land, which cannot be acquired without writing or prescription, or such a possession or use as furnishes presumption of a grant; neither of which is averred in (the) plea." There is nothing in that case which militates against the above view; but it in fact supports it. If a man license me to enter into his land, and to occupy it for a year, half a year or such like, this is a lease, and so shall be pleaded. Viner's Abridg., title License, p. 92.

792 *Again, it cannot be maintained that the right acquired by the lessee or licensee is not transferable or transmissible at his death. Suppose there had been no repeal of the statute, or revocation, and

that the defendants in error, after they had planted or sown oysters upon their reservation, had made sale of their land fronting on the shore, and were about to remove from that country; can there be any question of their right to transfer their oyster grounds to the purchaser of their farm? Or if they died, that their oyster plantation, in the same plight in which they held it, would be transmitted to their personal representatives? Yet a mere license is so much of a personal trust and confidence, that it does not extend to any one but the licensee, and the death of either the licensor or the licensee, or the transfer by either party, will revoke it (1 Wash. on Real Property, p. 545). That is not the nature of the assignment in question, and it cannot be regarded therefore as a mere license.

If it is a license it is coupled with an interest; it gives an exclusive right to use and occupy and take the profits of the soil upon which the oysters are planted or sown. It was anciently held, that "there is a great diversity between a license in fact, which giveth an interest, and a license in fact which giveth only an authority or dispensation; for the one is not to be countermanded, but the other is." Arg. Lane's Rep. p. 46, citing 5 H. 7, and Mar. Dyer 92.

If it is a license, it is a license which not only gives an interest—a right to its exclusive use and occupancy—but gives it for a certain period, for one year, and for a valuable consideration which is paid. If a certain time is limited, it is not revocable though the thing is not done. Jenk. Rep. 209, pl. 41.

But whether it be a lease or a li-
793 cense, has there *been a revocation by the state in this case? If the state has not revoked it, though it be revocable, the defendants below could not derive advantage in their defense upon the ground that it was revocable. There is no express revocation by the state. But it is argued that the repeal of the act of 1873, by the act of 1874, was a revocation of the license. It is enacted (chap. 15, § 13, p. 196, Code of 1873), "that no law shall be construed to repeal a former law;" first, "as to any right accrued; or," second, as to any "claim arising under the former law;" "or in any way whatever to affect" "any right accrued, or claim arising," "before the new law takes effect." In this case it is at least a claim arising under the act of 1873, before the repealing act took effect, if indeed the right had not accrued. They had in all respects complied with the terms and requirements of the statute. They were entitled to a priority over all others on certain conditions, which they had fulfilled. They had made application in time to the inspector. They had paid the rent which was the consideration of the assignments. And the assignments had been executed to them by the officer of the state, who was clothed with authority for that purpose.

But it is said that the payment of the rent was voluntary, that it was paid in advance of the obligation to pay, and therefore could give no good foundation for their claim. The statute does not say at what time the rent should be paid, whether in advance or during the year, or at its close. But it is argued that as rent is usually not due until the end of the year, it is presumable that the legislature did not intend that it should be paid until then; and that when the legislature intended otherwise, as in section 11, it expressly required the rent "to be paid in advance." It may
794 *rather be inferred therefrom, that in the mind of the legislature the payment in advance was not incompatible with the idea of rent. The requirement to pay in advance not being expressed in the previous sections does not imply that the legislature intended that it should not be paid in advance. But those sections being silent as to the time of payment, it is implied that it was left to the discretion of the inspector to prescribe the time of payment. And in the proper exercise of his discretion having required the rents to be paid in advance, it was as obligatory upon the assignees as if it had been expressed in the statute.

The new act, which repeals the act of 1873, was approved on the 18th of April 1874. By the acts of assignment, which were executed when the act of 1873 was in force, they were invested with the exclusive right to the use and occupancy of the premises, provided they caused them to be marked by suitable stakes before the 1st of May 1874, which requirement and condition was strictly within the inspectors authority. They complied with that proviso to the letter, and caused the reservations to be marked with suitable stakes before the 1st of May 1874; that is, about the 26th of April. And the court is of opinion that although it was not done until after the repealing act was passed, it was a fulfilment of the condition which entitled them to the right, and that upon the performance thereof their right to the exclusive use and occupancy of the premises vested, and cannot be affected in any way by the repeal of the former act.

The court is therefore of opinion to affirm the judgment with costs and damages to the defendants in error.

Judgment affirmed.

OYSTERS.

I. Ownership of Oyster Lands.
  A. State as Owner.
  B. Riparian Proprietors.
  C. Ownership by Statutory Assignment.
  D. Mere Possession.
II. Violation of Oyster Laws.
  A. Defective Indictments.
  B. Forfeitures.
III. Oyster Tax.
IV. The Compact of 1785.

I. OWNERSHIP OF OYSTER LANDS.

A. State as Owner.—The principle had long been settled, that each state owns the bed of all tide-

waters within its jurisdiction, unless they have been granted away. But the title thus held is subject to the paramount right of navigation. The state in the exercise of its ownership of land covered with water, may grant the exclusive use of it to its own citizens. Such a grant is not a violation of the power of congress to regulate commerce. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade. The right acquired under such grant is a property right and not a mere privilege. McCready v. Com., 94 U. S. 391. (1877.)

B. Riparian Proprietors.—Riparian owners of lands bounded by the Ohio river own the fee to low-water mark, subject to an easement of the public in that portion lying below high-water mark, with the right of the state to control that easement for the purposes of navigation and commerce without compensation to the owner. Ravenswood v. Flemings, 22 W. Va. 52.

A lessee of a fishery in a navigable river, whether his title extends to the middle of the stream or not, has certain riparian rights which can be taken for the public good only upon due compensation made. Alex. & Fred. Ry. Co. v. Faunce, 31 Gratt. 761.

C. Ownership by Statutory Assignment.—Under ch. 254, § 6, acts 1883-84, an assignment for planting oysters may be made to the owner or occupier but not to both if the full quantity has been once assigned. The inspector may, however, assign occupied bottom but in such case the planter has eighteen months in which to remove his oysters already planted. Hurst v. Dulany, 84 Va. 701, 5 S. E. Rep. 802.

No irrevocable right of property can be acquired under the act of March 4th, 1884, § 6, for the right to revoke privileges granted under that act is expressly reserved therein. Nor can one who has availed himself of privileges under that act question the constitutionality thereof. Purcell v. Conrad, 84 Va. 557, 5 S. E. Rep. 545.

The main object of the oyster law is to obtain revenue. A conditional application for assignment of oyster bottoms is, therefore, in the eyes of the law, no application, and is no bar to an assignment of unoccupied ground. The mere fact that the plaintiff formerly rented the ground raises no equity in his favor. Coleman v. Claytor, 98 Va. 20, 24 S. E. Rep. 463.

One who shows no application to the inspector, or assignment of grounds by him, or notice, or receipt for rent paid, has no property in oyster grounds under the statute and cannot maintain the action of unlawful detainer for them against one who is not a mere wrongdoer but who is holding under a claim of right. West v. Adams (Va.), 27 S. E. Rep. 496.

An inspector, in the assignment of oyster grounds, acts in a quasi-judicial capacity, and cannot be compelled by *mandamus* either to exercise his discretion or to undo what he has already done in the exercise thereof. Thurston v. Hudgins, 98 Va. 780, 20 S. E. Rep. 966.

D. Mere Possession.—In Mears & Lewis v. Dexter, 86 Va. 834, 11 S. E. Rep. 588, the action of unlawful entry was brought. It was held, since the plaintiff was in actual possession of the oyster beds, when the defendant entered, and such entry was unlawful, the plaintiff was entitled to recover, any possession being legal possession against a wrongdoer.

II. VIOLATION OF OYSTER LAWS.

A. Defective Indictments.—An indictment for taking oysters with ordinary oyster tongs, without paying the tax prescribed, charges no offence. The tax intended by the statute is a tax on sales of oysters so taken, and not for the taking. Const. Va. Art. 10, § 2; Morgan v. Com., 26 Gratt. 992. (1875.)

§ 2, Act March 14, 1872, forbids any other person than a resident of the state of Virginia to catch, take or plant oysters in the water thereof.

§ 22, Act April 1st, 1873, which was construed to deal with the whole subject of oysters omits the word "plant." *Held*, this is equivalent to an express repeal of the former statute so far as concerns planting oysters. McCready v. Com., 27 Gratt. 982.

The acts of April 28, 1887, and March 5, 1888, prohibit dredging on private oyster grounds, and fix a penalty therefor. The Act of March 3, 1898, which amends and re-enacts these acts also prohibits such dredging but fixes no penalty. *Held*, since the latter act was intended to embrace the whole subject of oysters, the provision against such dredging was repealed by implication. Somers v. Com., 97 Va. 759, 33 S. E. Rep. 381.

B. Forfeitures.—There is no doubt that, where not restricted by the United States Constitution, a state legislature has the power to exact the forfeiture of a vessel employed in violating the oyster laws of the state, notwithstanding the owner may not be implicated in the offence, and the vessel may be so employed without his knowledge or consent. But such law, so far as it applies to third persons not charged with nor convicted of the offence denounced by the statute, must provide an opportunity for defence. The mere fact that in a particular case such third person was notified and had opportunity of defense is immaterial. The statute must *provide such opportunity to be heard* or it is void as to him. Boggs v. Com., 76 Va. 989.

The Act of March 6, 1880, which provides for the forfeiture of vessels employed contrary to the provisions of that Act, does not extend such forfeiture to the oysters unlawfully taken. Nor can the state retake such oysters as from a wrongdoer unless there be proof that the particular oysters were unlawfully taken. McCandlish v. Com., 76 Va. 1002.

III. OYSTER TAX.

In Com. v. Brown, 91 Va. 762, 21 S. E. Rep. 357, it was held that § 5, Acts 1892, providing for tax or weekly sales of oysters does not violate § 1, Art. 10, of the Const. or § 2, Art. 10. Also the title of an amendment to a section of the Va. Code need not be so detailed as that of the original act. A mere reference to the chapter and section to be amended, repealed, or added to, is sufficient if the amendment is germane to the subject of the chapter.

IV. THE COMPACT OF 1785.

The compact of 1785, between Virginia and Maryland is not in conflict with the second clause of the sixth article of confederation, and so far as it was in conflict with the constitution of the United States, it has been suspended and superseded. Such compact is not a treaty, alliance or confederation tending to weaken the central government, but a mere agreement to facilitate free commercial intercourse between two adjoining states. Wharton v. Wise, 153 U. S. 155, 14 Sup. Ct. Rep. 783.

Va. Code 1873, p. 110, provides "all laws and regulations, which may be necessary for the preservation

of fish," in the river Potomac or the river Pocomoke, within the limits of Virginia, "shall be made with the mutual consent and approbation of both states" *i. e.*, Maryland and Virginia. In Hendricks v. Com., 75 Va. 934, it was held that under this compact a citizen of Maryland could be convicted in a Virginia court for the violation of a Virginia statute in regard to fishing, passed with the consent and approval of Maryland. The court said: "The power of a state to enact laws, carries with it the judicial power to enforce them."

An indictment in a Maryland court for unlawful fishing in the Potomac which does not aver that the statute violated was assented to by Virginia is defective. State v. Hoofman, 9 Md. 28.

In *Ex parte* Marsh, 57 Fed. Rep. 719, construing the compact of March 28, 1785, between Virginia and Maryland, the court in a very able opinion, *held*, disapproving the dictum to the contrary in Hendricks v. Com., 75 Va. 934, that the provision that "all laws and regulations which may be necessary for the preservation of fish shall be made with the mutual consent and approbation of both states" applies only to the Potomac river and not to the Pocomoke river; and that provisions as to the Pocomoke river do not include the Pocomoke Sound, they being separate and distinct. The court seems, however, to have incorrectly stated the decision of the Virginia court in Hendricks v. Com., 95 Va. 934, saying that the Virginia court of appeals sustained the defense of defendant Hendricks.

The official report shows the verdict of conviction was affirmed. See Wharton v. Wise, 153 U. S. 155, 14 Sup. Ct. Rep. 783.

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795 ***Moses & al. v. Hart's Adm'or.**

January Term, 1875, Richmond.

1. **Fiduciaries—Receiving Confederate Money—Scaling.**—A personal representative having, during the war, received Confederate money and used it in his own business, in the settlement of his account of administration after the war, the money so received will be charged to him as of its scaled value in gold at the date of its receipt, and not at the end of the year.
2. **Same—Same—Commissions.***—A personal representative will be entitled to his commissions upon moneys received by him during the war, though he did not settle his accounts until after the war.
3. **Same—Same—Accounts.**—In settling the account of a personal representative who acted during the war, the balance found against him should be reduced to its value in gold. And the decree against him should be for the amount, to be paid in gold or its equivalent, in United States currency.
4. **Same—Same—Ancillary Administration.**—Where there has been a principal administration in one state, and an ancillary administration in another, whether the courts of the latter will permit the assets there being to be transferred to the former, before the legatees as well as the creditors in the state of the ancillary administration are satisfied, will depend upon the circumstances of each case. There is no inflexible rule on the subject.
5. **Same—Same—Burden of Proof.**—In such a case, the foreign claimants who come here insisting on the transmission of the assets to another state, when there are domestic claimants also, ought to be required to show that their transmission is indispensable to the purposes of justice. They ought to show that distribution cannot be made here without injury, or at least great inconvenience, to parties interested in the estate. The burden is upon them to make out a case for the interposition of the court in their favor.
6. **Same—Same.**—A testator having died in New York, and his executrix having qualified there, a curator of the estate in Virginia pays money to two of the testator's legatees who are in Virginia. It being probable that the debts of the estate have been paid, the curator will not be required to pay over to the representative of the estate
796 the money paid to the legatees, *until an enquiry can be directed to ascertain whether any part of the assets are needed in New York to pay debts and legacies, and to what portion of the estate the two legatees to whom the curator paid money are entitled under the will of the testator. And the curator will be entitled to a credit on his account for so much as they are entitled to as legatees, and he has paid to them.

Michael Hart, a citizen of New York, died in September 1861, leaving a widow and several children; and leaving a will which was duly admitted to probate in the surrogate court of New York. By his will he gave to his widow $75,000, and to his widow in trust for his daughter $30,000. To each of his other children he gave $5,000; and after some other small legacies, he devised and bequeathed the balance of his estate to his widow, Solomon Davis and Alfred Moses, of Richmond, Va., and George A. Davis, of Cleveland, in trust, for the benefit of all his children equally, to be held as they think proper; and he appointed these same persons his executors. Mrs. Hart alone qualified as executrix in New York.

Michael Hart appears to have left a large estate, much of it in New York, and a considerable portion of it in Virginia; that in this state consisting of lots in Richmond, Lynchburg, &c., slaves, stocks in banks and internal improvement companies, in insurance and other joint stock companies, in bonds and notes, in bonds of the state of Virginia, &c., &c.

It being feared that if the will was admitted to probate the property might be sequestered by the Confederate States government, it was withheld until 1868, when it was admitted to probate, and the estate in Virginia was committed to John Wright, sheriff of the city of Richmond, for administration.

In the meantime, in 1861, Alfred Moses, the nephew of the testator, who had
797 been appointed one of his *executors, qualified in the probate court of Richmond as curator of the estate.

In 1868 Wright, as administrator of Hart, instituted his suit in equity in the Chancery court of the city of Richmond against Moses and George Davis, his surety, for an account of the estate which came into his hands and for payment. The defendants

*Fiduciaries—Settlement of Accounts—Commissions.—See Crigler v. Alexander, 33 Gratt. 674, and *note*.

answered, and a commissioner of the court was directed to take the account.

The commissioner made his report, which was excepted to by the defendants; and some of his exceptions having been sustained, the report was recommitted to be reformed. The second report was also excepted to by the defendants. The most of these exceptions need not be stated, as they are questions of fact dependent on evidence. But there are three which require to be stated. They are

1st. Because the commissioner has scaled the money received by the curator at the date of its receipt, instead of at the end of the year.

It appeared that the curator used the money collected by him in his business.

2d. That the curator was not allowed commissions on his receipts from 1861 to 1866.

It appeared that no account was settled by the curator during the war. In 1866 he put his papers in the hands of the commissioner; but before the commissioner had completed the account he was removed from office by the military authorities; and no further effort was made for the settlement of the account until the order for the account was made in this case.

3d. Because the curator was not allowed a credit for the sums of $5,573.55 and $1,000, paid by him to Henry Hart, and $10,250 798 of Confederate bonds, in *which he had, early in 1862, invested moneys of the estate which he had collected, and which he had delivered to Henry Hart.

It appeared that Henry Hart, who was a son of Michael Hart, came to Richmond soon after the commencement of the late war, and George, another son, also came south subsequently, and they seem to have remained in the south during the war. The sum of $5,573.55 was paid to them on account of their interest in the estate of their father. It appears further, that when McClellan was near Richmond, Moses and Henry Hart fearing that Richmond would be taken, Henry Hart left the city and went to North Carolina, taking with him most of the slaves belonging to the estate, and also these Confederate bonds, which were put into his hands by Moses for the purpose; and Moses also paid him at the same time $1,000 in southern bank bills. Other facts bearing on this question are referred to in the opinion of Judge Staples.

The cause came on to be heard on the 14th of February 1874, when the court overruled the defendants' exceptions, and the gold balance against Moses, reported by the commissioner, having been converted into United States currency, there was a decree against Moses and surety in favor of the plaintiff for $30,871.13, with interest on $18,637.09 from the 10th of February 1874, and also for $1,279.14, with interest on $916.52 from the 20th of December 1873, and costs. And from this decree Moses and Davis' administratrix applied to this court for an appeal; which was allowed.

Neeson and Keiley, for the appellants.

Ould & Carrington and Page & Maury, for the appellee.

799 *STAPLES, J. Michael Hart, a resident of New York, died in that state in September, 1861, possessed of a considerable real and personal estate.

By his will, which was admitted to probate in the surrogate court of New York, he appointed his wife, Frances Hart, his executrix, George A. Davis, of Ohio, the appellant Moses and Solomon Davis, of Richmond city, his executors. None of them qualified, however, except Mrs. Hart, to whom letters testamentary were granted in New York. The will was not offered for probate in this state; no doubt under an apprehension that the property here might thereby be exposed to confiscation. The appellant Moses, however, at the request of the parties interested, or a part of them, qualified as curator of the estate in Virginia. The precise time of this qualification does not appear, though it was probably in the winter of 1861 and '62. The appellant, in his character of curator, took possession of the personal property, which was of considerable value, consisting of stocks in banks, insurance and other companies, shares, bonds, notes, and other evidences of debt. He continued to act in that capacity until the year 1868, when the will was, for the first time, admitted to probate here, and administration, with the will annexed, was committed to the appellee Wright, sheriff of the city of Richmond.

In August 1869 this bill was filed by Wright in the Circuit court of the city, against the appellant, for a settlement of his accounts as curator, and for the payment of such balance as might be found due the estate. In this suit such proceedings were had that in February 1874, a decree was rendered by the Chancery court of Richmond against the appellant for the sum of thirty thousand eight hundred and 800 seventy-one *dollars and thirteen cents. From this decree an appeal was taken by Moses to this court.

There are various assignments of error in the proceedings of the court below. I do not propose, however, to consider them in the order in which they are presented, or to enter into any elaborate discussion of the questions growing out of these assignments, with the exception of one of these, which will be more particularly noticed in the conclusion.

The first matter that demands attention is the amount of the decree against the appellant. He insists that it greatly exceeds the assets which came into his hands after allowing him his just credits. The objection I think is not well taken. It is in proof that in December 1861 the appellant had in his possession more than five thousand dollars belonging to the estate, which he paid to Henry and George Hart. He had also over ten thousand dollars invested in Confederate bonds, and the further sum of one thousand dollars, with all of which he is chargeable. In his letter of April 1862

to Mrs. Hart, the executrix, he states that he then had in cash about twenty thousand dollars on which he was making interest.

The appellant's account, as curator with the Traders Bank of Richmond, shows that between the 18th January 1862, and the 31st January 1863, he had deposited to his credit in that bank about twenty-four thousand dollars in Confederate money belonging to the estate, that the greater part was drawn out by him during the year 1862, and the entire amount by the 2d July 1863. The evidence in the cause, indeed the appellant's own admissions, lead irresistibly to the conclusion that this money was appropriated by him, and employed in trade and speculation.

801 *These facts show that the report of the commissioner, upon which the decree is based, does not over estimate the amount of the assets which came to the hands of the appellant. The only doubt I have had is, whether the appellant is not justly chargeable with a larger sum. The decree in this particular is perhaps as nearly correct as can be under all the circumstances of the case, and does substantial justice to the parties.

Another ground of complaint is, that the court scaled the Confederate currency in the hands of the appellant, as of the date of its receipt, instead of applying the scale at the end of the year in which it was received. It is said that the law allows to a personal representative a reasonable time to make his disbursements, and during this reasonable time the estate and not the fiduciary should bear any loss resulting from a depreciation of the currency.

This may be true with respect to a fiduciary who has properly disbursed the assets, or has retained them in his hands a reasonable time with a view to disbursement or investment; but the benefit of the rule cannot be justly extended to one who has been guilty of a devastavit by converting the assets to his own use. As it is difficult, if not impossible, in most cases to ascertain the period of conversion, and as the fiduciary plainly violates his duty in using the trust fund, he may be properly charged with the value of the currency at the time it was received. On the other hand there may be cases in which the value should be fixed as of the time of the conversion. No inflexible rule can be laid down on the subject. In the case before us, I am of the opinion the chancellor was warranted by the circumstances in applying the scale of depreciation at the time the Confederate currency was received by the appellant.

802 *Another ground of error assigned is, that the chancellor, after reducing the Confederate treasury notes to their gold value, added thereto the premium in national currency. It is argued that this practice is in conflict with the decisions of the Supreme court of the United States, which hold, that under the act of congress, treasury notes, known as "greenbacks," constitute a legal tender in the payment of all debts.

A moment's consideration will show that these decisions have no bearing upon the question. The act of March 3d, 1866, for the adjustment of Confederate liabilities, provides that the debt may be liquidated and settled by reducing the nominal amount to its true value at the time the contract was entered into, or at such other time as to the court or jury may seem right in the particular case. This act has been generally construed by the courts as authorizing, if not requiring, the gold value of the Confederate notes to be ascertained. And this has been the practice throughout the state. If this course be pursued—if the Confederate debt be reduced to its value in gold, and judgment entered for the amount, it is very clear that the debtor ought not to be permitted to discharge that judgment in a depreciated currency less valuable than gold. Such a result would be unjust to the creditor, and contrary to the true intent and meaning of the statute. And yet this very result will follow if the court render a judgment for the gold value, and the debtor is allowed, as he will be, to pay the debt dollar for dollar in depreciated legal tender notes. It was from an apprehension of the unjust working of this practice, this court adopted the rule laid down in Magill v. Manson, 20 Gratt. 527, of adding the premium to the gold value, and of giving judgment for the amount thus ascer-

803 tained. The court does not *thereby undertake to prescribe the kind of money in which a debt is to be paid; but to ascertain and determine the precise amount which is to be paid. Instead of rendering a judgment for gold, or for a sum to be paid in gold, the court enters judgment for a sum which may be paid in money, the equivalent in value of the gold. The main objection to the rule adopted in Magill v. Manson is, that the national currency may so appreciate in value between the date of the judgment and the time of payment as indirectly to increase the amount for which the debtor is liable. On the other hand, the creditor may lose by the depreciation of the currency after the rendition of the judgment. This, however, is a hazard necessarily incident to every judgment, and indeed to every obligation payable in currency rather than gold.

In order to avoid this difficulty, and with a view to attain, as far as may be, the justice of the case, this court has so far modified the rule laid down in Magill v. Manson as to authorize the debtor to pay in coin or its equivalent. This will be effected by fixing the amount of recovery under the statute in gold, and by so framing the judgment or decree as to authorize and require the debtor to discharge it in gold; or, at his option, to pay a sum in currency equivalent in actual value to the gold. The decree in the present case can be modified accordingly; the result will not, however, be substantially varied.

I have devoted more time to the consideration of this branch of the case than is perhaps necessary. As the question has not

been discussed by this court on any previous occasion, and as counsel seem somewhat mistaken as to the ground upon which the court has heretofore proceeded, it has been deemed but just that these grounds should be now briefly stated.

804 *Another error assigned is the refusal of the chancellor to allow the appellant his commissions. As already stated, the appellant qualified as curator in the winter of 1861-'62. It appears that in September 1866 he laid before a commissioner his accounts for settlement, but none was made, in consequence of the removal of the commissioner from office by the military authorities from the federal government. No other settlement, before or subsequent to the time just mentioned, was ever made or attempted. The chancellor allowed the appellant his commissions subsequent to September 1866; but he refused to allow them for the period between 1861 and 1866. In this I think he committed no error. This could be demonstrated by a reference to section 8, chapter 132, page 662, Code of 1860; act of March 14, 1862; acts of March 11, 1863; act of 1862 and 1863, page 82, and the act of March 3d, 1866.

This question must however be regarded as settled by the decision of this court in Strother v. Hull, 23 Gratt. 652, 671, in which it was held that the fiduciary was entitled to his commissions. I did not sit in that case, but regard it as a binding authority.

There are other exceptions involving mere matters of fact, not necessary to be particularly considered here. I think the chancellor was correct in overruling them.

The last and most important question in this case remains to be considered. It seems that Henry and George Hart, sons of the testator, and legatees under his will, during the war resided in Virginia. Henry Hart came to Richmond very early after the hostilities commenced. The exact date of George Hart's arrival does not appear; but he was certainly in the state during the period of the transaction hereafter to

805 be *mentioned. In December 1861 the appellant paid them about five thousand and five hundred dollars. He delivered to Henry Hart in April 1862 the Confederate bonds heretofore referred to, amounting to more than ten thousand dollars, and the appellant paid him the sum of one thousand dollars in southern bank bills. Under the will of Michael Hart, they, George and Henry Hart, are entitled to legacies of five thousand dollars each. They are also residuary legatees with the other children, of the entire estate after the payment of the specific legacies.

The appellant claimed in the court below that he should be allowed credit for the payments thus made, or, at least, for so much as did not exceed the interest of George and Henry Hart under the will of their father. This claim was disallowed by the chancellor upon various grounds which will be noticed hereafter.

The appellant insists that the decree in this respect was not only erroneous but grossly unjust to him. He insists that although a curator is not strictly authorized to pay legacies, yet he will be allowed credit for those actually paid, when the rights of creditors are not prejudiced; and in this case there is no danger upon that point, as all the debts, both here and in New York, have been long since settled; that the only effect of sending the assets abroad will be to require the appellant to incur the expense and hazard of pursuing the legatees in the courts of a foreign state to obtain that redress which his own courts ought to grant him.

On the other hand, the appellee contends that the object of the ancillary administration is simply the protection of domestic creditors, and so soon as this is accomplished the residuum of the assets should be transmitted at once to the domiciliary administrator, for final settlement

806 *and distribution. This (it is claimed) is the general rule; the exceptions to it are rare, and never occur unless it clearly appears that the transmission of the assets will be attended by some prejudice or serious inconvenience to citizens of the country where the assets are situated.

It is further contended, that until the whole estate, both here and in New York, has been fully administered and settled, it cannot be known what are the shares of George and Henry Hart; that there is nothing in the record to show that any such settlement has been made or that the debts have been paid, or that the estate is even sufficient to pay the preferred legacies; and, under such circumstances as these, to decree the payment of these legacies here would produce endless confusion and embarrassment in the administration of the estate.

This is a mere abstract of a very able and exhaustive argument made by the counsel for the appellee. In support of his view he cites a number of authorities. The learned counsel's main reliance is upon certain Massachusetts cases, which, it must be admitted, fully sustain his position. The first is that of Richard's adm'r v. Dutch, 8 Mass. R. 515, in which the court say, "that legatees who claim only from the bounty of the testator must resort to the country of the testator where the will was originally proved, and by the laws of which his effects are to be distributed, to obtain the bounty they claim."

The second case is Danes, Judge v. Boylston, 9 Mass. R. 337. The court, after stating that the lex domicilii must govern in the distribution of the personal estate, say: "And this distribution is to be made under the authority of the court within whose jurisdiction the deceased had his domicil; it not being competent for a

807 *court granting an auxiliary administration to order a distribution among the heirs and legatees."

If these propositions of law be sound, there cannot be a question of the correctness of the decree in this case. But are they sound? I think it can be demonstrated that they are not correct in principle, and

that they are not sustained by the current of authority in England or in this country. Even in Massachusetts they have been considerably modified by later decisions. "And the courts there now hold, that whether the assets shall be retained for domestic claimants or transmitted to the domiciliary administrator for distribution, depends upon the particular circumstances of each case." Dawes v. Head, 3 Pick. R. 128-9; Sturgis v. Slacum, 18 Pick. R. 36.

In the latter case the court say, the court of the ancillary administration may order distribution according to the laws of the country where the deceased had his domicil, or it may order the balance to be transmitted to the administrator appointed in the country where he had his domicil.

The case of Harvey v. Richards, 1 Mason's R. 381, is generally recognized as a leading authority. It was argued by Mr. Webster and Mr. Prescott as opposing counsel, and was decided by Mr. Justice Story. It is very true, as suggested by the counsel for the appellee, that no part of the assets in the hands of the ancillary administrator were needed by the domiciliary administrator, either to pay debts or legacies; but Judge Story entered into an elaborate examination of the authorities, and of the principles applicable to the subject. He expressed his emphatic disapprobation of the Massachusetts cases, so much relied on by the learned counsel. He said that whether distribution ought or ought not to be made by the ancillary administrator, should depend upon the circumstances
808 of each case; *that no universal rule ought to be laid down on the subject; or, at least, that the rule should be flexible, and depend for its application upon the equity of the particular case presented to the court. He asked why should not legatees and distributees be entitled to recover out of the assets here as well as creditors. It is true that legatees claim by the bounty of the testator; but it is a legal right, as fixed and vested as the right of a creditor. If it belongs to the public policy of a country to sustain the claims for debts due to its citizens, it seems no less to belong to that policy to sustain any other claims founded in justice and law. He declared he was unable to admit the rule in favor of creditors, without admitting at the same time the like rights in favor of legatees and heirs.

The only case I have been able to find in the New York Reports is that of Parsons v. Lyman, 20 New York R. 103. The opinion of the court was delivered by Judge Denio, who expressed his entire concurrence with the views of Judge Story.

In Mothland v. Wiseman, 3 Penn. R. 188, it was held that the foreign administrator, although but auxiliary, is bound to remit the assets to the administrator of the domicil only in case there are no domestic claimants in the character of creditors, legatees, or next of kin; but that where these appear, the assets are to be retained for administration. This was the opinion of Chief Justice Gibson, upon a careful review of all the authorities. This decision was fully approved in Dent's Appeal, 10 Harris' R. 514. In that case the court went so far as to say, "where there are domestic claimants upon the fund their rights must be protected, and they must not be put to the expense or danger of following it into a foreign jurisdiction. And they further held that legatees and distributees not residing in
809 the state, *but seeking their remedies in her courts, were to be regarded as domestic claimants. See also Miller's Estate, 3 Rawle's R. 317; Parker's Appeal, 61 Penn. R. 478.

The learned counsel for the appellee has cited the case of Churchill et al. v. Boyden, adm'or, 17 Vermont R. 319, in which Judge Redfield stated that the prevailing practice of the courts in the ancillary administration is not to decree distribution, but to remit the funds to the principal administration. This point was not involved in the case, and this observation of Judge Redfield was therefore a mere obiter dictum. He makes no reference to any other than the Massachusetts decisions. He concedes that even here there is a discretion in the courts where the funds are found, and if they do remit them it is merely from courtesy.

Upon a careful examination of the Vermont decisions it will be found they do not sustain the practice of the Massachusetts courts as assumed in the cases so much relied on for the appellee. One of the latest upon this question is that of the Probate Court v. Kemball, 42 Vermont, in 1869; in which the court held it is the duty of the Probate court having in hand the ancillary administration to remit the assets within its jurisdiction not needed for debts and legacies within the state; thus placing debts and legacies upon substantially the same ground.

There is one other authority which seems to have escaped the researches of the counsel, and which is entitled to greater consideration with us than any yet mentioned. I allude to the case of Tunstall v. Pollard's adm'r, 11 Leigh 1-35. In that case Judge Tucker, in alluding to the doctrine announced in Richards v. Dutch, 8 Mass. R. 506, and Dawes v. Boylston, 9 Mass. R. 337, that legatees who claim only from the bounty of the testator must resort to
810 the country of *the testator, to obtain the bounty they claim, said: "These decisions appear to me unreasonable and extravagant, and they are rejected by Judge Story himself in the case of Harvey v. Richards, 1 Mason's R. 381, 420. They are opposed, too, by the decisions in other states (Guier v. O'Daniel, 1 Binn. 349, in note), and by the cases collected by the court in Harvey v. Richards. It would be unreasonable indeed that a legatee should be compelled to go abroad to get payment out of the assets that are here in the hands of an administrator who has duly qualified in our courts and is within our jurisdiction." In this opinion the other judges fully concurred. And although this precise question was not involved in that case, still the

opinion is entitled to great consideration, in the absence of any express contrary decision.

As already stated, the English cases are equally explicit upon the subject of the rights of legatees residing within the state of the ancillary administration. I do not propose, however, to cite them, as they may be seen in Harvey v. Richards, where they are reviewed by Judge Story. It will be sufficient to give a single extract from a work of high authority, which contains the result of the English decisions. In 2 Williams on Executors, page 1415, it is said: "Although the new administration is treated as merely ancillary to the foreign administration, so far as regards the collection of the effects and the proper distribution of them, still, however, the new administrator is made subservient to the rights of creditors, legatees and distributees, who are resident within the country where it is granted; and the residue is transmitted to the foreign country only when a final account has been settled in the proper tribunal where the new administration is granted, upon the principles adopted
811 by its own laws *in the application and distribution of the assets found there. See also Preston v. Melville, 8 Clark & Finn. 1, 13.

Other authorities might be named to the same effect. These are sufficient to show that the doctrine of the earlier Massachusetts cases is not good law. They show, indeed, that there is no general inflexible rule upon this subject; that whether the assets will be retained or remitted for the payment of legacies or distribution, must depend upon the circumstances of each case. The question is one not of jurisdiction, but simply of judicial discretion. Every state determines for itself the manner in which property within its limits shall be disposed of. Although one administrator or executor may be termed principal, and the other ancillary, each in fact is principal, because each is independent of the other, and derives his power from equally independent sources. Neither has any control of the assets beyond the limits of his state. If the court of the ancillary administrator consents to a transmission of the assets abroad, it is a mere matter of courtesy, and not because there is any obligation to do so. That courtesy ought never to be exercised to the injury or inconvenience of domestic claimants, whether they be creditors, legatees or distributees. The one has as much right to the protection of the government as the other. It is not a just principle to subject our own citizens to the expense, trouble and hazard of redress in foreign tribunals, when our own courts are entirely competent to afford it. The foreign claimants who come here insisting upon a transmission of the assets to a distant state where there are domestic claimants also, ought to be required to show that such transmission is indispensable to the purposes of justice.

They ought to show that distribution
812 cannot be *made here without injury, or at least, great inconvenience to parties interested in the estate. The burden should be upon them. Instead of permitting them to take away the fund by invoking general principles of some supposed international comity, it ought to be incumbent upon them to make a case for the interposition of the court in their favor. If there is to be any general rule on the subject, I would be for establishing this as the proper one. This is the view taken by Mr. Justice Story, who declares that it is not only sustained by principles of public policy, but stands commended by its intrinsic equity.

In the present case, however, it is not a legatee who is seeking payment of a legacy. It is a much stronger case. It is that of a fiduciary who has made advancements to legatees under circumstances as will be hereafter seen, which appeal very strongly to the court. The question is, whether he shall be required to remit the assets abroad that he may there be decreed to receive them again.

It is said, however, that the appellant was a mere curator, whose duties are very limited, and whose authority does not extend to the payment of legacies. This may be true with reference to creditors. But the question here is whether, having made the payments to legatees, the appellant shall have credit as against them for such payments. In a controversy between George and Henry Hart and the appellant no court would compel him to pay the fund to them and put him to his suit to recover it again. If the New York court may decree in his favor so may this court, if it may decree distribution at all.

It must be conceded, at any rate, that the appellant, to the extent of his advances, is the equitable assignee of the parties paid, and stands in their shoes.

813 *The appellant was executor under the will. But he could not qualify here as such because it was deemed unsafe to record the will. He could not qualify as administrator, because he could not take an oath that the deceased, so far as he knew, died without a will. And so a very limited form of administration was assumed. But surely it could not have been intended that George and Henry Hart should wait until the termination of a protracted war before they could receive one dollar of the large and valuable estate left them by their father. The learned chancellor very correctly holds that the appellant was justified in making the investment in Confederate bonds; and yet it is absolutely certain that they would have been utterly lost to the estate had they not been delivered to Henry Hart. Every dollar paid these legatees was so much gained to the foreign claimants; and it does not become them to make complaint of the conduct of the appellant in this respect.

It is said, however, that the fund here may be needed in New York for the payment of debts and the preferred legacies. The appellee states in his bill that the testator owed but few debts, and he is informed

that all of them were paid by the executors, who qualified in New York. There is nothing in the record throwing the slightest doubt upon the accuracy of this statement, and it must be taken as true. In regard to the legacies there is more difficulty. I have not a doubt but that they have been satisfied long ago. The estate, as is conceded, was a very valuable one both here and in New York. It appears that the appellee on the 18th May 1872 sent to the executrix in New York about twelve thousand dollars, and there is still in his hands the additional sum of twelve thousand two hundred and thirty-one dollars. Besides this, if
814 the appellant *is allowed all his credits he will be indebted to the estate some ten or fifteen thousand dollars. Although this suit has been pending more than five years, during this time we hear no complaint from the executrix or either of the legatees in New York: the Chancery court was furnished with no statement or account to enable it to ascertain whether the funds are needed abroad for the payment of debts or legacies. It is not even asserted that they are, except in the way of suggestion in the argument for the appellee.

Under these circumstances the court without further investigation might well allow the appellant the credits claimed by him if there was no other difficulty in the way. But Henry Hart, whose general pecuniary legacy is much less than the amount he received from the appellant, is a residuary legatee of the entire estate, in conjunction with the other children after the payment of the pecuniary legacies. With a view to remove all difficulty upon this point, and indeed to prevent any possible injury or loss, an inquiry can be directed to ascertain whether any part of the assets are needed in New York to pay debts or legacies; and further, to ascertain what portion of the estate George and Henry Hart are entitled to under the will of their father. This information can no doubt be easily obtained. It will enable the court to act understandingly upon the rights of the parties.

This course is certainly more reasonable and equitable than to require the appellant to pursue the legatees in a foreign state to recover what he has already paid. If the appellant is compelled to raise the large sum decreed against him before he can claim against the legatees, it is highly probable both he and his security will be reduced to bankruptcy. And when the funds reach New York it is impossible to foresee
815 the *obstacles that may be thrown in the way of subjecting any part of them to the appellant's claim. How can we say that he will there obtain credit for the Confederate bonds delivered to Henry Hart. The decisions of the federal courts repudiate investments of this kind, and we cannot say the New York courts will not follow their example. No rule of law or principle of international comity requires us to expose a citizen of this state to hazards of this character, and it ought never to be done unless in a case of overwhelming necessity. If the accounts have all been settled in New York, and the interests of each of the legatees ascertained, it will be an easy matter to determine the extent of appellant's credits. If, on the other hand, the administration there has not been settled, a sufficient sum ought to be retained here for appellant's indemnity until the shares of George and Henry Hart are ascertained. No injury can arise from this course, for if the funds are remitted to the domiciliary administration they would have to await the settlement of the final account before distribution can be made. The appellant ought to have the amplest opportunity of showing the state of the New York accounts, and of establishing his credits. I say the appellant, because his payments to the legatees were not strictly within the line of his duty as curator, and it is therefore incumbent upon him to obtain the necessary information from abroad in regard to the state of the accounts. The appellant is himself a legatee to the extent of five hundred dollars under the will. He is certainly entitled to a credit for this in his settlement, unless it is made to appear that the assets are required for the payment of debts or the preferred legacies. Until the inquiries herein directed have been made, the decree of the chancery court will
816 be suspended as to a part *of the fund found due by the appellant. The security of the lien of the decree will thus be preserved to the appellee.

In the meantime, George Hart and Henry Hart must be made parties to the suit, that they may have an opportunity of being heard upon the question of the payments made to them. This disposes of all the questions presented to this court; one of them has been considered at much length, because it was argued very elaborately by the learned counsel for the appellee, and the judge of the Chancery court arrived at a different conclusion from what is here expressed. The importance of the case has justified, and perhaps required, a longer discussion than otherwise would have been deemed necessary.

The case must be remanded to the Chancery court, to be proceeded with in conformity with the principles herein announced.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of Staples, J.

ANDERSON and BOULDIN, Js., concurred in the opinion except as to the commissions; as to which they referred to Strother & als. v. Hull & als., 23 Gratt. 652.

Decree reversed.

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817 *Kent, Paine & Co. v. Dickinson, Judge.

January Term, 1875, Richmond.

1. **Court of Appeals—Circuit Courts.**—Where, in pursuance of the act of 1869-'70, ch. 171, § 5, p. 257, this court sent a cause, as having been pending in a District court of appeals, to a Circuit court, that was a decision of this court that the cause had been pending in the District court, and that the

Circuit court had jurisdiction to rehear and decide it.

2. **Same—Same—Mandamus.***—If in such a case the judge of the Circuit court refuses to rehear and decide the case, and directs it to be dismissed from the docket of his court, he may be compelled by *mandamus* from this court to hear and decide it.

The surviving partners of the firm of Kent, Paine & Co. applied to this court by petition for a mandamus to the Honourable Asa D. Dickinson, judge of the Circuit court of Charlotte county, to compel him to hear and decide a case which had been sent by the Court of Appeals to his court. The case is stated by Judge Christian in his opinion.

Ould & Carrington, for the petitioner.

Jones & Bouldin, for the judge.

CHRISTIAN, J. On the 5th day of December 1872, the following order was entered by this court in the case of Kent, Paine & Co. v. Bailey:

"This day came the parties by their counsel, and the record in this cause which was pending in the District Court of Appeals held at Lynchburg, when the present constitution took effect, and which
818 were *transferred by law to this court, having been received by the clerk of this court, and this court being satisfied that it has no jurisdiction of this cause, it is ordered that it be transferred to and docketed in the Circuit court of Charlotte county, from whence the appeal was originally taken; there to be heard and fully disposed of as by an appellate court, according to law."

This order was made by this court in conformity to the provisions of the fifth section of chapter 171, Sess. Acts 1869-'70, which is in the following words: "§ 5. All cases which were pending in the District courts, when the present constitution took effect, of which the Supreme Court of Appeals may not have jurisdiction, shall be transferred to and docketed in the Circuit courts of the counties or corporations whence the appeals were originally taken; there to be heard and finally disposed of as by an appellate court. When the judge of the court to which any such case is referred, is the same person before whom the case was originally tried, then the judge, either in term-time or vacation, may remove such case to any other Circuit court, there to be heard and finally disposed of, as by an appellate court."

By this order, made in conformity to this provision of the statute, the cause was transferred to the Circuit court of Charlotte. That court, on the 13th of October 1874, dismissed the appeal, upon the ground, as set forth in the order of dismission, that the several District courts had ceased to exist when the appeal was allowed by one of the judges of the District court of Lynchburg; the Circuit court of Charlotte being of opinion that the "present constitution took effect" on the 6th July 1869, and consequently that the said District court was no longer in existence; and
819 *that therefore this cause was not "pending in said court when the present constitution took effect."

After this dismission of their appeal, the appellants applied to this court for a mandamus to compel the judge of the Circuit court of Charlotte to proceed to hear and finally dispose of their case, in pursuance of the order of this court and of the said fifth section of ch. 171 of Sess. Acts 1869-70.

A mandamus nisi was awarded by this court; to which the Hon. A. D. Dickinson returned his answer on the 23d January last.

The learned judge, in the very respectful answer he returned to the rule of this court, summoning him to show cause why the commonwealth's writ of mandamus should not be awarded, submits as the only reason why such writ should not issue, that he was of opinion "that by the constitution of Virginia, adopted by the people on the 6th July 1869, the several District Courts of Appeals had ceased to exist, and that the Hon. S. S. Weisiger was no longer judge of such District court, and had no authority of law for granting the appeal to the decree of the Circuit court of Charlotte on the 24th January 1870, rendered by Hon. P. A. Bolling, the judge of said court when said appeal was granted; and that the appeal allowed was improvidently awarded."

The question we now have to determine is, Is this a sufficient answer to the rule?

It is conceded that the Circuit court of Charlotte did not hear and finally dispose of the cause on its merits; but simply dismissed the appeal, because, in its opinion, the District court had ceased to exist, and that the judge awarding the appeal had no authority to allow it. This was, in effect, to decide that the cause was not "pending in the District court at Lynchburg
820 *when the present constitution took effect;" and it is plain the appeal was dismissed upon that ground alone. But that precise question had been determined by this court. In its order entered in this very cause, this court had declared that this cause was pending in the District court at Lynchburg when the present constitution took effect. That order was before the Circuit judge, and in plain terms had adjudicated that very question. No matter what may be the opinion of the circuit judge as to when the constitution took effect, he had no right to declare the case not pending in the District court, when this court had declared it was so pending.

The very question which the circuit judge undertook to decide had already been passed upon by this court, and of necessity must have been decided. If the District courts had ceased to exist when the appeal was allowed, then the cause was not pending in the District court when the present constitution took effect. And when this court declared by its order that it was so pending,

*Mandamus.—See on this subject, Page v. Clopton, 30 Gratt. 415, and *note*.

it decided, in effect and in terms, that the District courts had not ceased to exist on the 24th January 1870.

The case was either pending in the District court when the present constitution took effect, or it was not pending there. It was for this court, and not the Circuit court, to decide that question. This court did of necessity decide that question when it sent the case to the Circuit court. It was no longer an open question, and the Circuit court could only dismiss the appeal by reversing the decision of this court.

In Cowan v. Doddridge, 22 Gratt. 458, and Cowan v. Fulton, 23 Gratt. 579, where the circuit judge dismissed the appeal because in his opinion the law transferring such cases to the Circuit courts to be heard 821 and finally *disposed of as by an appellate court was unconstitutional and void, this court, without dissent, held that this question was not one to be determined by the Circuit court, but had already been passed upon by this court; and that when, in pursuance of the act of assembly above referred to, this court sent a cause which had been pending in a District Court of Appeals to a Circuit court, that of itself was a decision of this court that the act was constitutional, and that the circuit judge had no right to dismiss the case, but must proceed to hear and finally dispose of the case; and he was compelled to do so by a peremptory mandamus issued by this court.

The case before us is still stronger. Not only may it be said that the fact that the cause was sent to the Circuit court was a decision of the question that it was a proper case to be sent, but the order transferring it in terms declared that this case was pending in the District court in Lynchburg when the present constitution took effect.

When therefore the circuit judge undertook to declare that the cause was not pending in the District court at Lynchburg, and therefore dismissed the appeal, he reversed the decree of this court made in the same cause and entered of record in the very order which transferred the case to the Circuit court.

But it is insisted in the argument of the able counsel who appeared here for Judge Dickinson, that the dismissal of the appeal was a final judgment in the cause, and that it is not competent to the appellate court by mandamus to compel in effect a rehearing of the cause. I do not deem it necessary to review the numerous cases which the research and learning of the able counsel produced; because they do not, in my judgment, apply to such a case as the 822 one we are now *considering; and the principles of those cases when properly applied are sound and admitted law. But both the argument and the authorities may be fully met by the lucid opinion of Judge Bouldin in the case of Cowan v. Fulton, Judge, supra. Not only the principles there declared and the authorities there relied on, but the very language used by him, mutatis mutandis, may be applied to this case.

In answering the same position taken in that case which has been taken here, Judge Bouldin says: "If the premises were true the conclusion might perhaps be conceded; for it certainly is not regular nor proper to use the writ of mandamus to review and rehear the judgments of a subordinate court. But the fallacy of the argument consists in the assumption that there was a judgment in the cause; whereas the court positively and unequivocally refused to pass upon it at all, either to review, reverse or affirm the judgment, and merely directed the cause to be dismissed and stricken from the docket. It was a simple refusal to hear and decide the case; and this court having held that no appeal lies from such refusal, it is exactly the case to which the high remedial writ of mandamus is most frequently applied in order to prevent a failure of justice."

I refer to this opinion, and the authorities cited, as conclusive, without repeating them here, to show that this case is peculiarly one to which the writ of mandamus is applicable. It seems to my mind impossible to draw any distinction between the case before us and the case of Cowan v. Fulton, Judge, 23 Gratt. 579. In the latter case Judge Fulton dismissed the appeal, because in his opinion, the law under the provisions of which the case was sent to him, was unconstitutional and void. But it was 823 held, that this court passed on *that question, by sending the case to him for trial; that he had no right to decide that question, as it had already been adjudicated by this court; and that his judgment dismissing the appeal was not a final judgment. Consequently a writ of mandamus was awarded by this court to compel him to hear and finally dispose of the case. Now how does this case differ from the one before us? Judge Dickinson also refused to hear and finally dispose of the case sent by this court to him, but dismissed the appeal because, in his opinion, the District courts were not in existence when the appeal was awarded, and that therefore no case was pending in the District court of Lynchburg. But this court had already decided that question, not only (as was settled in two cases by this court) by sending the case to him, but by its order transferring the case in terms declaring that the case was pending in the District Court of Appeals at Lynchburg, when the constitution took effect. It was not for the circuit judge to say that the case was not pending in the District court when the constitution took effect, when this court had declared it was so pending, no more than it was competent for Judge Fulton to declare an act of the general assembly unconstitutional which this court had declared to be constitutional and valid. In both cases alike the dismissal of the appeal was not a final judgment, but was in both cases a refusal to hear and decide the controversy.

It is well settled that applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court having

jurisdiction of a case refuses to hear and decide the controversy. 15 Wall. U. S. R. 165, Ex parte Newman, and cases there cited. Now that is precisely what has occurred in this case.

824 *Original jurisdiction to award writs of mandamus upon the principles of the common law has been conferred on this court by the constitution and laws of the state, and in accordance therewith I think we must say to the judge of the Circuit court of Charlotte that this cause is properly before him, and that he must go on and hear and finally dispose of the same. For that purpose a peremptory mandamus should issue.

MONCURE, P., concurred in the opinion of Christian, J.

STAPLES, J., said he had been counsel in the case of Cowan v. Doddridge, and therefore did not sit in it; and, if he might not have concurred in that decision, still it decides this case.

ANDERSON and BOULDIN, Js., dissented.

Peremptory mandamus ordered.

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825 *Manchester Cotton Mills v. Town of Manchester.

January Term, 1875, Richmond.

1. **Municipal Corporations—Improvement of Streets—Damage to Private Property.***—The authorities of the town of M gave notice to the corporation of C, that they would remove three brick tenements held by C, which the authorities of the town claim encroach on a street of the town of M. The corporation of C and those under whom they claim, have been in possession of the houses for more than twenty years, and have had title to the land much longer. The authorities claim that the ground was dedicated as a street by a previous owner, under whom C claims; and this C controverts. HELD:

   1. **Same — Same — Same — Injunction.** — Equity will enjoin the authorities of the town of M from removing the houses until the rights of the parties are ascertained.

   2. **Same—Same—Same—Same.**—The evidence in the cause leaving the rights of the parties in doubt, equity cannot settle them, involving, as they do, the title and boundaries of land; but will enjoin the removal of the houses until the question of right can be settled by a trial at law.

   3. **Same — Same — Same — Same.**— Such relief in equity will be more readily afforded against corporations than against private individuals. For the principles on which it will be adminisered, see the opinion of STAPLES, J.

   4. **Same—Same—Same—Same—Charter.**—A provision in the charter of M prohibits the interference with the authorities by injunction, unless they are transcending their powers. If the lot in controversy be the property of C, the authorities of M would transcend their powers in removing the houses; and the injunction is not forbidden by the charter.

*Municipal Corporations—Improvement of Streets—Damage to Private Property.—See monographic *note* on "Municipal Corporations" appended to Town of Danville v. Pace, 25 Gratt. 1.

The case is sufficiently stated in the opinion of Judge Staples.

McRae & Christian, for the appellant.

Logan & Bransford, for the appellee.

STAPLES, J. This is an appeal from 826 a decree of the *Circuit court of Chesterfield, dissolving an injunction in a case wherein the "Manchester Cotton Mills" are plaintiffs, and the "Trustees of the Town of Manchester" are defendants. The object of the bill is to restrain the defendants from removing or otherwise interfering with certain buildings belonging to the plaintiffs situate in said town. The defendants claim that these buildings encroach upon what is known in the plan of said town as "Summers street;" that the ground upon which they stand was long since dedicated to the public as a street by the parties under whom the plaintiffs derive title, and that they, the defendants, are authorized under the charter and ordinances of the corporation, to remove said buildings as a nuisance.

On the other hand the plaintiffs deny there was ever a dedication of the lot in controversy, or any valid acceptance of it by the public: and even though "Summers street" may have been dedicated to the public, there is no satisfactory evidence of its width at the time of the supposed dedication; and if the buildings now encroach upon that street, it is because of a subsequent unauthorized extension or widening of the street in that direction.

It is conceded that the plaintiffs have a clear legal title to the premises, unless there has been a dedication as claimed by the defendants. It is conceded further, that the plaintiffs, and those under whom they claim, have been in the actual uninterrupted possession of the buildings since their erection in 1849 or 1850, and also of the ground upon which they stand, long anterior to that time, under a bona fide claim of title. Upon the question of dedication the evidence is confessedly very conflicting, and presents a case peculiarly proper for the consideraiont of a jury. Under these circumstances the title is not in a condition to be passed 827 upon *by a court of equity. The only matter to be determined by us is, whether it is competent for the court to interpose for the preservation of the property until the legal rights of the parties can be adjudicated in the proper forum.

The learned judge of the Circuit court was of opinion that equity cannot interfere, because the plaintiffs have a plain and adequate remedy at law for any loss or injury they may sustain by the acts of the defendants in "pulling down and removing" the buildings. Now, it is very true that an injunction will not be granted to restrain a mere trespass, because ordinarily the party injured may obtain adequate compensation

in the common law courts. Nor do I mean to affirm it will be granted in every case involving the removal, or even destruction of a building, without regard to its value or the uses to which it is appropriated. Every application for an injunction is addressed to the sound discretion of the chancellor acting upon all the circumstances of each particular case. In the one now under consideration it appears that the tenement consists of three brick buildings. It is not denied that they are valuable. To what precise use they are appropriated the record does not disclose. The buildings were erected as places of residence, and were occupied as such for several years, and it may be fairly inferred they are still so used, probably for the operatives of the "cotton mills factory." As before stated, they have been in the actual uninterrupted possession of the plaintiffs and those under whom they derive title, for more than twenty years, with a bona fide claim of right.

Now, if a case can be found at all analogous to this in which a court of equity has declined to interfere, upon the ground that the party has a plain and adequate 828 *remedy at law, it has escaped not only my own researches, but those of the counsel engaged in this cause. The books abound with decisions to the contrary. One of the earliest is that of Agar v. Regents Canal Company, reported in Cooper's Chancery Cases, page 77. The bill sought to restrain the defendants from cutting a canal through the plaintiff's garden and rick yard, alleging they were deviating from the line indicated in the act of parliament. The injunction was granted by Lord Eldon. There was no averment that the plaintiff could not obtain adequate compensation in damages. No such averment was considered necessary to entitle him to relief in equity.

The jurisdiction in such cases is exercised upon the higher ground, that the act of the defendant is an appropriation of the freehold, and a destruction of the substance and value of the estate in the character in which it is enjoyed. Many of the cases may be found in Kerr on Injunctions, 199; High on Injunctions, sec. 350, and in Jerome v. Ross, 7 John. Ch. R. 315. This principle is more liberally applied to corporations than to individuals. It is said by an eminent author, that "a private person who applies for an injunction to restrain a public incorporated company or body of functionaries from entering illegally on his land, is not required to make out a case of destructive trespass or irreparable damage." The tendency of such bodies to act, oftentimes, in an arbitrary manner, and the inability of private persons to contend with them, it is said, raises an equity for the prompt interference of the court whenever there is the slightest excess of powers. The general spirit of the latter cases is, therefore, to favor a relaxation rather than a strict application of the rule which denies the right to resort to equity when there is a remedy at law. Accordingly 829 *there are numerous decisions by which municipal corporations have been restrained from encroaching upon the property of private citizens under the pretense of removing obstructions from the public streets. This jurisdiction proceeds upon the idea of quieting the title and possession, and also upon the ground that damages at law will not meet all the requisitions of the case. In Varick v. The Mayor &c. of the City of New York, 4 John. Ch. R. 53, Chancellor Kent granted an injunction restraining the city authorities from entering upon and digging into a lot of the plaintiffs, upon which a stable, board fence and green-house had been erected. It was not alleged or proved that these buildings were of any special value, or that adequate compensation in damages could not be obtained at law; but the plaintiff relied upon an uninterrupted possession of twenty-five years and upwards. Chancellor Kent said, after such a length of time it is right and just that the plaintiff should be protected in the enjoyment of his property, and that he should not be disturbed by any act or entry of the corporation, under pretense or allegation that the fence and buildings stand or encroach on part of the public highway.

In Oakley v. Trustees of Williamsburg, 6 Paige's R. 262, the corporate authorities were illegally proceeding to dig down and alter the grade previously established for certain streets. It was held by Chancellor Walworth that the owner of adjoining lots, whose property would be seriously injured by such alteration, was entitled to an injunction to restrain the proceedings. The case of Clark v. Mayor of Syracuse, 13 Barb. R. 33, is a case to the same effect. See also Kerr on Injunctions, 199, 295, 304; High on Injunctions, s. 350. There are other cases which I shall have occasion to refer to hereafter in another connection. 830 *They all proceed upon the idea either of quieting the title and possession, or upon the ground that the threatened mischief reaches to the very substance and value of the estate, and goes to the destruction of it, in the character in which it is enjoyed. Eden on Injunctions, 226, note 1, 231. They are founded upon the broad doctrine that the citizen cannot be disseized of his freehold without compensation, without the intervention of a jury, upon the mere declaration of a city council, however honestly made. It is no answer to him to say that for the appropriation of his lot he may recover in ejectment, and for the destruction of his valuable building he may recover in damages. Universal experience demonstrates how ineffectual such a remedy is to afford a just compensation, especially in controversies with a corporation backed by all the appliances of wealth and the influence of public sentiment. And without attempting to lay down any general rule applicable to all cases, I think this case is clearly not one of those in which there is an adequate remedy at law.

It is said, however, that here the title, to say the least, is doubtful, and in such case

the court will require the complainant first to establish his right at law. This was the view of the learned judge of the Circuit court, who was of the opinion it was not competent for the court in this form of proceeding, to determine the boundaries of land or the legal title thereto; and in the absence of any decision adverse to the claim of the city, it would not enjoin the defendants from the exercise of one of their most important rights, that of removing encroachments from the public streets.

The principle stated is doubtless correct; but it has no necessary application to the case. The court is not called on to settle the boundaries or title to land. The
831 *question is, whether it will interfere to preserve the property until the legal rights of the parties can be determined before the proper forum. The protection of property from damage or destruction pending litigation is an established head of equity jurisdiction. The court does not undertake to settle the right, but merely to preserve the property until the right is settled at law. It is not essential that the applicant shall establish a clear title, but that he shall show a fair prima facie case in support of his title. Kerr on Injunctions, 196-7. The same principles apply in favor of a party in possession seeking protection against irreparable damage, although no litigation may be pending at the time. If the legal title of the appellant is clear, a perpetual injunction may be at once granted. If it is not clear, whether the court will interfere, by way of a temporary injunction, depends upon circumstances. The case resolves itself into a question of comparative convenience and inconvenience, whether the defendant will be more damnified by the injunction being granted, or the plaintiff by its being withheld. Kerr on Injunctions, 294, 209-10; Hilliard on Injunctions, sec. 39, page 32, and cases there cited.

Apply this test to the present case. The refusal of an injunction results in the destruction of the buildings, and the conversion of the ground upon which they stand into a public thoroughfare, and the plaintiffs are put to a protracted and expensive litigation for compensation. If the plaintiffs recover, the town of Manchester is subjected, it may be, to vindictive damages. On the other hand it is not pretended, certainly it is not proved, that the corporate authorities will be exposed to any special inconvenience by granting the injunction.

They saw without objection the
832 *buildings erected. They have failed for more than twenty years to make any complaint, notwithstanding repeated alienations of the property during that time. Surely no great mischief can ensue from a further delay of a few months or longer, until the question of the title can be finally determined. No proposition of law is better settled than that long acquiescence in the claim of another to use and occupy the subject of complaint as of right, and to expend money upon the strength of it without objection, may estop the owner from the assertion of his title. Whether this doctrine applies to municipal corporations, it is unnecessary to decide here. Upon this question no opinion is expressed.

But one thing is clear, upon the question of withholding or granting an injunction, a long and uninterrupted possession, with a claim of right, has a most important bearing. The doctrine on this subject is thus laid down in 2 Story Eq. Jur. sec. 925f, 928: In all cases where the plaintiff has been long in the exercise of his right, or where delay would be disastrous, the court will not require the right to be first established at law. This principle is still more broadly announced in High on Injunction. "The jurisdiction is exercised in such cases on the ground of quieting title; and where complainant has been for twenty years in continued and adverse possession of public ground, or of a public street, he is entitled to the aid of equity to prevent the municipal authorities from interfering.

In Varick v. Mayor &c. of the City of New York, 4 John. Ch. R. 53, already cited, Chancellor Kent said: "The city authorities must first acquire possession of the ground in dispute, not by forcible entry, but by the regular process of law, before they
833 can be permitted *to use it as a street." This is upon the obvious ground that after a claim of right, accompanied with a possession of twenty-five years, a corporation cannot be permitted, without the regular process of law, to enter upon the possession and pull down buildings and fences under the right to regulate highways.

The case of Dudley v. Trustees of Frankfort, 12 B. Mon. R. 610, in many of its features, is almost identical with this. There, however, the corporate authorities were proceeding merely to pull down and remove the fences which enclosed the lots, with the intention of taking possession of the latter. The court say, conceding that the jurisdiction would fail in the case of a private person, because the trespass would not produce irreparable mischief; yet the suit being against a municipal corporation, the power of the court to prevent, by injunction, the trespass on private property, cannot be questioned. When a private citizen has been permitted for twenty years and upwards to remain in the actual possession of the ground without interruption, he is entitled to have his title quieted. And accordingly the court, without even directing an inquiry, granted an injunction.

The case of Yates v. Milwaukee, 10 Wall. U. S. R. 497, is also an authority upon the question involved here. There the city of Milwaukee, under authority of certain ordinances, attempted to remove plaintiff's wharf. The defendants relied upon the want of title in the plaintiff to the locus in quo; and, second, upon the absolute power of the city of Milwaukee as the repository of the public authority on the subject of wharves, and piers, and other matters affecting the navigation of the river within the city limits, to determine the character and location of such structures. The court

say that a mere declaration by the city
834 *council of Milwaukee, that a certain structure is an encroachment or obstruction, does not make it so; nor could such declaration make it a nuisance unless in fact it had that character. It is a doctrine not to be tolerated in this country (say the court) that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities. And the court granted a perpetual injunction to the action of the city council. In this case it may be said with equal propriety, that the mere declaration of the trustees of the town of Manchester, that the tenement in controversy is an obstruction upon a public street, does not make it so. Whether it is or is not is a question to be settled by the courts. If, under the authority to remove encroachments upon the public streets, the corporate authorities may pull down these buildings, and a court of equity cannot interfere because there has been no decision adverse to the claim of the city, then, indeed (in the language of the Supreme court), "every house, every business, and all the property of the town are at the uncontrolled will of the temporary local authorities." The doctrine is not sustained by authority, nor is it in accordance with a sound public policy.

It is said, however, that the trustees of the town of Manchester are charged with the duty of establishing and opening public streets, and under the amended charter the courts are prohibited from interfering with them in the prosecution of their work.
835 The charter *does not declare that an injunction shall not be granted under any circumstances; but that it shall not be awarded unless it be manifest that the corporate authorities are transcending their powers, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

Now if the lot in controversy be the property of the plaintiffs, and not that of the defendants, it is manifest that the latter are transcending their authority. They are invading private rights, and taking private property for public uses, not only without compensation, but without even a promise of compensation. This is prohibited not only by the constitution, but by the express provisions of the charter. If the town authorities are unable by agreement with the owner, to obtain title to ground necessary for streets and other public purposes, they are provided with remedies sufficient for all the exigencies of the corporation. They may apply "to the Circuit or County court of the county in which the land shall be situated, for authority to condemn the same, which shall be applied for and proceeded with according to law." See Charter of Manchester, sec. 22, p. 10. When this has been done, or when the title to land is acquired in any other legal mode for the uses of the corporation, the courts are prohibited from interfering by injunction with the town authorities in the prosecution of their work upon the ground so acquired. This is all that is meant by the provisions of the charter in question.

It is not competent to deprive the citizen of his property, and turn him to an action against the corporation for compensation, which may or may not be realized. The legislature could never have intended that the citizen should be divested of his
836 freehold upon the *mere claim of a city council, and that a court of equity should be prohibited from interposing in his behalf, although the injury might be of an irreparable character. It is equally objectionable to take private property without compensation upon an unfounded claim of title, as it is to take it without compensation, acknowledging the title of the true owner. Legislation which authorizes either to be done is violative of the constitution, and would be disregarded by the courts. In the case before us the whole controversy is as to the title. The defendants claim by dedication. The plaintiffs rely upon the legal title, upon twenty years of adverse possession, and deny the dedication. Are we to assume that the claim of the defendants is valid until there is an adverse decision. An injunction would be of but little value after the buildings are levelled with the ground, and the lot upon which they stand appropriated as a highway. In the language of Lord Cottenham, in Hilton v. The Earl of Granville, 18 Eng. Ch. R. 283, 292, the plaintiffs having at least a strong prima facie case in support of the title they assert, the court will interfere for the purpose of protecting the property pending the decision of the legal title.

It only remains to notice one other ground taken by the counsel for the defendants. It is that the plaintiffs purchased with notice that the buildings encroached upon "Summers street;" and they have therefore no just claim to the interference of a court of equity. The plaintiffs were not notified that the houses would be removed, but merely that the encroachment existed. This notice was given by the commissioners who made the sale, to guard against all misapprehension, and to prevent any future controversy with the purchaser as to the nature of his title and the extent of his pur-
837 chase. The commissioners *undertook to sell and did sell the interest of the "Manchester Cotton and Wool Manufacturing Company." Whatever that interest was the plaintiffs acquired it. If the former had title to the premises, so have the latter by virtue of their purchase. Notice of the supposed encroachment could not diminish or in any manner affect this title.

For these reasons I am of opinion the decree of the Circuit court must be reversed,

with costs, and the cause remanded for further proceedings. The injunction must be reinstated and continued until the trustees of the town of Manchester shall by proper proceedings try their title at law. If such trial results in establishing their title, the injunction will be dissolved. If otherwise, it will be perpetuated. If no action is brought within a reasonable time, to be judged of by the court, the same result will follow, and the plaintiffs will be quieted in their possession.

The other judges concurred in the opinion of Staples, J.

Decree reversed.

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838 *Dabney v. Preston's Adm'ors.

January Term, 1875, Richmond.

1. **Partnership—Dissolution—Bill for Account—Parties.***—H and P were partners, and they made a contract with D in relation to a business to be conducted by D. After the death of P, his personal representative, and H as surviving partner, filed their bill against D to have an account and settlement of the business aforesaid. The bill showed, that some time previous to filing it, H had assigned all his interest in the firm of H & P to the firm for proper settlement of accounts; and after paying his partners all he might owe them, the surplus, if any, was to be paid to C. It also appeared from the bill, that H had been declared a bankrupt. Both C and the assignee in bankruptcy of H are necessary parties; and a decree made in their absence against D will be reversed by the appellate court, though no objection was taken in the court below to the want of parties.

2. **Chancery Practice—Answers—Replication.**†—The decree in the court below was made when there was no replication to the answer of D; and after an appeal from the decree by D was perfected, the court, on the motion of the plaintiffs, made an order permitting the plaintiffs to file the replication *nunc pro tunc*. If it was a proper case for such an order, the court should have allowed D time to take testimony to meet the new phase of the case presented by the issue thus taken on his answer.

3. **Same—Amendment of Pleadings.**‡—When the new parties are made, both parties should have liberty, if they desire it, to amend and modify their pleadings, so as to exhibit the case as they may desire respectively to present it.

***Parties to Suit in Equity.**—"It is a general rule in equity (subject to certain exceptions), that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all." *Per curiam*, in Yost v. Porter, 80 Va. 859, citing the principal case. See also, Armentrout v. Gibbons, 25 Gratt. 371, and *note*.

†**Chancery Practice—Answers—Replication.**—See monographic *note* on "Answers in Equity Pleading" appended to Tate v. Vance, 27 Gratt. 571.

‡**Same—Amendments.**—See monographic *note* on "Amended Bills" appended to Belton v. Apperson, 26 Gratt. 207.

The case is sufficiently stated in the opinion of Bouldin, J.

John Daniel, Kirkpatrick & Blackford, and Mosby & Brown, for the appellant.

Kean and Jones & Bouldin, for the appellees.

BOULDIN, J., delivered the opinion of the court.

839 *This is an appeal by A. G. Dabney from a decree of the Circuit court of Lynchburg, entered in a suit brought against said Dabney by the personal representatives of Pleasant Preston, deceased, and S. C. Hurt, as surviving partner of the firm of Hurt & Preston, which consisted of said S. C. Hurt and Pleasant Preston, deceased.

The suit was brought to obtain an account and settlement of certain transactions growing out of a contract entered into about the first day of February 1856, between said firm of Hurt & Preston, by S. C. Hurt of the one part, and said A. G. Dabney of the other part; and it was so proceeded in that on the 20th day of November 1871, the cause came on to be heard on the bill set for hearing as to one of the defendants, and on the bill, answers and exhibits filed, as to the other defendants, without replication to the answers; and the court, after settling an important principle in the cause, ordered sundry accounts to be stated and settled by one of its commissioners.

From that decree A. G. Dabney, the party mainly affected thereby, applied to a judge of this court for an appeal, and prayed a supersedeas. The appeal was allowed and supersedeas awarded.

At the next term of the Circuit court after the decree aforesaid was rendered, and after the case had been taken to this court by appeal and was here pending, the plaintiffs below moved the court to amend the record and allow them to file a replication to A. G. Dabney's answer, to be entered nunc pro tunc. Notice of the motion was given to Dabney, and it was duly heard on affidavit and arguments of counsel; and thereupon the court entered an order allowing the replication "to be entered nunc pro tunc as an act of the last term, and to have the same effect as if it had been then entered before the hearing.

840 *The proceedings on this motion appear in a supplemental record attached to the record on which the appeal was allowed; and the legality of this action of the court, and its effect on the previous decree, constituted the chief subjects of discussion before this court.

The question is interesting, and was earnestly and ably argued by counsel on both sides; but the decision thereof is rendered unnecessary by the view taken by this court of a question of practice, raised by the record, but not noticed at the bar.

The bill shows on its face, that at and before the institution of this suit, S. C. Hurt, one of the plaintiffs therein, had been

duly declared a bankrupt, and, of course, all his rights of property and action, existing at the date of his bankruptcy, passed from him and vested in his assignee in bankruptcy, who alone could legally assert such rights; and it further appears from exhibit S. C. H., filed with and as part of the bill, that as far back as January 4th, 1861, all Hurt's interest in the firm of Hurt & Preston, and in several other concerns therein mentioned, including the Phœnix foundry, one of the subjects of controversy in this suit, had been assigned to Hurt & Preston for proper settlement of accounts, and after paying to his partners respectively all balances that might be due from him to them, the surplus, if any, was to be paid to Robert W. Crenshaw. His entire beneficial interest in this suit, then, long before its institution had been transferred, subject to the rights of his co-partners, to said Robert W. Crenshaw, and all his other interests and rights of every description, whether of action or of property, had, from the date of his bankruptcy, vested in his assignee. Whether the assignee in bankruptcy was directly interested in the
841 issue of this suit *or not, depends on the character and purpose of the assignment to Crenshaw. If that assignment was in payment of a debt, or merely for collection, then, in either event, the assignee was directly interested in watching the settlements and swelling the surplus. It is apparent that Hurt had no beneficial interest in the litigation; and that his assignee in bankruptcy and Robert W. Crenshaw, one or both, subject to the rights of his partners, represented his entire beneficial interest in this suit. That interest is material and substantial; and, according to the well established practice of courts of equity, the assignee in bankruptcy and Robert W. Crenshaw should have been parties to this suit.

It is an old and familiar rule of equity that "all persons materially interested in the subject of controversy ought to be made parties in equity; and if they are not the defect may be taken advantage of either by demurrer or by the court at the hearing." And if the defect be apparent on the face of the record, although the bill was not demurred to in the court below, nor the defect noticed by that court at the hearing, it will be noticed at the hearing in this court, and the decree reversed for that cause. These principles have been recognized and affirmed by this court as well established rules of equity, in cases too numerous to mention. In Sillings v. Bumgardner, guardian, 9 Gratt. 273, 275, Judge Moncure delivering the opinion of the court says: "But the counsel for the appellee contended that this objection not having been made in the court below, now comes too late. But it was not waived in the court below; the want of parties appeared on the face of the bill; and in such cases it is well settled that the objection is fatal in the appellate court, though not taken in the court below." Citing
842 *2 Rob. Prac., 273, 433, and cases cited; Richardson's ex'or v. Hunt, 2 Munf. 148; Sheppard's ex'or v. Starke & wife, 3 Munf. 29; and the principle has been reaffirmed to its full extent in the most recent case in this court on the subject, Armentrout's ex'or v. Gibbons, supra 371, where some of the numerous decisions of this court on the question are cited.

The practice of the United States Supreme Court accords with that of this court. Hoe et al. v. Wilson, 9 Wall. U. S. R. 501. In that case, after stating that the rights of persons not parties would be materially affected by a decree in the cause, the court say, p. 504, "According to the settled rules of equity jurisprudence the case cannot proceed without their presence before the court. The objection was not taken by the defendant, but the court should, sua sponte, have caused the bill to be properly amended, or have dismissed it, if the amendment were not made. Instead of this being done, the case was heard and decided on its merits. This was a manifest error. The decree must therefore be reversed and the cause remanded to the court below. In that court both parties can take leave to amend and can modify their pleadings so as to exhibit the case as they may desire respectively to present it."

We are therefore of opinion that the Circuit court erred in entering a decree settling an important principle in the cause in the absence of the assignee in bankruptcy of S. C. Hurt and of Robert W. Crenshaw as parties to the suit.

And without deciding whether the case, as shown by the supplement to the record, was or was not a proper case for allowing a replication to be filed and entered nunc pro tunc, or whether the supplement to the record can or can not be considered by
843 this court *as part of the record, we think it proper to say that in our opinion it was clearly error in the Circuit court to allow it to be so filed without requiring the plaintiffs below to pay the costs of the amendment; and without allowing the defendant Dabney time to take testimony to meet the new phase of the case presented by the issue thus taken on his answer.

The decree of the Circuit court of the 20th November 1871 must be reversed and annulled with costs to the appellant, and the cause remanded to said Circuit court with instructions to require the plaintiffs below to amend their bill, and make Robert W. Crenshaw, and the assignee in bankruptcy of S. C. Hurt, parties to the suit; and liberty must be allowed to both parties, should they desire it, to amend and modify their pleadings, so as to exhibit the case, as they may desire, respectively to present it.

The decree was as follows:

This day came again the parties by counsel, and the court having maturely considered the transcript of the record and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that it plainly appears on the face of the bill that before the institution

of this suit, S. C. Hurt, one of the plaintiffs below, had been duly declared a bankrupt, and that his assignee in bankruptcy was a necessary party to this suit to assert and protect any interest of the bankrupt, direct or indirect. And the court is further of opinion that it also plainly appears from exhibit (S. C. H.) filed with the bill, that after full settlement of the accounts of the several firms therein mentioned, and payment to them of whatever might be due by Hurt, the entire residue of Hurt's interest, if any, in the subject of this suit was
844 transferred, or ordered *to be paid, to Robert W. Crenshaw. It is obvious, therefore, that Crenshaw is directly interested in the matter in controversy, and should also have been made a party to the suit before any decree settling the principles of the cause could be properly entered. It is therefore decreed and ordered, that the decree of the 20th day of November 1871 be reversed and annulled, and that the appellees do pay to the appellant his costs by him about the prosecution of his appeal in this behalf expended.

And the cause is remanded to the said Circuit court, with instructions to that court to require the plaintiffs to amend their bill, and make the assignee in bankruptcy of S. C. Hurt and Robert W. Crenshaw, parties to the suit; that liberty be allowed the parties respectively, if so desired by them or either of them, to amend and modify their pleadings, so as to exhibit the case, as they may desire respectively to present it.

Decree reversed.

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845 *Wood & Wife v. Sampson's Ex'or & als.

January Term, 1875, Richmond.

Absent, BOULDIN, J.*

1. **Wills—Construction—Legacies.**†—A testator, owning real and personal estate, after several legacies to grandchildren, says: "All the remaining estate, property and credits, whether real and personal, which I may own at my death, I devise and bequeath to my daughter S." The real estate given to S is subject to the satisfaction of the legacies.

2. **Same—Same—Same—Residuum.**—Testator gives a legacy to his wife; but she dies before him. The legacy will not sink into the residuum of the estate, but will pass to her issue.

Richard Sampson, of the county of Goochland, died in 1864. He left a will which was made in August 1855, and a codicil which was made in September 1863. By the first clause of his will he gave to his wife Mary Sampson $20,000, to bear interest from his death, payable semi-annually, till the full discharge of the principal; also a carriage and horses, and two slaves.

He gave to each of his four grandchildren, children of his late son the Rev. F. S. Sampson, $10,000, payable without interest as each attains the age of twenty-one or marries. He made no provision for the intermediate maintenance and education of these grandchildren, as he says, because, from advances made by him to their father, his estate will suffice for such purposes.
846 *He makes a like bequest of $10,000 to each of his two grandchildren, the children of his late daughter Janetta Wood, payable without interest as each attains the age of twenty-one or marries. And he makes no provision for their maintenance or education, because of advances made to their father.

He confirmed and ratified all advances theretofore made by him to his children or their husbands, and directed that they should not be accounted for as a part of his estate. And he then says:

"All the remaining estate, property and credits, whether real or personal, which I may own at my death, I give, devise and bequeath to my daughter Susan Josephine, the wife of Dr. William T. Walker."

He appointed Dr. Walker his sole executor, and directed that no security should be required of him.

At the time Mr. Sampson made his will, and at his death, he owned a valuable real estate on which he lived, upwards of sixty slaves, horses, &c., every thing necessary for the profitable cultivation of the estate, and a large amount in stocks of different joint stock companies. He had advanced to his son F. S. Sampson from thirty-five to forty thousand dollars, and to his son-in-law Richard Wood a farm on James river, for which he gave $13,500, and which some years afterwards sold for $35,000. He and his wife were old, and their daughter Josephine lived with them until she was married, and after a short absence she and her husband came back and lived with them until their deaths respectively. Mrs. Sampson died in the lifetime of her husband.

At the close of the war the negroes had been emancipated, many of the horses had been carried off by the enemy, the stock destroyed, and the stocks had become comparatively worthless, and there was little left of the estate but the land.
847 *In 1867, Mary J. Wood, one of the legatees of Mr. Sampson, instituted her suit in equity in the Circuit court of Goochland county against William T. Walker, as executor of Richard Sampson, deceased, and the said Walker and his wife, as devisees of said Sampson, and the other legatees under the will and a codicil which had been made in 1863, to recover her legacy, and her share of the legacy to Mrs. Sampson, and seeking to subject the real estate devised to Mrs. Walker. The plaintiff afterwards married Henry Wood, and the suit was conducted in their name; and after various proceedings, came on to be heard on the 7th of September 1869, when the court held that the will of Richard Sampson did not subject the real estate devised to Mrs.

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*He had been counsel in the cause.

†**Wills—Construction.**—The principal case is cited in Lee v. Lee, 88 Va. 809, 14 S. E. Rep. 534; Smith v. Mason, 89 Va. 716, 17 S. E. Rep. 8; Wildberger v. Cheek, 94 Va. 520, 27 S. E. Rep. 441.

Walker to the satisfaction of the legacies; and that Mrs. Sampson having died in the lifetime of her husband, the legacy to her sunk into the residuum of the estate; and decreed that the bill, so far as it sought to subject the real estate to the satisfaction of the plaintiff's legacy, and to recover a share of the legacy to Mrs. Sampson, be dismissed. And the report of the commissioner was recommitted. From this decree Wood and wife applied to this court for an appeal; which was allowed.

Jones & Bouldin, for the appellants.

Guy, for the executor.

STAPLES, J., delivered the opinion of the court.

The court is of opinion, that whether general pecuniary legacies are chargeable on real estate is always a question of intention; that this intention is to be ascertained, not by parol proof of the declarations of the testator, but by reference, as in other cases, to the provisions of the will and the 848 circumstances surrounding *its author. And in examining the instrument, the language used must receive that interpretation which a long series of decisions have attached to particular words. One of the rules or canons of construction is, that where there is a general gift of legacies, and then the testator gives the rest and residue of his property, real and personal, the legacies are chargeable upon the realty. It is considered that the testator, in blending his real and personal estate into a common fund, plainly indicates his purpose to make no distinction between them. And as there is no previous devise of any portion of the real estate, the residue can only mean what remains after satisfying the legacies.

This is the established doctrine of the English courts; is almost universally recognized in this country; and was acted on by the court in Crouch v. Davis' ex'or, 23 Gratt. 62; where the authorities are cited. See Greeville v. Brown, 7 House of Lords cases 688; Smith's ex'or v. Smith, 17 Gratt. 268. In the present case the testator, after various pecuniary legacies to a large amount, gives all his remaining estate, property and credits, real and personal, to his daughter, Mrs. Susan J. Walker. The testator in thus using the words "remaining estate," can only mean what remains after the previous dispositions; and as there is no previous disposition of any part of the realty, the legacies must be looked to to satisfy the terms of the residuary clause. The court is therefore of opinion that the Circuit court erred in holding that the legacies given by the testator are not chargeable upon his real estate.

The court is further of opinion that Mrs. Mary Sampson, the wife of the testator, having died during his lifetime, leaving issue who survived the testator, the legacy of twenty thousand dollars which was given to her passed to her issue under the 849 provisions of the *13th section, chap. 122, Code of 1860. That section declares that "if a devisee or legatee die before the testator leaving issue who survive the testator, such issue shall take the estate devised or bequeathed, as the devisee or legatee would have done if he had survived the testator, unless a different disposition thereof be made or required by the will."

There is nothing in the will here indicating in the slightest degree, that the testator designed or desired a different disposition of the legacy from that pointed out by the statute. The court is therefore of opinion that the Circuit court erred in holding that the legacy aforesaid lapsed by the death of Mrs. Sampson in the lifetime of her husband, and passed into the residuum of the estate.

For these errors the decree must be reversed, and the case remanded for further proceedings in conformity with these views.

Decree reversed.

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850 *Blair v. The Commonwealth.

March Term, 1874, Richmond.

Pardons.—Under the constitution of Virginia the governor has authority to pardon a person convicted of a felony by the verdict of the jury, before sentence is passed upon him by the court.

In January 1874 J. A. Blair was indicted in the Hustings court of the city of Richmond for larceny, in stealing United States treasury notes of the value of fifty-three dollars. On his trial the jury found him guilty, and fixed the term of his imprisonment at three years.

Although the taking the money by the prisoner was proved, yet his condition at the time was such as to relieve the act from much of its moral guilt, and the members of the jury, as well as the attorney for the commonwealth, united in recommending him to the governor as a proper object of executive clemency. The governor accordingly issued his pardon to the prisoner, but affixed to it a condition that he should abstain wholly from the use of ardent spirits and intoxicating liquors of any kind, and to any extent, for the space of five years from the date of the pardon, except medicinally, and then only upon the prescription of a regular and reputable physician, and in the manner and quantity prescribed.

The only question involved in the case is as to the power of the governor to grant a pardon in a case of felony after a verdict of conviction by the jury, and 851 *before sentence is pronounced upon the prisoner. The case is sufficiently stated in the opinion of Moncure P.

Stiles, for the prisoner.

The Attorney General stated that he had officially given his opinion to the governor when the application for a pardon was be-

fore him, that he had the power to pardon after the verdict and before the sentence, and he was still of that opinion.

MONCURE P. delivered the opinion of the court.

This is a writ of error to a judgment of the Hustings court of the city of Richmond, sentencing the plaintiff in error to confinement in the penitentiary for the term of three years for grand larceny, of which he had been found guilty by the verdict of a jury. The case is as follows:

On the 2d day of February 1874 the said plaintiff was indicted in the said court for grand larceny. On the fourth day of the same month he was found guilty of the said offence by the verdict of a jury, by which the term of his confinement in the penitentiary was ascertained to be three years. On the 10th day of the same month it being demanded of him if anything for himself he had or knew to say why the court should not now proceed to pronounce judgment against him according to law, he tendered to the court a special plea of pardon for the said offence, and produced in court, as a part of said plea, an instrument of writing, under the hand of the governor and the lesser seal of the commonwealth, purporting to be such a pardon. To the said plea the attorney for the commonwealth demurred, and the plaintiff in error joined in the demurrer. On the next day, to wit: the 11th day of February 1874, the court sus-
852 tained the demurrer and *rejected the said plea. The said plaintiff thereupon moved the court in arrest of judgment upon the verdict aforesaid, which motion the court overruled; and nothing further being offered or alleged in delay thereof, judgment was thereupon pronounced according to the verdict. To that judgment this writ of error was awarded.

The only question involved in this case is, "whether the governor had any authority to pardon the plaintiff in error for the said offence before judgment was rendered against him therefor?"

The governor's power to grant a pardon is conferred by the constitution, article iv, sec. 5, which declares that "he shall have power to remit fines and penalties in such cases, and under such rules and regulations as may be prescribed by law; and, except when the prosecution has been carried on by the house of delegates, to grant reprieves and pardons after conviction; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this constitution, and to commute capital punishment; but he shall communicate to the general assembly at each session the particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting, or commuting the same."

Can the governor under this constitutional provision pardon a person for an offence after he has been found guilty thereof by the verdict of a jury, but before sentence is pronounced on such verdict? or, which is the same thing, do the words "after conviction" in the said provision refer to the verdict of the jury, or to the sentence in such a case? This is the question we now have to solve.

853 *What is the meaning of the word "convicted," in this connection? Blackstone says: If the jury "find the prisoner guilty, he is then said to be convicted of the crime whereof he stands indicted; which conviction may accrue two ways—either by his confessing the offence and pleading guilty, or by his being found so by the verdict of his country." 4 Bl. Com. 362. And again he says: "The plea of autrefois convict, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment." Id. 336. Jacob says: "There is great difference between a man convicted and attainted, though they are frequently, though inaccurately, confounded together:" and he then proceeds to explain the difference and its consequences. 1 Jacobs' Law Dictionary, p. 163, title "Attainder." And again he says: "Convict, convictus. He that is found guilty of an offence by verdict of a jury. Crompton saith, that conviction is either when a man is outlawed, or appeareth and confesseth, or is found guilty by the inquest; and when a statute excludes from clergy persons found guilty of felony, &c., it extends to those who are convicted by confession. Cromp. Just. 9." "Judgment amounts to conviction, though it doth not follow that every one who is convict is adjudged." 2 Id. p. 63, title "Convict and Conviction." Bouvier says: Conviction means "a condemnation. In its most extensive sense, this word signifies the giving judgment against a defendant, whether criminal or civil. In a more limited sense, it means the judgment given against a criminal. And in its most restricted sense, it is a record of the summary proceeding upon any penal statute, before one or more justices of the peace, or other person duly authorized,
854 *in a case where the offender has been convicted and sentenced; this last has usually been termed a summary conviction." 1 Bouv. Law Dictionary, p. 346, title "Conviction." Bishop says: "This word conviction ordinarily signifies the finding of the jury, by verdict, that the prisoner is guilty. When it is said there has been a conviction, or one is convict, the meaning usually is, not that sentence has been pronounced, but only that the verdict has been returned. Yet the word sometimes denotes the final judgment of the court. It has likewise some other significations, according to one of which, a conviction is defined to be a record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced." 1 Bishop on Crim. Law, § 361.

And again he says: "There can be no pardon of an offence until committed; for earlier immunity granted, would be a license procurable only from the legislature. But when the guilt is incurred, it can be remitted either before judicial proceedings are undertaken, or during their pendency, or after their termination, or after the punishment has been partly or fully endured. This is the general doctrine; but the constitution of most of our states forbid the pardoning power to act before conviction. We have already seen that a defendant is convicted when the verdict of guilty is returned by the jury, though the sentence is not pronounced, and accordingly, in Massachusetts, where this constitutional restraint prevails, the court, in one case, postponed the sentence after the verdict of guilty had been brought in, expressly to permit the defendant to apply for a pardon; which being obtained, was pleaded in bar of the sentence." Id. § 751. The case here referred to is Commonwealth v. Mash, 7 Metc. R. 472.

855 *All, or nearly all, of the authorities before referred to and others, were cited by the counsel for the plaintiff in error and the attorney general, in support of the view, in which they both concurred, that a verdict of guilty, without any sentence upon it, amounts to a conviction, within the meaning of the constitutional provision aforesaid. And the former also referred to many portions of our statute law, and some cases decided by our highest criminal court in support of the same view. As for example, Code of 1873, ch. 202, § 18: 'If, after conviction, and before sentence of any person, the court see reasonable ground to doubt his sanity, it may impanel a jury," &c. § 20: "When a prisoner is so brought from the asylum," &c., "if convicted he shall be sentenced," &c. § 27: "If a person indicted of felony, be by the jury acquitted of part and convicted of part of the offence charged, he shall be sentenced for such part," &c. Id. ch. 195, § 23: "The term of confinement in the penitentiary or in jail of a person convicted of felony where that punishment is prescribed shall be ascertained by the jury." § 25: "When any person is convicted of an offence and sentenced to confinement therefor in the penitentiary," &c. § 27: "When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced, &c., for the like offence, he shall be sentenced to be confined in the penitentiary for one year." Also §§ 28 and 29; and 2 Va. Ca., p. 235, Bennet's case; and 316, Campbell's case.

The case of the Commonwealth v. Williamson, 2 Va. Cases 211, strongly tends to support the same view. The question there was whether, under our statute on the subject, an accessory might be tried after the principal had been found guilty by a

856 jury, but before any *judgment had been entered on the verdict. The words of the statute were, "If any principal offender shall be convicted of any felony, or shall stand mute on his arraignment, or persist, after being admonished by the court, in not answering directly to the indictment, or shall be outlawed, it shall and may be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall be admitted to the benefit of his clergy, pardoned, or otherwise delivered before attainder," &c. Mr. Leigh, in argument for the prisoner, contended, that at common law the accessory could not be tried before the attainder of the principal. "The ground," he said, "on which this doctrine is founded, seems to be, that the verdict only ascertains the fact, but the guilt is not conclusively proved until the court gives judgment. The charge itself against the principal may not be legal; the verdict may not be conformable to law and the evidence, and a new trial may be awarded: these things are not certainly fixed till the sentence is passed." But a majority of the court held, that the prisoner (the accessory) might be legally tried, and a verdict found against him, before the principal had received judgment, or been adjudged by the court guilty on the verdict.

The learned counsel, in his argument in this case, also referred, and with much effect, to the form observed when sentence is pronounced, as laid down in 3 Rob. Pr. old ed. p. 281; which, he contended, strongly serves to confirm his view, as to the sense in which the word "conviction" is generally used, in our laws and legal proceedings. "The day before sentence is to be pronounced, notice is usually given to the jailer to have the convicts in court on the

857 next *day, as soon as the orders are read. When the prisoners are set to the bar, the clerk holds together in his hands the indictments against all the convicts, and proceeds thus: 'A B, &c., stand up. You have been severally indicted and tried, and now stand convicted, you, A B, of murder in the first degree, &c. Have you anything to say for yourselves why the court should not now proceed to pronounce judgment against you according to law? What say you, A, B, &c.?" If nothing be alleged in delay of judgment, the clerk hands the indictments to the judge, who passes sentence on the prisoners."

These authorities seem fully to verify what is stated in 1 Bishop on Crim. Law, § 361, as before mentioned; that the word conviction ordinarily signifies the finding of the jury, by verdict, that the prisoner is guilty; and that when it is said there has been a conviction, or one is convict, the meaning usually is, not that sentence has been pronounced, but only that the verdict has been returned. A verdict, however, is not always necessary to a conviction, which may be by a judgment upon a demurrer, or upon a confession of guilt, or upon a proceeding in outlawry, as well as by a verdict of a jury on the plea of not guilty. The

word "conviction," in its ordinary sense, may therefore be said to mean the ascertainment of the fact of guilt in a criminal prosecution, in the mode prescribed by law, which mode, most generally, is a verdict of a jury on the plea of not guilty. The Code, ch. 195, § 17, provides that "No person shall be convicted of felony unless by outlawry, or by his confession of guilt in court, or by his plea or demurrer, or by the verdict of a jury, accepted and recorded by the court," which plainly implies that a person may be convicted in either of those modes.

858 *But the further statement contained in 1 Bishop, § 361, as before mentioned, that the word conviction sometimes denotes the final judgment of the court is equally true. As an example of the use of the word in that sense, the Code, ch. 195, § 19, may be referred to, which declares, that "except where it is otherwise expressly provided, a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor, and a person convicted of perjury shall not be a witness, although pardoned or punished." The word "convicted" in this section means "adjudged guilty." "No person is deemed infamous in law," says Greenleaf, "until he has been legally found guilty of an infamous crime. But the mere verdict of the jury is not sufficient for this purpose, for it may be set aside, or the judgment may be arrested, on motion for that purpose. It is the judgment, and that only, which is received as the legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify." See 1 Greenleaf on Evidence, § 375, and the cases cited in note 1; also Keithler v. The State of Mississippi, 10 Smeedes & Marsh. 192. The whole of title 56 in the Code, consisting of chapters 206, 207 and 208, concerning the penitentiary, may be referred to as affording many instances in which the word "convict" is used to signify a person adjudged guilty of felony by the final judgment of the court; the word convict being so used as a convenient designation of such a person. There are no doubt other like examples to be found in the Code, but it is needless to refer to any more.

It thus appears that the word "conviction," as used in our laws, ordinarily signifies the finding of the jury by verdict that the prisoner is guilty, or something equivalent thereto; but the word sometimes

859 denotes *the final judgment. In which of these two senses was this word used in the provision of the constitution before referred to?

My first impression was, that it was used in the latter sense, and that it denoted the final judgment. But further reflection, and an examination of the authorities referred to, have brought my mind to a different conclusion; and I now think, that in this instance, the word was used in the former sense; that is, according to its ordinary signification aforesaid. Why should it not have been so used? In England, and in many of the states of this Union, the power of pardon is subjected to no restriction, and may be exercised indifferently, before or after conviction. In this and some of the other states it is subject to the restriction of being exercised only after conviction. It was not always subject to such a restriction in this state. It was not so subject under the constitution of 1776; nor under the constitution of 1830. It was for the first time made so in the Code of 1849, ch. 17, § 18, which has continued in the same words ever since; being the same with the Code of 1873, ch. 16, § 18. The same restriction was engrafted on the constitution of 1851, the provision of which on the subject of the granting of pardons being identical, in words, with that of the present constitution; except that there is a material enlargement of the power in the present constitution; the words, "or the law shall otherwise direct," in the old constitution having been omitted in the new: thus freeing the executive power from the control of the legislature, to which the old constitution subjected it; and the words, "to remove political disabilities consequent upon conviction for offences committed prior or subsequent to the adoption of this constitution," which were not in the former, were inserted in the new constitution;

860 *thus extending the power of executive pardon over a new and important subject. The framers of these constitutions, and especially of the former, in adopting this provision, seem to have copied it in many respects from the like provision in the constitutions of those states in which the power is restricted in the same way; and the presumption is, that they used the word "conviction" in the same sense in which it had not only been always ordinarily used in this country and in England, but in which it appears to have been used in those constitutions of other states from which the provision in ours was substantially copied.

Massachusetts is one of the states in whose constitution the restriction exists; and that is a state from whose laws our revisors borrowed more largely in the revision of our code than any other. In the case of Commonwealth v. Mash, 7 Metc. R. 472, referred to by the attorney general, decided in 1844, in which Shaw, C. J., delivered the opinion of the whole court, the power of the governor to grant a pardon of an offender after she was found guilty by the verdict of a jury and when no sentence had been pronounced upon the verdict, was recognized and admitted. Indeed no question was raised in regard to it. And the court being satisfied that it was a proper case for pardon, and that the governor, upon being informed of the facts, would grant a pardon, did not pass sentence on the prisoner, but took a recognizance for her appearance in court on a future day, for the purpose of affording her an opportunity to apply for a pardon; and she having accordingly obtained one, pleaded the same in bar of sentence; whereupon the court ordered her to be discharged. South Caro-

lina is another state in whose constitution there *is a like restriction of the power of pardon. Indeed the provision of their constitution on the subject is very similar to that of ours. In State v. Mary Fuller, 1 McCord R. 178, decided in 1821, the word "conviction" in the provision was construed in the same way, and no question was raised by court or bar as to its meaning. The opinions of the Supreme courts of those two states, Massachusetts and South Carolina, are entitled to very great respect. We all know the high and well-merited reputation of Chief Justice Shaw. I think those opinions ought to have much weight in the decision of the question now before us. And I have found no case at all in conflict with them.

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I can see no reason why the construction adopted by those courts ought not to be adopted also by us. On the contrary, I think that construction is a reasonable one. Why is it required that conviction shall precede pardon? It can only be that before an offence is pardoned it shall be legally ascertained that there is an offence, and who is the offender. Both of these matters are fully ascertained by the verdict of a jury, upon the plea of not guilty to an indictment charging the offence in such circumstantial detail as to place its identity beyond all question. When the verdict is received and recorded, as it must be, nothing remains to be done but to enter up a formal judgment upon it; unless the defendant chooses to move for a new trial, or move in arrest of judgment. It is at his option, therefore, whether he will make one of these motions or let judgment be entered in regular order. Why may he not, at this point, apply for a pardon of the offence of which he has been found guilty by the verdict of a jury? His doing so is an admission that he has no good ground for setting aside the verdict or arresting the judgment; for if he *could obtain relief in that way, the presumption is he would certainly do so. At least, his applying for a pardon indicates a waiver of any right he might have to move for a new trial or in arrest of judgment. Why, then, may he not take that course, and thus save himself, if he can, the humiliation of a sentence, which is not to be executed if a pardon be obtained, and which would therefore be a mere form?

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It must be very rare that a pardon would be granted, or even applied for, before sentence. Often, if not generally, the sentence immediately follows the conviction. That is almost always the case in our county courts, which sit but a few days. In our city courts, which sit longer, there is sometimes an interval of some days, during which there is time enough for an application for a pardon. Generally, even in such a case, the accused avails himself of every means in his power to obtain his discharge at law, and there is thus, of necessity, a final judgment in the case, either for or against him; after which he may, as a last resort, apply for a pardon. But suppose there are circumstances which make it desirable to him to apply for a pardon after conviction and before sentence, and make it proper, in the estimation of the governor, to grant such a pardon; why may he not accordingly grant it? Is it not reasonable to suppose that the framers of the constitution, while they were enlarging the executive powers of pardon, and freeing it from the control of the legislature, intended to invest the governor with discretion in such a case? May there not be cases in which it would be proper that such a power should exist and be exercised? Look at the Massachusetts case before referred to. There a woman was convicted of bigamy. She had married a second husband after her first had left her, and been absent in parts unknown *for several years without being heard from by her, and she bona fide believed him to be dead. She may have had other good reasons for so believing, in addition to his long absence. But he had not been absent for seven years, the time prescribed by law for the presumption of death; and Chief Justice Shaw, while he felt and acknowledged the force of the argument made in behalf of the prisoner, that guilty intent is a necessary ingredient of every crime, and that she could not therefore be guilty, yet thought that the law was imperative, and that her conviction was proper. But he admitted that it was clearly a case for pardon, and suspended the sentence till a pardon could be obtained. Governor Kemper seems to have been of the same opinion in regard to the plaintiff in error in this case, and thinking that he had the constitutional power to grant a pardon after conviction and before sentence, and that this was a proper case for the exercise of such power, accordingly granted a pardon.

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I have said nothing in regard to the argument, strongly urged by the counsel for the plaintiff in error, that the presumption in favor of liberty strongly supports the construction for which he contended. There may be much force in that view; but I have found no occasion to rely upon it.

I am therefore of opinion that the Hustings court erred in sustaining the demurrer to the special plea of pardon, and in rejecting the said plea, and that instead of doing so the said demurrer ought to have been overruled, the said plea sustained, and the prisoner discharged. I am therefore for reversing the judgment, and rendering such judgment as the said Hustings court ought to have rendered.

The judgment was as follows:

*The court, for reasons stated in writing and filed with the record, is of opinion that the said Court of Hustings erred in sustaining the demurrer to the special plea of pardon of the said plaintiff in error, and in rejecting the said plea, and in overruling the said plaintiff's motion in arrest of judgment, and in sentencing him to confinement in the penitentiary for the term of three years, the period by the jurors in their verdict ascertained, and in ordering

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him to be removed and conveyed to the penitentiary; and that instead of doing so, the said court ought to have overruled the said demurrer, and sustained the said plea, and dismissed and discharged the said plaintiff of and from the premises in the said indictment and conviction specified, according to the true intent, meaning and effect of the said pardon.

Therefore it is considered by the court, that the said judgment be reversed and annulled; and this court, proceeding to enter such judgment as the said Court of Hustings ought to have entered, it is further considered that the said demurrer be overruled, the said plea of pardon be sustained, and the said plaintiff be dismissed and discharged of and from the premises in the said indictment and conviction specified, according to the true intent, meaning and effect of the said pardon, and go thereof without day, &c.; which is ordered to be certified to the said Court of Hustings of the city of Richmond.

Judgment reversed.

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865 *Coleman v. Commonwealth.*

March Term, 1874, Richmond.

[18 Am. Rep. 711.]

Absent, CHRISTIAN, J.

1. **Evidence—Competency of Witnesses.**—All persons examined as witnesses must be fully possessed of their understanding; that is, such understanding as enables them to retain in memory the events of which they have been witnesses, and he gives them a knowledge of right and wrong; and, therefore, idiots and lunatics, whilst under the influence of their malady, not possessing this share of understanding, are excluded.
2. **Same—Same—Lunatics.**—A witness is not excluded by this rule merely because he is a lunatic. That is not enough *per se* to exclude him; but he must at the time of his examination be so under the influence of his malady as to be deprived of that "share of understanding" which is necessary to enable him to retain in memory the events of which he has been a witness, and gives him a knowledge of right and wrong. If at that time he has this share of understanding he is competent.
3. **Same—Same—Question for Court.**—Of the competency of the witness in such case the court is the judge, whilst the weight of the testimony, the credit to be attached to it, is left to the jury.
4. **Forgery—Evidence—Motion for New Trial Appeal.***—On a trial for forgery M was introduced as a witness for the commonwealth, and gave important testimony against the prisoner. He was examined and cross-examined for two days, and neither the counsel nor the court suspected he was deranged, though they thought he was drinking deeply. After the conviction and sentence of the prisoner he moved for a new trial, on the ground that M was deranged when he gave his evidence; and it was proved that he had been deranged a few days before the trial, and within a few days after it, and so continued. But the judge who tried the prisoner overruled the motion, and certified that at the time of M's examination he was a competent and proper witness, and not laboring under any mental disability whatever. The proofs not showing derangement at the time of his examination as a witness, he was a competent witness; and the judgment affirmed.

866 *5. **Same—Indictment.**—If in an indictment for a forgery, the document alleged to have been forged is described in such manner as would sustain an indictment for stealing it, supposing it to be the subject of larceny, the indictment is sufficient.

6. **Trial for Felony—Bill of Exceptions.**—In a prosecution for a felony, where the trial has been protracted, and much evidence introduced, and it will consume much time in preparing a bill of exceptions, the court may properly refuse to delay the trial to permit the counsel to prepare the bill of exceptions, and postpone its preparation until the case is submitted to the jury.
7. **Evidence—Public Records.**—A public record must be a written memorial, intended to serve as evidence of something written, said or done, made by a public officer authorized by law to make it; but that authority need not be derived from express statutory enactment.
8. **Same—Same.**—Whenever a written record of the transactions of a public officer, in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that written memorial, whether expressly required so to do or not; and when kept it becomes a public document, a public record, belonging to the office and not the officer.
9. **Same—Same.**—The warrant book of the sinking fund, kept by the second auditor in his office, of the transactions of the commissioners of the sinking fund of the state, is a public record, and is of itself evidence of what it contains, to be considered with the other evidence in the case.
10. **Public Debt—Statute.**—The act, Code of 1873, ch. 42, § 22, in relation to the public debt, is not repealed.
11. **Argument of Counsel.**†—Counsel in arguing the case before the jury, refer to an instruction given by the court, and represent it erroneously. It is not error in the court to interrupt him, and state to the jury the instruction correctly.

In March 1874, William D. Coleman was indicted in the Hustings court of the city

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*For monographic note on Forgery and Counterfeiting, see end of case.

†ARGUMENTS OF COUNSEL.

I. **Right to Be Heard by Counsel.**—Upon the trial of a question of fact in a criminal case, the accused has a right to be heard by counsel before the jury, and the court has no right to prevent him from being so heard, however simple, clear, unimpeached and conclusive, the evidence in its opinion may be; but the court has a superintending control over the course of the argument to prevent the abuse of that or any other right. Word v. Com., 3 Leigh 743.

But upon a question addressed to the court, the judge is not bound to hear an argument for the prisoner's counsel, if his opinion is already formed. Howel v. Com., 5 Gratt. 665.

II. **Regulation of Time and Order of Argument.**

A. **Time.**—It is in the discretion of the trial court in a felony trial, as in any other, to put a proper limit to the time of counsel in their arguments to

of Richmond, for that on the 31st of December, 1873, he was secretary of the commissioners of the sinking fund, the said sinking fund having been authorized, &c.; "having acquired possession in some manner and by some means, to the jury unknown, of a certain record, the same then and there being and remaining as a public record of the commonwealth of Virginia, in the office of the second auditor
867 thereof in the capital of said *commonwealth, at said city, to wit: the warrant-book of the said sinking fund, the said public record to wit: warrant book of the said sinking fund, then containing an entry in writing in the words, figures, ciphers and letters following, that is to say: '1873, Nov. 11. By warrant No. 7, to Planters Nat'l Bank, for purchase of $18,100 of Virginia consolidated bonds, $8,190.25,' feloniously did forge the said public record, by then and there feloniously, falsely and corruptly erasing the figure 1 from the figures and ciphers $18,100, before written in the said public record, which figures, with the sign $ next preceding them, did, before such forgery and erasure, import and signify eighteen thousand one hundred dollars; but by reason and means of such forgery and erasure did become, import and signify eight thousand one hundred dollars, which said false, forged and altered entry in writing in the public record aforesaid is in the words, figures, ciphers and letters following, that is to say: '1873, Nov. 11. By warrant No. 7, to Planter's Nat'l Bank, for purchase of $8,100 of Virginia consolidated bonds, $8,190.25;' with intent to defraud, against the peace and dignity of the commonwealth of Virginia."

There was a second count in more general terms.

The prisoner demurred to the indictment; but the demurrer was overruled by the court. He then moved the court to quash the indictment for errors apparent upon its face; which motion the court also overruled; and he then pleaded "not guilty."

On the trial of the cause, after all the evidence had been introduced, including the book in which the forgery was charged to have been made, and the vouchers on which the entries in it were made, the prisoner by his counsel asked the court to give to the jury the following instructions:
868 *1st. The jury are instructed that forgery of a public record can only consist in forging those things which the law authorizes or requires to be recorded.

2d. The law does not require the second auditor of the commonwealth of Virginia to keep a record of warrants issued to the treasurer of the state for payments of money on account of the sinking fund, provided for by the act of the general assembly of Virginia of March 30, 1871.

3d. In order to convict the prisoner of the forgery with which he stands charged, the jury must believe from the evidence that he committed the act of forgery as charged with intent to defraud.

4th. The jury are instructed that they must disregard all the evidence of the witnesses for the commonwealth, introduced to prove the number of bonds which ought to belong to the sinking fund, so far as such

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the jury; a discretion with which the appellate court will not interfere, unless the time was made so short as to manifestly prejudice the rights of the prisoner. State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 414; Word v. Com., 3 Leigh 744.

In State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 413, a burglary case, it was held not unreasonable to restrict each side to five hours. See also, Thompson v. Com., 88 Va. 45, 13 S. E. Rep. 304.

So on a trial for an attempt to commit rape, the argument of counsel was limited to one hour and a half on each side. *Held*, under the circumstances of the case, this was not an abridgment of the right of the accused to be fully heard. Cunningham v. Com., 88 Va. 37, 13 S. E. Rep. 309.

On the other hand, in Jones v. Com., 87 Va. 63, 12 S. E. Rep. 226, it was held that, where the indictment was found upon the evidence of seventeen witnesses, though it does not appear how many testified at the trial, the ruling of the lower court restricting the argument to thirty minutes, against the objection of the prisoner, was an undue abridgment of his rights, and reversible error.

B. Order.—It is the right of the plaintiff to commence and introduce his evidence in all cases for unliquidated damages, though the general issue is not pleaded, whether the action is *ex delicto* or *ex contractu*. Young v. Highland, 9 Gratt. 16.

Defendant cannot, after argument to jury has commenced, withdraw plea of general issue, and thus entitle himself to open and conclude the argument. Valley Mut. L. Assoc. v. Teewalt, 79 Va. 421.

"Where the general issue is not pleaded, but special matter, the proof of which rests on the defendant, it may be proper for the court, in which the cause is pending, to allow his counsel to begin the argument and have the reply. But be this as it may, the failure of the court below to allow the defendant's counsel to open and conclude is not of itself a sufficient ground for an appellate court to set aside a verdict not appearing to be contrary to the evidence." Valley Mut. L. Assoc. v. Teewalt, 79 Va. 42[illegible]; Steptoe v. Harvey, 7 Leigh 501.

The trial court may, at its discretion, allow counsel employed by private parties to aid the prosecution, to close the argument before the jury; and its ruling is not subject to review except for abuse of such discretion. Sawyers v. Com., 88 Va. 356, 13 S. E. Rep. 708.

Though on a criminal trial the accused offers no evidence, yet as the affirmative of the issue is on the commonwealth, the attorney for the commonwealth is entitled to open and conclude the argument before the jury. Doss v. Com., 1 Gratt. 557.

On the trial of a writ of right, upon the mise joined on the mere right, the tenant is entitled to the opening and conclusion of the case before the jury. Overton v. Davisson, 1 Gratt. 212.

In Barbour v. Com., 80 Va. 287, it is held that after the argument has commenced it is too late to admit mere cumulative evidence.

III. Reading and Arguing Law to the Jury.

A. In Civil Cases.

1. **In General.**—Whether counsel, in argument before a jury, shall read law from law books and

testimony was derived from the warrant book of the sinking fund kept by the second auditor, and alleged to have been forged by the prisoner, unless they believe that the said witnesses could speak of the number of bonds from their own memory, after having it refreshed by reference to said book.

5th. The jury are further instructed that they must disregard all the testimony of the witnesses for the commonwealth, introduced to prove the number of bonds which ought to belong to the sinking fund, so far as such testimony was derived from the orders from the commissioners of the sinking fund, signed by the prisoner as secretary, and directing the second auditor to issue his warrants, which orders were offered in evidence by the attorney for the commonwealth, unless they believe further that the said witnesses could speak of the number of bonds from their own memory, after having it refreshed by reference to said orders.

869 *6th. The law does not authorize the second auditor of the commonwealth to keep a record of warrants issued to the treasurer for payments of money on account of the sinking fund, provided for by the act of March 30, 1871.

7th. The law does not authorize the second auditor of the commonwealth to issue warrants to the treasurer for the payment of money on account of the sinking fund, provided for by the act of March 30, 1871.

8th. In issuing his warrant to the treasurer for the payment of money on account of the sinking fund, provided for by the act of March 30, 1871, the law only authorizes and requires the second auditor to record the fact of issuing such warrant, the amount for which it is issued, the date thereof, and the particular head of general revenue or expenditure on account of which the money is paid; and other statements in the record warrant book of the second auditor, kept by him to record the issuing of warrants on account of the sinking fund, provided for by the act of March 30, 1871, are no parts of the public record.

9th. The law neither authorizes nor requires the second auditor to record in his warrant book, produced to the jury, the number of Virginia consolidated bonds, for the purchase of which warrant No. 7 was issued; therefore it could not be forgery for the prisoner to alter the figures 18,100 therein.

10th. The jury are instructed that they must exclude from their consideration the record book of the sinking fund produced to them, so far as the commonwealth's attorney would seek to show from said book the number of bonds which ought to be in the sinking fund; and that they must also exclude from their consideration the orders signed by the prisoner as secretary, so far as the commonwealth's attorney would

870 *seek to show the number of bonds which ought to be in said fund from those orders.

11th. The court is asked to say to the jury, that if they believe, from the evidence, that the prisoner made the alteration in the book as charged in the indictment, they must find him not guilty, unless they believe

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reported cases, and comment thereon, is within the discretion of the court, subject to review in case of abuse of discretion. If the law read be good law, and relevant to the case, it is clearly not a ground of error. If bad law, or irrelevant to the case, and calculated to mislead the jury, yet, if the court has given instructions correctly stating the law on the subject, it would not be reversible error; but, in the absence of such instructions to counteract the danger, it would be reversible error. Gregory v. Ohio River R. Co., 37 W. Va. 606, 16 S. E. Rep. 819, *distinguishing* Ricketts v. C. & O. Ry. Co., 33 W. Va. 433, 10 S. E. Rep. 801. See also, Michael v. Roanoke Machine Works, 90 Va. 492, 19 S. E. Rep. 261; N. & W. R. Co. v. Harman, 83 Va. 565, 8 S. E. Rep. 251.

In Delaplane v. Crenshaw, 15 Gratt. 458, the court held, in a civil suit (whatever may be the law in a criminal case), after the judge presiding at the trial has given an instruction to the jury, the counsel should not be allowed to discuss before the jury the same matter which the court has already decided.

When the trial court has refused to give an instruction embodying a particular view of the case, it is not error to refuse to permit counsel to argue the same view before the jury. Alleghany Iron Co. v. Teaford, 96 Va. 372, 31 S. E. Rep. 525.

Counsel in arguing the case before the jury, refer to an instruction given by the court, and represent it erroneously. It is not error in the court to interrupt him, and state to the jury the instruction correctly. Coleman's Case, 25 Gratt. 866.

2. To Show Amount of Verdict.

Virginia Rule.—In N. & W. R. Co. v. Harman, 83 Va. 563, 8 S. E. Rep. 251, it was held clearly permissible for counsel to read to the jury cases from the Virginia Reports for the expressly declared purpose of "showing what damages other Virginia juries have given." The court continued: "While it is the province of the court to give the law to the jury, and of the jury to deal with the facts, it would be an unwarranted restriction upon the legitimate scope of argument of counsel, if not a flagrant act of usurpation, for a trial court to prohibit counsel, in this state at least, from referring to and reading from recognized authorities, and especially from decisions in similar cases by courts of last resort. These are, in fact, the sources of correct information for bench, bar and jury, as in them are garnered up the enduring landmarks of the law,—the truths which have stood the tests of centuries, and have received the sanction of the wisest and best legislators and judges who have gone before us."

West Virginia Rule.—Upon the trial of an action for damages it is error for the court to permit the counsel for the plaintiff, over the objection of the defendant, in argument, to read to the jury, upon the question of the measure of damages, extracts from reported cases, showing large damages held not excessive. Ricketts v. Chesapeake & O. Ry. Co., 33 W. Va. 433, 10 S. E. Rep. 80.

There is also a *dictum* in Gregory v. Ohio River R. Co., 37 W. Va. 606, 16 S. E. Rep. 824, to the effect, that, the reading from a decision to bring before the jury the facts of the case decided, will not be allowed.

B. In Criminal Cases.—Whatever may be the right of counsel, in criminal cases, to maintain by argu-

that the alteration aforesaid did prejudice the rights of the commonwealth or some person, or might have prejudiced the rights of the commonwealth or some person.

And the court having considered the same, gave the first instruction asked, but with the addition of the following words: "But the warrant book of the said sinking fund is such a public record as may be the subject of forgery." The second and third instructions are given as asked, with the addition to the third instruction of the words "to the prejudice of another's rights." The fourth instruction was given as asked, with the addition of the following words: "But such book is of itself evidence, to be considered by the jury in connection with other evidence." The fifth instruction was given as asked, with the addition of the following words: "But the orders themselves are evidence before the jury, to be considered with other evidence in this case."

The sixth, seventh, eighth, ninth and tenth instructions the court refused; the eleventh instruction the court considered unnecessary, the court having added to the third instruction asked for, the words "to the prejudice of another's rights."

And thereupon the prisoner, by his counsel, excepted to the decisions of the court refusing the first instruction as asked, and adding thereto the words added as aforesaid; to such refusal to give the third, fourth and fifth instructions as asked, and adding
871 *thereto the words added as aforesaid; and to the refusal of the court to give instructions six, seven, eight, nine, ten; and to the refusal of the court to give the eleventh instruction as asked, and to the addition of the words "to the prejudice of another's rights," in the third instruction.

This is the prisoner's first bill of exceptions.

The prisoner then moved the court to allow his counsel sufficient time to prepare his bill of exceptions, before the argument of the cause was proceeded with before the jury. But the court considering that the amount of testimony was large, having taken two days in the examination, and that such bill could not be prepared, examined and signed for at least a day, which would have the jury to be kept together another day in the custody of the officers, refused to allow the trial of the cause by the jury to be delayed until the prisoner's counsel could prepare his bill of exceptions and present it to the court, but required the cause to be proceeded with at once; leaving the prisoner's counsel to prepare his said bill of exceptions and present it to the court after the cause had been argued before the jury. And the court certified that the said bill of exceptions occupied the counsel from two o'clock P. M. until seven o'clock P. M.; and being returned to the court next morning, occupied the court until the next day at one o'clock in its examination. And to this ruling of the court the prisoner excepted. This is his second exception.

During the argument of the cause before the jury, the prisoner's counsel argued to the jury, that the instructions given by the court, and numbered as four, meant to declare it as the opinion of the court, that

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ment to the jury propositions of law untrammeled by the court, where no instructions have been given by it, as to which no opinion is expressed; yet, where the court has instructed the jury, in accordance with principles established by this court, counsel have no right to argue against such instructions. Dejarnette v. Com., 75 Va. 868; Davenport v. Com., 1 Leigh 597; Brown v. Com., 86 Va. 471, 10 S. E. Rep. 745. See especially monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192. The case of Brown v. Com., 86 Va. 472, 10 S. E. Rep. 745, expressly decided that the jury are not the judges of the law, in criminal cases, but only of the facts. This point has for a considerable period been enveloped in a cloud of doubt, though perhaps not entirely *res integra*—there being a *dictum* by SMITH, J., in Doss v. Com., 1 Gratt. 559, to the effect that, in a criminal case, the jury are the judges of the law. See also, on this subject, Muscoe v. Com., 86 Va. 443, 10 S. E. Rep. 584.

In Robinson v. Woodford, 37 W. Va. 377, 16 S. E. Rep. 602, it was held to be proper for counsel on one side in his argument, before the jury, to comment on the fact that the other side had taken depositions but had failed to put them in evidence.

Much latitude is allowed counsel in argument, but they should not relate to the jury the prisoner's version as the statement of the accused, where the latter could not himself testify. Barbour v. Com. 80 Va. 287.

It is the duty of counsel, in argument, to confine themselves to the case at bar, the evidence properly before the jury, and the law as laid down by the court in its instructions, and an unwarranted departure from this course may make it necessary to set aside the verdict. But in the case at bar the remarks of counsel in the closing argument, as to the result of a former trial of the case, were not, in view of the instructions of the court on the subject, prejudicial to the plaintiffs in error. Taylor v. Mallory, 96 Va. 19, 30 S. E. Rep. 472.

IV. **Comments on Failure of Accused to Testify.**—In State v. Chisnell, 36 W. Va. 659, 15 S. E. Rep. 412, the prosecuting attorney in his argument before the jury had alluded to the failure of the accused to testify in her own behalf, but on exception he withdrew, and asked the jury not to consider his remarks in that respect, and the court declared the remarks improper and directed the jury to disregard and not consider them. *Held*, this is no ground for a new trial, the court in the course of its opinion saying: "It seems to be held that if such comment upon the failure of the accused to testify is made, without any action by the court or attorney to nullify or neutralize it, it will be ground for annulling the trial, unless waived. * * * But where the court corrects the error by excluding the comment and admonishing the jury to disregard it, the authorities fairly sustain the proposition that it will not be ground for setting the verdict aside." See also, State v. Greer, 22 W. Va. 800; State v. Ice, 34 W. Va. 244, 12 S. E. Rep. 696; Price v. Com., 77 Va. 393.

But if the exception to such comment is not taken until after verdict, it is too late, unless, under all the circumstances, the court can see that a proper verdict has been rendered and the accused not injured by the comment. Price v. Com., 77 Va. 393.

the record warrant book of the sinking fund, copied into the prisoner's first
872 bill of exceptions, could only *be referred to by the witnesses to refresh their memories; and that it did not, standing alone, prove the number of bonds to have been purchased and brought into the sinking fund, which it purported to show that warrants had been issued for. That this book was like a letter which, not being evidence itself, a witness might read to refresh his memory; but that afterwards he must speak from his own memory refreshed, and not from the letter. But the court interrupted the prisoner's counsel, and told the jury that the book was not like a letter which a witness looked at and refreshed his memory, and must then speak from his memory alone; but that the book itself is in this case evidence of that which it contains. To this instruction the prisoner excepted. This is his third exception.

The jury found the prisoner guilty, and fixed the term of his imprisonment in the penitentiary at four years; and the court sentenced him accordingly.

The judgment against the prisoner was pronounced on Saturday, the 28th of March, and on the 30th the prisoner moved the court to set aside the judgment, stating that he proposed to follow it, as soon as the judgment was set aside, by another motion to set aside the verdict, and grant him a new trial, on the ground that Colonel Joseph Mayo, jr., a material witness for the Commonwealth in its prosecution against him, is now insane, had been insane for a long time prior to said trial, and was insane at the time he testified in the cause. And he filed his own affidavit and that of one of his counsel, in both of which the affiant states that Mayo was insane, as he believes, at the time of the trial; and that he had no knowledge of the fact at the time.

It was agreed that both motions
873 should be heard together; *and a large mass of testimony was introduced, from which it appeared very clearly that some two or three weeks before the trial Col. Mayo was deranged, and that he was deranged when the motion was made. This evidence is sufficiently referred to in the opinion of Judge Bouldin. After hearing the evidence the court refused to set aside the judgment and verdict and grant the prisoner a new trial. And the prisoner again excepted. This is his fourth exception.

Upon the application of the prisoner a writ of error was awarded.

Royall and Flournoy, for the prisoner.

The Attorney General, for the Commonwealth.

BOULDIN, J., delivered the opinion of the court.

The plaintiff in error was indicted at the March term of the Hustings court of the city of Richmond for forging a public record, then being in the office of the second auditor of this state. On his arraignment he demurred to the indictment; but his demurrer was overruled by the court, and he was put on his trial, was found guilty by the jury, and his term of imprisonment in the penitentiary was fixed at four years. In the progress of the trial sundry bills of exception were taken by the accused to rulings of the court, and the bills were signed and sealed by the court, and made a part of the record. After the verdict of the jury was rendered, the accused moved the court to set the same aside as contrary to the law and the evidence, and also moved in arrest of judgment; both of which motions were overruled by the court without exception, and judgment was entered according to the verdict. On a subsequent day the accused moved the court to set the judgment and verdict aside, and award him a
874 *new trial, on the ground that Joseph Mayo, Jr., a material witness for the commonwealth to prove the alleged forgery was then insane; that he was insane at the time he testified, and had been insane for some time prior to the trial. Affidavits of the prisoner and of one of his counsel were filed, showing that they had no suspicion of the insanity of the witness during the trial, but had ascertained the fact after the case was ended. Much testimony was taken on the motion on both sides, but after fully considering the same, the motion was overruled by the court, and the prisoner again excepted. The testimony offered on this motion, and the reasons of the court for overruling it, are fully set forth in the bill of exceptions.

A writ of error was awarded by this court to the judgment of the Hustings court, on which the case is now before us.

We shall consider the errors relied on in the order in which they have been presented at the bar. The first error assigned is the refusal of the court to set aside the judgment and verdict on account of the alleged insanity of the witness, Joseph Mayo, Jr.

There can be no doubt, that the rule laid down by Peake in his work on Evidence, and approved by the Court of Errors of New York in the case of Hartford v. Palmer, 16 John. R. 143, is sound and reasonable, and is one, as said by the court in that case, "which cannot fail to command the respect of all mankind"; to wit, "that all persons who are examined as witnesses must be fully possessed of their understanding; that is, such understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; that, therefore, idiots and lunatics, whilst under the influence of their malady, not possessing their share of understanding, are excluded."

875 *It will be seen then, that a witness is not excluded by this rule, merely because he is a lunatic. That is not enough per se to exclude him; but he must at the time of his examination be so under the influence of his malady as to be deprived of that "share of understanding" which is necessary to enable him to retain in mem-

ory the events of which he has been witness, and gives him a knowledge of right and wrong." If at the time of his examination he has this share of understanding, he is competent. That is the test of competency, and of such competency the court is the judge; whilst the weight of testimony—the credit to be attached to it—is left to the jury.

Mr. Wharton, in his work on Criminal Law, says, "It was once held that an idiot was inadmissible, and so of a lunatic. It is now settled, however, that in all cases, either an idiot or lunatic may be received, if, in the discretion of the court, he appears to have sufficient understanding to apprehend the obligation of an oath, and to be able to give a correct answer to the questions put. The competency is to be determined by the judge trying the case, upon the examination of the witness himself, or upon the testimony of third persons." 1 Wharton's Crim. Law, § 752, and cases cited.

In the case of the Queen v. Hill, 20 Law Journal, N. S., p. 22, (reported also in 5 Eng. Law & Eq. R. 547) it was held by all the judges, Ld. Campbell, C. J., presiding, that the mere fact of insanity is not enough per se to exclude a witness. The judges were all of opinion, that if at the time of his examination, he appeared to the judge to be of sufficient intelligence to distinguish between right and wrong—to appreciate the nature and obligation of an oath—then he was admissible; all beyond was matter 876 affecting the weight of *his testimony and his credit as a witness, and was therefore matter for the consideration of the jury. "If," as Coleridge, J. says, ibid. p. 26, "his evidence had in the course of the trial, been so tainted with insanity as to be unworthy of credit, it was the proper function of the jury to disregard it, and not to act upon it."

We think the principle of law in such cases, as above laid down, furnishes a sound and reasonable rule. The question then before this court is not whether the witness, Joseph Mayo, Jr., was or was not a lunatic; whether on two occasions, shortly before his examination, he was not for a few days decidedly insane; whether a few days after his examination he was not in the same condition; or whether at the time of the motion he was not, and is not still, a lunatic; all of which we incline to believe has been established by the proofs and admissions of counsel, before this court in argument. This we say however is not the question before this court; for, as was said by Judge Story, speaking for all the judges of the United States Supreme court in the case of Evans v. Hettick, 5 Wheat. R. 470, "a person being subject to fits of derangement is no objection either to his competency or credibility if he is sane at the time of his giving his testimony." The real question before us is, whether on Monday and Tuesday, the 23d and 24th of March 1874, when, as a witness in this cause, he was subjected to a protracted and searching examination and cross-examination, without objection to his competency from any quarter, Joseph Mayo, Jr., possessed a sufficient share of understanding to appreciate the nature and obligation of an oath; to distinguish between right and wrong; to remember events, of which he had been a witness; and to answer intelligently the questions propounded to him. If he 877 then possessed that degree of *intelligence, we think he was competent. The learned judge who presided at the trial, and whose peculiar province it was to decide that question, was of opinion that he did possess the requisite share of understanding; and it would require very cogent and conclusive proof to the contrary to induce this court to interpose under such circumstances. But we see no error in the ruling of Judge Guigon on the motion. With all the testimony before us, we fully concur with him in the opinion that there was nothing in the testimony to justify the exclusion of the witness, even had the motion been made before his examination. But there was no such motion; and in deciding this question we have the benefit of an actual examination of Col. Mayo as a witness on two successive days—the whole examination relating to complicated transactions of a delicate and painful character: yet during that protracted examination nothing occurred which excited even a suspicion of insanity in the mind of the plaintiff in error, or of his learned and astute counsel; although they did think that he was under the influence of stimulants; nor upon a close and critical review of his testimony, since it was given, have they been able to point the court to anything in it evincing delusion or inconsistency, any want of intelligence, or even want of memory. Whilst on the other hand Judge Guigon certifies, that although evidently drinking deeply, he was at the time of his examination "a competent and proper witness, and not laboring under any mental disability whatever;" that his mind was perfectly clear, his appreciation of the interrogatories perfect, his answers clear and intelligent, and framed in language unusually accurate and succinct, giving a better and clearer idea of the complicated transactions as to which he deposed than any other wit- 878 ness in the case." The *testimony of the commonwealth's attorney, and of the five jurors, who, among others, were examined, was substantially to the same effect. This testimony all applied to Mayo's state of mind on the two days on which he was examined as a witness, being the precise time at which, in the opinion of this court, it was material to ascertain the state of his mind; and there is, in our opinion, nothing in the record to counteract it, or to weaken its force. We are of opinion therefore that the motion was properly overruled.

The next error assigned is, that the court erred in overruling the demurrer to the indictment; that it was not sufficient to charge that the defendant forged a public record, describing it so as plainly to iden-

tify the record charged to have been forged; but that it was further incumbent on the commonwealth to state all the facts necessary to show that the document alleged to be a public record, was in point of fact such record.

Were such strictness now required, it might well be held that it is met by the terms of the indictment. The document forged is charged to be a public record remaining in a public office, the office of the second auditor, judicially known to be a public officer; the record being the warrant book of the sinking fund, a fund judicially known to be a public fund, the sole property of the state; the entry on that book alleged to have been forged, being set out totidem verbis, and showing on its face that it is an entry of a public nature, and affecting the public interest. Did the law now require the strictness of allegation contended for by the counsel for the plaintiff in error, we should be strongly inclined to hold that his demands were fully met by the terms of the indictment. But the minuteness and particularity formerly required in in-
879 dictments *for forgery are now dispensed with by express statute. All that is now required is, that the document alleged to have been forged shall be described "in such manner as would sustain an indictment for stealing such instrument or other thing, supposing it to be the subject of larceny;" and we think there cannot be a doubt that the description given in this indictment of the public record alleged to have been forged, would be amply sufficient to identify the same in an indictment for the larceny thereof.

The demurrer was, therefore, properly overruled.

3. The next objection is to the refusal of the court to arrest the argument before the jury until the counsel of the plaintiff in error should prepare their bill of exceptions in relation to the instructions given and refused by the court.

We see no error in this proceeding. It was apparent that the preparation of the bill would consume much time; and as the trial had already been a protracted one, it was deemed best by the court to consider the points as saved, to go on with the case before the jury; and when the argument should be concluded, to prepare the bill of exceptions with due care and deliberation. The question thus presented is one of practice merely, and must of necessity be left largely to the discretion of the court of trial, to be exercised according to the circumstances of the particular case. In the present case we do not see that this discretion was erroneously exercised. The length of time actually consumed in the preparation of the bill shows, we think, the propriety of the course pursued by the court. The practice itself is a very common one in such cases, and we think is commended by convenience. No wrong or inconvenience to the plaintiff in error has been shown
880 to have resulted from it; and *whilst no unbending rule is intended to be laid down, nor can with propriety be laid down, in such cases, we are all of opinion that in this case there was no error in the proceeding.

The next error assigned is that the Hustings court erred in giving, modifying and refusing the instructions to the jury, as set forth in the first bill of exceptions.

The instructions are all connected with and run into each other, and we will consider them as a whole.

They declare in what consists the forgery of a public record; that the warrant book of the sinking fund is such public record; and that it is of itself evidence of what it contains, to be considered with the other evidence in the case.

These are the material propositions affirmed in the instructions given by the court. Several instructions relating to the powers and duties of the second auditor and his relation to the existing sinking fund were asked for and refused, as shown by the exception. The principle involved in this refusal, however, is so connected with the main propositions of law announced by the court, that we propose to consider them, as they have been considered at the bar, very much together.

The chief objection to the instructions is that they affirm that the warrant book of the sinking fund is a public record, the subject of forgery as such; and is evidence per se of what it contains.

The counsel for the plaintiff in error insist, on the other hand, that it is not such a record; is not the subject of forgery as such; and is not per se evidence of what it contains, and it was error therefore so to declare.

They do not deny that a public record is the subject of forgery under the terms of our statute.

881 *What then is a public record?

Mr. Bouvier, tells us in his Law Dictionary, 2 vol., p. 429, that it is "a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done." It must be "a written memorial," must be made by "a public officer," and that officer must be "authorized by law" (not required) to make it. These elements must, at the least, combine, to make the record a public record. Do they exist in this case? Before proceeding to answer that question, it may be well to consider a little further the nature of a public record, and the power of a public officer to make it. He must have authority to make it; but that authority need not be derived from express statutory enactment. Whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not the officer; is the prop-

erty of the state and not of the citizen, and is in no sense a private memorandum.

Among the writings classed by Mr. Greenleaf as public writings, and evidence per se, are "books kept by persons in public office, in which they are required, whether by statute, or the nature of their office, to write down particular transactions occurring in the course of their public duties and under their personal observation." 1 Greenleaf's Ev., § 483. And at page 610, § 496, the same author says: "To entitle a book to the character of an official register, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the 882 *book indispensable. It is sufficient that it be directed by the proper authority to be kept, and that it be kept according to such directions." All such books are recognized as public records, not merely because they are required by law to be kept, but "because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office, or at least under that of official duty." 1 Greenleaf, § 484. And in the same section the author cites, as books of this description, the following among others: "the books of the Bank of England, which contain the transfers of public stock, the transfer books of the East India Company, the books of the post office and custom house, and registers of other public offices."

With these principles in view, let us enquire what is the character of the warrant book of the sinking fund and of the entries made therein.

The book itself has been inspected by the court. It is marked on the back, where the name of a book is usually printed, "Sinking fund." On the outside of the first lid it is marked "Warrant book, Sinking Fund," and at the head of the first page is written, "Sinking Fund." The sinking fund is judicially known to the court, as we have already seen, to be a public fund owned wholly by the state, and managed wholly by public officers of the state; and the marks aforesaid upon the book in question would, if standing alone, tend strongly to show its public character. It was kept in the office of the second auditor, one of the most important public offices in the state, and one of the managers of the fund, by a clerk in that office, and by the direction of the second auditor himself. The entries, on their face, show the character of the book. They are headed "Sinking 883 Fund;" and on one *page the fund is debited with moneys received into the treasury for the fund, and on the other is credited by the warrants of the second auditor on the treasurer for amounts paid for state bonds purchased for the sinking fund. These warrants were issued as follows: an order purporting to be issued by the board of commissioners of the sinking fund, authorizing and requesting the second auditor to issue his warrant on the treasury, payable out of the sinking fund, for a given sum, the purchase money of a certain amount of state bonds, certified and signed by the plaintiff in error, as secretary of the board, would be carried to the clerk in the second auditor's office who kept the warrant book aforesaid. This clerk would then make the entry in the warrant book, and file away the order, fill a warrant on the treasurer in the name and in favor of the seller of the bonds, for the amount of the purchase money, which would be signed by the second auditor; and on the back of this warrant the treasurer drew his check on a bank for the amount. The entries of the transaction on the warrant book showed the number of the warrant, the person or persons in whose favor it was drawn, the face value of the bonds for the purchase of which it was payment, and the exact amount paid; and the second auditor proves that he kept that book as a record of the amount of bonds purchased by the sinking fund, and as a record of the receipts and disbursements of his office as to the sinking fund, as required by § 22 of ch. 42, Code of 1873. If a record thus kept by such public officers, and relating to matters of such grave public interest, be not a public record, then it is difficult to conceive what does or can constitute a public record. But it is argued that the section to which the second auditor referred as his authority to keep this 884 record, is repealed, *and that he has no authority whatever in the premises; therefore the record kept is not a public record.

Were the repeal conceded, we are by no means prepared to concede that the supposed result would follow. There can be no doubt that the second auditor under the general law, is bound to keep a record of the public transactions of his office; and it is clear, whether under a mistaken sense of public duty or not, that the transactions recorded in the warrant book aforesaid did in fact take place in his office; that it was to the interest of the public that they should be recorded; that they were in fact recorded, and as a necessary consequence the record was public. The state had a right to the record, and this was the only one kept.

But the court is of opinion that the section aforesaid is not repealed, and the auditor was, in the strict line of official duty, both in acting as he did and in recording his acts.

It is not pretended that the section referred to is anywhere repealed by express enactment. If then it be repealed at all, it must be by implication merely, by the passage of some act covering the same ground and in conflict with it. No such act has been pointed out, nor can be, for none such exists. It is true that the act of March 30th, 1871, known as the funding act, created a new sinking fund in conflict with that formerly existing, and thereby by implication repealed the same, and that a different board of commissioners was established to manage it, but the number and name of the board was the same in both cases, and the second auditor was a member of both boards.

There was no change whatever made in the details of management, no new or different system provided, and it is but reasonable to suppose, as indeed is the conclusion
885 *of law, that it was the wish and design of the legislature to preserve the then existing system, so far as applicable to the subject. And we are fortified in this view by the fact, known to us judicially, that the second auditor, who, as we have seen, was a member of both boards, has, since the creation of the new sinking fund, continued to keep in his office the record of his transactions, in relation to the sinking fund, under the 22d section of ch. 42, Code of 1873, precisely as he did before the new sinking fund was established, and has annually reported the same to the legislature as a portion of the transactions of his office, without any intimation to him on the part of that body that he was usurping authority, or any amendment or repeal of the law under which he was acting.

We are of opinion therefore that the twenty-second section of chapter 42 of the Code of 1873, is not repealed, but is still in force; and that the same was properly referred to by the second auditor as an authority for his action in relation to the sinking fund. That section not only authorizes but requires the second auditor to keep an account of the transactions of the sinking fund with the treasury, and also to report the same to each session of the legislature." The warrant book aforesaid of the sinking fund is the only record kept of those transactions, and we are therefore further of opinion, as we have already said that the book thus kept is a public record, is evidence per se of what it contains, and that there was no error in giving and refusing the instructions as set forth in the first bill of exceptions.

This disposes of the point saved in the third bill of exceptions also. The counsel for the accused was arguing to the jury on a mistaken view of the meaning of the addition made by the court to the fourth
886 instruction. *The court referring to the warrant book aforesaid, added to the fourth instruction as follows: "But such book is of itself evidence to be considerep by the jury in connection with other evidence." The counsel was contending that the court meant to say that the book was before the jury like a letter, to be referred to by witnesses to refresh their memory, but that, standing alone, it was not evidence to prove the number of bonds for which warrants had issued. The court interrupted the counsel and said to the jury that the warrant book was not like a letter, to be referred to only to refresh the memory of witnesses; but was admitted as evidence per se of that which it contains; and to this opinion the accused excepted. We have already seen that the warrant book, in the opinion of this court, is a public record, and evidence of itself of what it contains; that the instruction as given was proper; and, of course, there was no error in correcting the counsel.

We have thus noticed and disposed of all the errors relied on by counsel, and are of opinion that there is no error in the record. The judgment of the Hustings court must therefore be affirmed.

Judgment affirmed.

FORGERY AND COUNTERFEITING.

I. Definitions.
II. Subjects of Forgery.
III. Uttering and Publishing With Knowledge That the Instrument Is a Forgery.
IV. Jurisdiction.
V. Indictment and Procedure.
VI. Evidence.
VII. Punishment.
VIII. On Appeal.

I. DEFINITIONS.

Forgery.—"Forgery is the fraudulent making of a false writing, which if genuine, would be apparently of legal efficacy. Bishop on Criminal Law (3d Ed.), sections 495 and 499." This was the definition by FAUNTLEROY, J., in Terry v. Commonwealth, 87 Va. 678, 13 S. E. Rep. 104.

Counterfeiting.—Counterfeiting is distinguished from forgery in only one particular; in counterfeiting there must be a resemblance to the coin or other instrument counterfeited, while in forgery no such resemblance is requisite. May's Cr. L. § 94, 7 Am. & Eng. Enc. Law (2d Ed.) 876.

II. SUBJECTS OF FORGERY.

Power of Attorney to Recover Money.—In Commonwealth v. Proctor, 1 Va. Cas. 4, it was held that the forgery of a power of attorney to recover money for military services, is not a crime within the "act against forgery," passed Nov. 25, 1789, c. 19.

Bail Bond—Validity of Instrument.—A bail bond taken by a sheriff which has been altered in a material part, may be the subject of a prosecution for forgery, although some doubts may be raised respecting the validity of the bond, arising from the recitals in the condition. Commonwealth v. Linton, 2 Va. Cas. 476.

Bank Notes.—In Commonwealth v. Hensley, 2 Va. Cas. 149, it was held that the false uttering of a forged bank note of another state or district, may be prosecuted as the false uttering of a "promissory note for the payment of money," under the statute of Dec. 8, 1794.

Suit on Forged Note—Knowledge of Counsel.—The bringing of a suit at law, as counsel, upon a forged note, and recovering judgment thereon, with the knowledge that the note was a forgery, is held to be an attempt to employ the said note as true, and an uttering thereof, within the meaning of the statute. Chahoon v. Commonwealth, 20 Gratt. 733; Sands v. Commonwealth, 20 Gratt. 800.

Negotiable Instruments—Indorsement.—In Powell v. Commonwealth, 11 Gratt. 822, the maker of a negotiable note, having endorsed the name of a third person on the back thereof, passed it to the payee. *Held*, this constitutes the offence of forgery.

Unindorsed by Payee.—In Hendrick v. Commonwealth, 5 Leigh 707, it was held that in a prosecution for the uttering of a false or counterfeit note payable to order, it is immaterial that the note was not indorsed by the payee.

Letters.—Indictment for forging, with intent to defraud W. & W., a letter in the following terms: "Nottoway, April 24, 1841. Gent., Agreeable to Mr. Wm. I. Watkins' request, I take pleasure in making you acquainted with his name, and would say to you that he is very extensively engaged in the manufacturing of tobacco, and has made some large purchases, and says that he wishes to patronize you (on my recommendation). You may be assured that whatever he engages to do he will certainly perform. He says it is probable he will want $1,000 by the 1st of May, to meet his engagements, and if he apply for the amount, I have no doubt but you will accommodate him. The roads are in such a condition that it is impossible to get any produce to market. Write me a few lines by Mr. Watkins, and say what the chance is for a rise in tobacco. Your compliance with the above will very much oblige your obedient servant, Joseph M. Foulkes.—P. S. Mr. Watkins prefers giving a negotiable note payable in Petersburg Exchange bank, where he can always have an opportunity to send at the shortest notice and draw. He is not a gentleman of a low mean degree, but one that is a perfect gentleman in every sense of the term. I am confident, as I have observed to him, that you will either let him have the money, or endorse for him. J. M. F." *Held*, this is not a writing in respect whereof forgery can be committed, either at common law or under the statute. Foulkes v. The Commonwealth, 2 Rob. 837.

III. UTTERING AND PUBLISHING WITH KNOWLEDGE THAT THE INSTRUMENT IS A FORGERY.

To convict a prisoner of uttering, or attempting to employ as true, a forged writing, it must be shown that the accused, himself, uttered or attempted to employ as true the said forged writing, or was present at the time such forged writing was uttered or attempted to be employed as true, by some other person, aiding and assisting such person to utter or employ the same as true; and it must be further shown that the accused knew at the time that the said writing was in fact forged; and that such uttering or attempting to employ as true, was made or done by him with the intent to defraud. But any assertion or declaration, by word or act, directly or indirectly, that the forged writing is good, with such knowledge and intent, is an uttering or attempting to employ as true the said writing; provided that such assertion or declaration was made in the prosecution of the purpose of obtaining the money mentioned in the said writing. Sands v. Com., 20 Gratt. 801; Chahoon v. Commonwealth, 20 Gratt. 733.

Proof of Scienter.—In a prosecution for passing a forged note, knowing it to be forged, evidence that the prisoner endeavored to engage a person to procure for him counterfeit money, that he enquired whether he had brought him any, and of declarations that he intended to cultivate the acquaintance of a counterfeiter and intended to remove to a place near his residence, etc., is admissible as tending to prove the *scienter*. Finn v. The Commonwealth, 5 Rand. 701.

On the trial of an indictment for passing a counterfeit bank note or check, after evidence that the prisoner passed the note, and that it was counterfeit, evidence that the prisoner had in his possession and attempted to pass other counterfeit notes of the same kind to other persons, the day after he passed those in the indictment mentioned, is admissible to prove the *scienter*. Hendrick v. The Commonwealth, 5 Leigh 707.

Indictment for passing a counterfeit note charges that the prisoner, on a particular day, at the county of M. and within the jurisdiction of the court, being possessed of the note, feloniously did pass the same, well knowing it to be counterfeit at the time he passed it. *Held*, the time and place of passing the note, and of the *scienter*, are set forth with sufficient certainty. Buckland v. Commonwealth, 8 Leigh 732.

Upon the trial of an indictment for passing counterfeit bank notes, proof that prisoner had, about the same time, passed another note of that kind, which was thought to be a counterfeit and which he took back, though this note is not produced at the trial, is admissible evidence to prove the *scienter*. So upon the trial of an indictment against M. for passing counterfeit bank notes, the prisoner appears clearly to have been confederated with one L. in passing counterfeit notes, and present when L. passed such notes; the notes so passed by L. are produced in evidence against the prisoner. *Held*, they are proper evidence. Martin v. The Commonwealth, 2 Leigh 745; Hendrick v. Commonwealth, 5 Leigh 707.

Uttering Counterfeit Coin—Proof of Scienter.—In a prosecution for uttering counterfeit coin, the guilty knowledge of the prisoner that the coin was counterfeit is a fact to be proved; and there can be no *presumption of law*, from the existence of other facts, of this guilty knowledge, though there may be a presumption of fact. Wash v. The Commonwealth, 16 Gratt. 530.

Uttering Forged Instrument—Proof of Foreign Corporation.—On a prosecution for uttering and attempting to employ as true a forged note purporting to be the note of the Bank of Delaware in Pennsylvania, a banking company authorized by the laws of Pennsylvania, the existence of such a bank may be proved by parol evidence. The averment that it was authorized by the laws of Pennsylvania is surplusage, and need not be proved. Cady v. The Commonwealth, 10 Gratt. 776.

Uttering Forged Instruments—Records as Evidence.—In Sands v. Commonwealth, 20 Gratt. 800, C had forged a note, and employed the prisoner, an attorney, to bring suit thereon, which he did and recovered judgment. *Held*, that in the prosecution of the attorney for uttering the forged note, the records of the civil suit, and the testimony of the clerks of the court are admissible evidence to show the complicity of the prisoner in the uttering of the forged paper.

Uttering Counterfeit Notes of the U. S. Bank.—It is felony under the statute 1 Rev. Code, ch. 154, § 1, to pass a counterfeit note of the bank of the United States, dated at a time when that bank was in existence, though, at the time of passing the note, the charter of the bank had expired. Buckland v. Commonwealth, 8 Leigh 732.

Uttering Counterfeit Bank Notes—Proof of Non-Genuineness.—In a criminal prosecution for passing counterfeit bank notes, it is not necessary to prove the notes to be counterfeit by an officer of the bank of which the notes are counterfeited. Martin v. Commonwealth, 2 Leigh 745.

IV. JURISDICTION.

Jurisdiction of State Courts.—A state has jurisdiction to punish an act made an offence by the laws of the state, though the same act is made an offence by a law of the congress of the United States. Ac-

cordingly a state court has jurisdiction to punish the offence of attemping to pass a forged note purporting to be a note of one of the national banks of the United States. Jett v. Commonwealth, 18 Gratt. 933.

Jurisdiction—Indictment—Counts.—A person examined in a county court on a charge of *forging* an order, and committed by that court for trial in circuit superior court for the *forgery* only, cannot be tried there for *uttering and publishing* the order; therefore, if the indictment against the prisoner contains counts for the *forgery*, and counts for *uttering and publishing*, the circuit superior court ought to quash these latter counts. The rule of practice in criminal cases, that if an indictment contain several counts, some good and others faulty, and a general verdict of guilty be found, the bad counts will not affect the validity of the good, and judgment will be given on those which are good,—is not applicable to cases of penitentiary crimes in Virginia, where the jury is to ascertain the term of imprisonment, since the evidence on the bad counts may aggravate the punishment imposed by the verdict. Mowbray v. The Commonwealth, 11 Leigh 643.

Venue—Evidence—Inferences of Jury.—If on the trial of a prisoner in a certain county for the forgery of a certain writing alleged to have been committed in that county, it be proved that the said writing was found in the possession of the prisoner in the said county where he had uttered or attempted to utter the same as true, and there be no evidence to show that the forgery of said writing was committed in any other county, the jury from these facts may infer that the forgery of said writing was committed in that county. State v. Poindexter, 23 W. Va. 805.

V. INDICTMENT AND PROCEDURE.

Preliminary Proceedings—Examination—Sufficiency.—A prisoner is committed for examination, is examined, and remanded by the examining court for trial, for felony in forging and uttering a promissory note purporting to be drawn by A. D. (no intention to defraud A. D. or any other person being charged). *Held*, the examination is sufficient, and well warrants an indictment for forging and uttering the note *with intention to defraud A. D.* Bogart v. Commonwealth, 10 Leigh 693.

Indictment—Where Prisoner Remanded to Superior Court.—If an examining court remand to the superior court for trial, a prisoner charged with forgery, the prisoner may be indicted in the superior court, not only for the forgery, but also for procuring the instrument to be forged, and for acting and assisting in the forgery. Huffman v. The Commonwealth, 6 Rand. 685.

Indictment—What It Should Set Out.—An indictment for uttering, and attempting to employ as true, a forged writing, need not set out the whole writing, but it is sufficient to give its purport and effect. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

Indictment—Sufficiency of Allegations.—The form of indictment for forgery and uttering forged instruments, found in Mayo's Guide (Ed. 1860), p. 587, is good as to both counts. Neither in an indictment for uttering or attempting to employ as true a forged instrument, nor one for forgery, is it necessary to name the person intended to be defrauded, as section 8, c. 158, Code 1887, dispenses with that in both such cases. It is not necessary in such indictment to allege that the act was to the prejudice of another's right, but it must appear from the description of the writing in the indictment that it is such as might prejudice his right. State v. Tingler, 32 W. Va. 546, 9 S. E. Rep. 935.

An indictment which charges a prisoner with the offences of falsely making, forging and counterfeiting; of causing and procuring to be falsely made, forged and counterfeited, and of willingly acting and assisting in the said false making, forging and counterfeiting, is a good indictment, though all of these charges are contained in a single count; the words of the statute being pursued, and there being a general verdict of guilty, judgment ought not to be arrested on the ground that the offences are distinct. Rasnick v. Commonwealth, 2 Va. Cas. 356.

Upon an indictment for passing a counterfeit note of the bank of Louisville, without alleging that the bank is a chartered bank, or that there is no such bank, and without alleging that the note was passed "to the prejudice of another's right," or "for the prisoner's own benefit, or for the benefit of another," *held*, the offence so charged is a felony within the meaning of the statute, 1 Rev. Code, ch. 154, § 4, and the indictment is good and sufficient. Murry v. The Commonwealth, 5 Leigh 720.

It is not necessary to set forth in the count, the persons whom the prisoner procured to forge the instrument, or with whom he acted and assisted in the forgery. A general description, in the words of the statute, is sufficient. An indictment which charges that the prisoner caused and procured a certain instrument to be forged, and willingly assisted in the forgery, etc., is to be understood as charging that he caused it to be done in his *presence*, and that he aided, being *present*; in other words, as charging him as *principal* in the second degree, and not as *accessary*. See Rasnick's Case, 2 Va. Cas. 356; Huffman v. The Commonwealth, 6 Rand. 685.

Indictment for Counterfeiting—Sufficiency.—An indictment on the statute of 1834-5, ch. 66, charging that the prisoner did knowingly have in his custody, without lawful authority or excuse, "one *die* or *instrument*" for the purpose of producing and impressing the stamp and similitude of the current silver coin called a half dollar (no further describing the die or instrument) is insufficient. Commonwealth v. Scott, 1 Rob. 695.

Indictment — Possession of Counterfeit Coin. — A prisoner is examined for forging and counterfeiting twenty-four pieces of silver coin, and is sent on to the circuit court for further trial. He cannot be indicted for feloniously having in his possession ten or more pieces of coin, with intent to alter and employ the same as true. An indictment under the statute, Code, ch. 193, § 6, p. 733, for feloniously having in his possession more than ten pieces of forged or base coin, must allege that the prisoner had them in his possession at the same time; and the charge that on a certain day he had them in his possession, is not sufficient. There are counts in an indictment for forging and counterfeiting coin, and also a count for feloniously having in his possession twenty pieces of forged coin, not saying, "at the same time." The prisoner having moved the court to quash the last count, which is overruled, there is verdict and judgment against him, and he obtains a writ of error. This court holding that the count is bad as an indictment for a felony, will not permit it to stand as a count for a misdemeanor, but will reverse the judgment, and quash the count. Scott v. Commonwealth, 14 Gratt. 687.

Indictment—Allegation of Time of Offence.—The time when the offence is alleged in the indictment to have

been committed, being stated in figures, is no error. Cady v. The Commonwealth, 10 Gratt. 776.

Indictment—Description of Instrument.—An indictment charges the forgery of an endorsement on a negotiable note, which is described as to the amount, date, to whom payable and when due; but the indictment does not state who is the maker of the note or where it is payable. *Held*, it is a good indictment. Cocke v. The Commonwealth, 13 Gratt. 750.

Indictment—Failure to Allege the Swearing of the Grand Jury.—In a bill of indictment with three counts, if in the third count it is omitted to be stated that the grand jury "*on their oath*" present, (the first two counts being regular in that respect) the objection is obviated by the fact that the record states that the grand jury were sworn in open court. Huffman v. The Commonwealth, 6 Rand. 685.

Indictment—Description of Offence.—The words "to the prejudice of another's right," in the Code, ch. 198, § 5, p. 783, in relation to forgeries, are descriptive not of the offence, but of the writings of which forgery may be committed; and it is not therefore necessary that they shall be inserted in the indictment in describing the offence charged. The description of the writing in the indictment, as the endorsement of a person whose name is forged, will not vitiate the indictment, though the simulated liability might not be that of a technical endorser, but of a different character. Powell v. The Commonwealth, 11 Gratt. 822.

Indictment—Variance—Endorsements upon Note.—An indictment for forgery charged the forgery of a negotiable note, and set it out *in haec verba*; without setting out the endorsements upon the back of it. On the trial when the note was offered in evidence, it was objected to on the ground of variance. *Held*, it was not necessary to set out in the indictment the endorsements upon the note, or any other matter written upon the same paper, constituting no part of the note itself, and not entering into the essential description of that instrument. Perkins v. The Commonwealth, 7 Gratt. 651, 56 Am. Dec. 123.

In setting out a counterfeit bank note *in haec verba*, in an indictment for feloniously passing the same, an indorsement appearing to have been made on the note after it was passed, is properly omitted, and the omission is therefore no ground for the objection of variance. Buckland v. Commonwealth, 8 Leigh 732.

The receipt described in the indictment for uttering it, knowing it to be forged, agrees with the receipt offered in evidence on the trial, with the exception that the endorsement thereon, "Witness, Susan M. Armstrong," is omitted therefrom. *Held*, no material variance. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 235.

Variance—Clerical Errors.—In State v. Poindexter, 23 W. Va. 812, in an indictment for forging a negotiable note, the letters "ar" in the word "bearer," were blurred or blotted, while these letters appeared plainly in the original. *Held*, this constitutes no variance.

Variance—Abbreviations—Idem Sonans.—In a commitment by a justice, of a person for forging an order, in setting out the order he writes out some words in full, which in the order as set out in the indictment are abbreviated, as Thomas for Thos., 23 cents for 23 c., Respectfully for Resp't'y. These are not such variances as require that the accused should be sent back to a justice for examination. Burress v. Commonwealth, 27 Gratt. 934.

While in an indictment for forgery it is unnecessary to set forth a copy or facsimile of the instrument forged, yet if this is done, and there is a material variance between the copy so set out and the paper offered in evidence, such paper, on motion of the accused, should be excluded from the consideration of the jury. When the alleged forged note is set out *in haec verba*, and in the body thereof are the words "with 6 per cent. int. from date," and the note offered in evidence contains no such words, this is a variance, both in substance and legal effect, fatal to the introduction of such last-mentioned note as evidence in support of the allegations of the indictment. State v. Fleshman, 40 W. Va. 726, 22 S. E. Rep. 309.

Variance—Evidence.—On the trial of an indictment for passing a counterfeit bank note, the prisoner moves to exclude the note produced from going in evidence to the jury, on the ground that the name of one of the firm of engravers, set out in the description of the note in the indictment, does not appear on the note produced: the attorney for the commonwealth proves, that when he drew the indictment, he had been able to make out the name on the note, from his knowledge that one of the firm of engravers bore that name, though he cannot say he would have been able to do so without the knowledge of that fact; but that the word had since become indistinct, he supposes, by handling the note. The court thereupon overrules the motion to exclude, and permits evidence to be given of the passing of the note produced. *Held*, it was right for the court to do so. Buckland v. Commonwealth, 8 Leigh 732.

New Indictment—Variance—Autrefois Acquit.—To a plea of *autrefois acquit*, upon an indictment for forgery, the attorney for the commonwealth craves oyer of the former record, and demurs to the plea. The record shows that the indictment was for forging an order for forty-seven dollars and twenty-five cents, and that the order was for forty-seven dollars and twenty-three cents. This was a variance which entitled the accused to acquittal on that indictment; and therefore the acquittal on that indictment does not forbid the prosecution of the accused on another indictment for the same forgery, setting out the order correctly. Burress v. Commonwealth, 27 Gratt. 934. See especially, monographic *note* on "Autrefois, Acquit and Convict," appended to Page v. Commonwealth, 26 Gratt. 942.

Indictment—Uncertainty of Counts—Venire Facias de Novo.—The indictment charges in one count the forgery of a note, and in another count the forgery of an endorsement upon the note. The jury find the prisoner not guilty on the first count; and then say, "On the second count, *viz*: that of uttering a negotiable note knowing it to be forged, we find the prisoner guilty, and affix the term of his imprisonment for the term of two years." The verdict upon the second count is too uncertain to authorize any judgment upon it; and a *venire facias de novo* on that count should be awarded. Cocke v. The Commonwealth, 13 Gratt. 750.

Indictment—Misjoinder of Counts.—The joinder of two or more offences in one count is not permitted. But if the whole transaction be only *parts of one fact of endeavor*, all the parts may be stated together as one offence—*e. g.*, a man may be indicted for the battery of two or more persons in the same count, etc. And so, an indictment charging in one count the forgery of a check and of the endorsement thereon, is not liable to the objection of duplicity or misjoinder. Sprouse v. Commonwealth, 81 Va. 374.

Indictment—Irregularities—Curative Effect of Verdict.—In an indictment for the forgery of bank notes, instead of setting out the tenor of the forged notes, the attorney "for greater certainty as to their identity," referred to them as "being annexed" hereto, and actually did annex them. The prisoner did not move to quash the indictment, nor did he plead in abatement, but pleaded the general issue, and a verdict was rendered against him. Although this is a careless and irregular mode of counting, yet after verdict the irregularity is cured by the act of jeofails. A charge that a forgery of bank notes was committed, with intent to injure "divers good citizens of the commonwealth and others, to the jurors unknown," without setting out an intent to injure the president, directors and company of those banks, or of any particular person, or body politic, by name, is good after verdict. So, to charge that the prisoners willingly acted and assisted in false making and forging, without setting out in particular any person who was assisted: So, to charge them with causing and procuring the forged notes to be passed, without setting out the *persons whom* the prisoners caused or procured to pass them, nor *to whom*: So, to charge them with passing them to W. S. with intent to defraud the said W. S. and *others*: So, also, to charge them with causing and procuring them to be passed or exchanged. *Held*, good after verdict. The Commonwealth v. Ervin and Lewis, 2 Va. Cas. 337.

Indictment—Counts—Verdict.—An indictment (described in the record of the finding, and in the entry of the arraignment, as an indictment for forgery) contains: 1, a count for forging and counterfeiting a note; and 2, a count for feloniously using and employing as true a counterfeit note; verdict finds the prisoner guilty of forgery, as alleged in the indictment. *Held*, an acquittal must be entered on the second count. Page v. Commonwealth, 9 Leigh 683.

Indictment for Forging—Trial for Uttering—Quashing Indictment.—A prisoner is committed for examination, is examined, and remanded by the examining court for trial, for "feloniously using and employing as true, for his own benefit, a certain counterfeit note, well knowing the same to be counterfeit." *Held*, an indictment for forging the note is not warranted by the examination, and must be quashed. Page v. Commonwealth, 9 Leigh 683.

VI. EVIDENCE.

Evidence—Forged Instrument.—A forged paper is passed by a prisoner bearing date in 1828; immediately after, with the knowledge of the holder, the prisoner alters the date to 1827. The indictment sets forth its tenor, and describes it as dated in 1827. The paper is proper evidence to go to the jury in support of the indictment, notwithstanding the proof that it bore date in 1828, when passed. Huffman v. The Commonwealth, 6 Rand. 685.

Upon the trial of an indictment against M. for passing counterfeit bank notes, the prisoner appears clearly to have been confederated with one L. in passing counterfeit notes, and present when L. passed such notes; the notes so passed by L. are produced in evidence against the prisoner. *Held*, they are proper evidence. Martin v. The Commonwealth, 2 Leigh 745.

Variance from Indictment.—The difference between "account" as set out in the indictment and "acct" as written in a forged order, is not a material variance, which will exclude the order as evidence. Burress v. Commonwealth, 27 Gratt. 934.

Proof of Non-Genuineness of Instrument.—Upon a trial for forgery of a written instrument, the commonwealth may, without producing as a witness the party by whom the instrument purports to be signed, and without accounting for his absence, prove by the evidence of other witnesses that the instrument is not genuine; such evidence not being in its nature secondary to that of the party whose signature is in question. Foulkes v. The Commonwealth, 2 Rob. 836.

Production of Counterfeit Coin—When Excused.—In a prosecution for passing a counterfeit coin to a person who resides in another state, if a subpœna for such person as a witness has been issued and returned not found, the fact of the passing, and the counterfeit character of the coin, may be proved without producing the coin at the trial. It seems, that in a prosecution for passing a counterfeit coin, the prosecutor is at liberty to prove the fact of the passing, and the counterfeit character of the coin, without either producing the coin, or accounting for its nonproduction. Kirk v. Commonwealth, 9 Leigh 627.

Evidence—Proof of Handwriting.—Upon a trial for forgery, to prove that the paper was forged, a witness was introduced, who said that he knew H., the party whose signature was in question, and who was dead, about two years; was his tenant; had seen him write; thinks he knew his handwriting tolerably well; but could not swear to a particular signature as his, without knowing the fact; thought he had a sufficient knowledge or recollection of his signature to enable him to give an opinion as to the genuineness of his signature, though he would not swear absolutely about it. Says: I think it is not his handwriting; but at the same time, I cannot say on oath positively it is not. This is admissible evidence. Chahoon v. The Commonwealth, 20 Gratt. 733.

Change in Handwriting.—Upon such trial it was not error to ask a witness if the handwriting of the person whose name was alleged to have been forged had changed. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 226.

Proof of Handwriting—Comparison.—Upon a trial for uttering a forged receipt, witnesses may testify as to the handwriting in the alleged forged receipt; and, being acquainted with the signature of the person's name purporting to be signed thereto, may before the jury make the letters of such person's name as they think he makes them, and the jury may compare such letters, so made, with the letters in the alleged signature. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

A witness who states that he is perfectly familiar with the handwriting of the accused, and states the circumstances which made him so familiar with it, expresses the confident opinion from his knowledge of the accused's handwriting, that he was incapable of writing the order. This opinion is incompetent testimony, and properly excluded. Burress v. Commonwealth, 27 Gratt. 935.

Submission to Jury of True and Forged Signatures.—Upon such trial the jury will not be permitted to receive the proved, but not admitted, signature of the person, when none had been alleged to have been forged, so as to permit them to compare the two signatures. Much less would it be proper to permit evidence to go to the jury by a witness that he had compared the alleged forged signature with one admitted to be genuine, and they were exactly alike. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 226.

Possession as Presumptive Evidence of Guilt—Venue.—Upon trial of an indictment for forging bank notes, the fact if proved, of the forged notes mentioned in the indictment, and other forged notes of like kind, and the plates, implements and materials, for forging such notes, being found in the prisoner's possession, is *prima facie* or circumstantial, presumptive evidence, that the prisoner was the forger, proper to be given to the jury. And such forged notes, etc., being found in possession of the prisoner in the county of B, is like *prima facie* evidence, proper to be given to the jury, of the fact that he committed the forgery *there*. Spencer v. Commonwealth, 2 Leigh 751.

Irrelevant Documents.—A genuine order by the same drawers upon the same party, which had been paid to the accused, as the order which the accused was charged with having forged, is not competent evidence for the accused. Burress v. Commonwealth, 27 Gratt. 935.

Bank Clerk's Book Entries.—Upon a trial for the forgery of an endorsement on a note, the commonwealth having proved that the note went into the prisoner's possession, and notice to the prisoner to produce it, may prove the note and the forgery in its absence; and the note having been deposited in bank for collection, the original entries in the book of the note clerk of the bank, proved by the clerk to have been made by him from the note, are competent evidence to prove that the note and endorsement thereon were as described in the indictment. Cocke v. The Commonwealth, 13 Gratt. 750.

Deed—Note—Witnesses.—A deed connected with a transaction with which an alleged forged receipt is connected, is competent evidence on a trial for uttering such forged receipt. The note, which purports to have been paid by money of which the alleged forged receipt is the evidence of such payment, is competent evidence upon a trial for uttering such forged receipt. Upon such trial it is proper to ask a witness, as to the money mentioned in the note, how it was applied, and to admit the answer, "It was applied on the land mentioned in the deed." State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

Records—Depositions.—Upon the trial of an indictment for uttering, and attempting to employ as true, a forged receipt for money, knowing it to be forged, the record of a cause in chancery between the person so uttering and the person whose name is alleged to have been forged, which record includes a deposition to the genuineness of the receipt, taken by the accused, all tend to show that the accused did utter, and attempt to employ as true, said receipt, and is competent evidence. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

Pecuniary Condition of Person Whose Note Is Forged.—In Sands v. Commonwealth, 20 Gratt. 800, it was held that, on a trial for the forgery of a note of a person who has since died, the commonwealth may prove that such person was prompt in the payment of his debts, and that he owned a large property—real and personal,—and was doing a good business. See also, Chahoon v. Commonwealth, 20 Gratt. 733.

Pecuniary Condition of Accused.—Upon such trial it is proper to inquire into the pecuniary condition of the person in whose favor the alleged forged receipt purports to have been given, at or about the date of such receipt. State v. Henderson, 29 W. Va. 147, 1 S. E. Rep. 225.

Elements to Be Considered by Jury.—To convict of forgery, the jury must be governed entirely by the testimony before them, and they must not presume or assume the guilt of the accused, by reason of his failure or neglect to produce evidence in his own behalf. But if the jury believe that it is in the power of the accused to produce evidence in elucidation of the subject matter of the charge against him, then his failure or neglect to produce such evidence may be considered by the jury, in connection with the other facts proved in the case. Chahoon v. The Commonwealth, 20 Gratt. 734.

Examination of Accused.—It is error to allow one accused of forgery, on trial therefor, to be interrogated as to other similar papers, unless it is first shown that such papers were forged, and the accused had culpable connection therewith. State v. Lowry, 42 W. Va. 205, 24 S. E. Rep. 561.

Compulsory Admissions.—Where prisoner was charged with forging a check payable to Gibson, and forging Gibson's name on it, the mayor asked him to write the name "Gibson." Prisoner reluctantly, but without threat or promise, wrote and misspelt it with a *p* instead of a *b*, just as it was misspelt in the forged writing. This was not compelling him to furnish evidence against himself. Sprouse v. The Commonwealth, 81 Va. 374. See especially, monographic *note* on "Confessions" appended to Schwartz v. Commonwealth, 27 Gratt. 1025.

Production of Forged Instrument—Secondary Evidence.—On the trial of an indictment for forgery of a check on a bank, if there be proof rendering it highly probable that the original paper has been lost or destroyed, though this was not done by the accused or by his procurement, secondary evidence of the contents, character and description, of the paper, is admissible to sustain the prosecution. Pendleton v. The Commonwealth, 4 Leigh 694, 26 Am. Dec. 342.

Secondary Evidence—Foundation for Its Admission.—On trial of indictment for forgery of a letter of credit with intent to defraud W. & W., the commonwealth proves that a draft, presented by the prisoner to W. & W. at the same time with the letter of credit, had been filed, together with an indictment against the prisoner for forging the same, with the clerk of the court, who, on making search for the draft among the papers in his office, has been unable to find it; and thereupon the commonwealth offered secondary evidence of the contents of the draft; no notice having been given to the prisoner, before the jury was impanelled, of any intention to offer such evidence. *Held*, the foundation so laid for the admission of the secondary evidence is sufficient. Foulkes v. The Commonwealth, 2 Rob. 836.

On the trial of a person accused of forgery the alleged forged paper must be produced, or its nonproduction satisfactorily accounted for, by showing it to be lost, destroyed, or in the hands of the accused or his friends; and, in the latter case, notice to produce it must be given to the accused or his counsel before evidence of its existence, character, and contents is admissible. State v. Lowry, 42 W. Va. 205, 24 S. E. Rep. 561.

VII. PUNISHMENT.

Statutes.—The manner and degree of punishment for the offense of forgery is fixed by statute in Virginia and West Virginia. See Va. Code, 1887, §§ 3733-3740; W. Va. Code, 1889, ch. 146.

VIII. ON APPEAL.

Habeas Corpus.—The prisoner being in the penitentiary, he will be brought before the appellate court by writ of *habeas corpus*, and committed to the sheriff

of the county of Henrico, to be taken back to the county from whence he was sent. Jones v. Commonwealth, 20 Gratt. 848.

Remanding for New Trial.—On a trial for a felony, for which the shortest term of imprisonment is five years, the jury find the prisoner guilty, and fix the term of his imprisonment in the penitentiary at three years; and the judgment is according to the verdict. Upon a writ of error to the judgment, on the application of the prisoner, the judgment will be reversed; but the prisoner will not be discharged, but will be remanded for another trial. Jones v. Commonwealth, 20 Gratt. 848.

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887 *Stoneman v. Commonwealth.*

June Term, 1874, Wytheville.

1. **Murder—Evidence—Records.**—On the trial of S for the murder of E, the commonwealth having shown that E and O, the sister of S, had been married, the prisoner may introduce in evidence the decree in a suit by O against E for a divorce, either to render O competent as a witness for him, or to show that E being no longer the husband of O was a mere intruder upon the prisoner's family. But the pleadings and depositions are not admissible as evidence for such a purpose.

2. **Same—Same—Exceptions—On Appeal.**—An objection to a question asked and to the witnesses answering it, is overruled, and an exception taken, which does not state the answer. The appellate court cannot consider it.

3. **Same—Justifiable Homicide.**—On the trial of S for the murder of E, if S shot E under a reasonable apprehension, that his own life or that of some member of his family was in imminent danger, or under a reasonable apprehension that the deceased intended to burn the dwelling house of his mother, or commit some other known felony, and that there was imminent danger of such design being carried into execution, he is justified in so doing, though such danger was unreal.

4. **Same—Same.**—The bare fear that a man intends to commit murder, or other atrocious felony, however well grounded, unaccompanied by any overt act indicative of any such intention, will not warrant killing the party by way of prevention. There must be some overt act indicative of imminent danger at the time.

5. **Same—Same.**—There must be some act by the deceased meaning present peril, or something in the attending circumstances indicative of a present purpose to make the apprehended attack. The act so done, or circumstances thus existing, must be of such a character as to afford a reasonable ground for believing there is a design to commit a felony, or to do some serious bodily harm, and imminent danger of carrying such design into immediate execution. Then the killing will be justifiable, though there was in fact no such design by the deceased.

6. **Instructions—On Appeal.**—If an instruction correctly expounds the law, and is expressed in
888 terms *familiar to the books, and well understood by the judicial mind, and especially if the jury or the counsel do not ask for an explanation of it, an appellate court will not set the verdict aside, because its true import and meaning possibly may not have been comprehended by the jury.

*For monographic note on Bills of Exception, see end of case.

In December 1873 Leftwich Stoneman was indicted in the County court of Carroll county for the murder of Annuel Edwards, Jr., and was sent to the Circuit court of the county for trial. In April 1874 the trial came on, and he was found guilty by the jury, and the term of his confinement in the penitentiary was fixed at nine years, and the court sentenced him in accordance with the verdict.

On the trial, after the commonwealth had closed the testimony on her part, and had shown that the deceased and Ollie Stoneman had been married, the prisoner offered in evidence the record of a suit for a divorce between the said Ollie and deceased. To the introduction of this record the attorney for the commonwealth objected; and the court sustained the objection as to all of said record, except the final decree in the cause. To this ruling of the court the prisoner excepted.

Ollie Stoneman was then examined as a witness for the prisoner; and upon her cross-examination, after stating in answer to questions, that she had received two letters and other messages from the deceased after their divorce, and that she had not replied to them, in answer to another question, she said she had received through Mr. Lundy a message from him. The attorney for the commonwealth then asked her to state what the message was that she had so received, and the nature of it. To which question, and to the witnesses answering the same, the prisoner objected. But the court overruled the objection, and di-
889 rected the *witness to answer. And the prisoner excepted; but the exception does not state the answer.

After all the evidence had been introduced, the attorney for the commonwealth moved the court to instruct the jury as follows:

The bare fear that a man intends to commit murder or other atrocious felony, however well grounded, unaccompanied by any overt act indicative of any such intention, will not warrant killing the party by way of prevention. There must be some overt act indicative of imminent danger at the time.

This instruction was objected to by the prisoner; and instead thereof he moved the court to give five. Four of these the court gave. The fifth which the court refused to give is as follows:

If the jury shall believe from the evidence that Leftwich Stoneman, the prisoner at the bar, has shown in his behalf that Annuel Edwards, the deceased, made such threats or did such acts as to cause him truly to believe that he was in danger, and no overt act was proven against the deceased to carry his threats into execion at the time of the homicide, and that the accusee killed the deceased under the opinion that his life was in danger, though such apprehension was unreal; and if they shall be-

lieve that the threats were communicated to him before the homicide, they must acquit the prisoner.

The attorney for the commonwealth objected to the fifth instruction asked for by the prisoner, and the court overruled the prisoner's objection to the instruction asked for by the attorney for the commonwealth, and gave the same to the jury with the following addition:

But the jury will judge whether the conduct and acts of the deceased, at the
890 time of the shooting, were *of such a character as to create in the mind of the prisoner a reasonable fear that the deceased intended to commit murder or other felony, or to do the prisoner or his family great bodily harm—together with instructions Nos. 1, 2, 3 and 4, asked by the accused; stating to the jury they would reconcile the instructions by understanding that apprehensions of danger, to justify a homicide, ought to be based not alone on surmises, but there ought to be coupled therewith some act on the part of the party from whom danger was apprehended, evidencing an intention to carry into execution his threats or designs.

After the jury returned into court with their verdict, the accused moved the court for a new trial, because the same was not warranted by the facts proved and the law applicable to the case. But the court overruled the motion.

The prisoner then moved the court for a new trial, because of misdirection to the jury in refusing to give the fifth instruction asked for by him, and in giving the instruction asked for by the attorney for the commonwealth, with the addition thereto made by the court. But the court overruled the motion.

The accused then moved the court to set aside the verdict and grant him a new trial, because in refusing to give instruction No. 5, asked for by the accused, and the giving the instruction asked for by the commonwealth, with the addition thereto, was calculated to mislead the jury. But the court overruled the motion.

The accused then moved the court to grant him a new trial, on the ground that the punishment ascertained by the jury was excessive. But the court overruled the motion.

To which opinions of the court in
891 refusing to give *instruction No. 5, and in giving the instruction asked for by the attorney for the commonwealth, with the addition thereto, and in overruling the motions 1, 2, 3 and 4, of the accused, to set aside the verdict, the accused excepted. And on his motion the facts proved were spread upon the record. The facts are sufficiently stated by Judge Staples in his opinion.

J. W. Shelton and Tipton, for the prisoner.

Walker, for the commonwealth.

STAPLES, J., delivered the opinion of the court.

The prisoner was indicted in the Circuit court of Carroll county for the murder of Annuel Edwards. At the April term 1874 he was tried and convicted of murder in the second degree, and the period of his confinement in the penitentiary fixed at nine years.

During the progress of the trial the prisoner offered in evidence the record of a suit for a divorce between the deceased and Ollie Edwards, the former wife of the deceased, and also the sister of the prisoner. To the introduction of this evidence the commonwealth objected; and the court sustained the objection as to all the record, except the decree; which was admitted.

The prisoner excepted, and this is his first bill of exceptions. It is very clear that the decree itself was competent evidence to show that a divorce had been granted. For this purpose the prisoner was entitled to rely upon it with a view to the introduction of the said Ollie Stoneman as a witness for him. Whether it was essential to that object, it is not material now to enquire.

The decree might also have been important to show that the deceased being no longer the husband of Ollie Stoneman, was a mere intruder upon the premises
892 *of the prisoner's family; having no pretense of a right to go there, and might be justly regarded and treated as a trespasser and an enemy. Indeed the divorce was necessary to explain the real status of the parties, and the circumstances which led to the homicide. The decree was therefore very properly admitted by the court to go to the jury. But it is very difficult to see upon what ground the preliminary proceedings which led to the decree could be regarded as evidence for any purpose. The commonwealth was not a party to that suit nor privy to it, and neither the recitals in the bill and answer, nor the depositions, were competent to establish the existence of any fact against her. It is very clear, therefore, that the court did not err in its rulings upon this point.

In the further progress of the trial, after the prisoner had proved by his sister Ollie Stoneman, that the deceased had made various threats against members of the family, and had on several occasions manifested a purpose to burn the dwelling, the attorney for the commonwealth asked the witness if she had not received messages from the deceased which contained no threats, to which the witness replied that she had. In answer to another question the witness said she had received a message from him through one Mr. Lundy. The attorney for the commonwealth then asked her to state what the message was. To which question and the witness answering the same, the prisoner objected; but the court overruled the objection, and directed the witness to answer. The bill of exceptions, however, does not state whether in fact the witness did answer the question. It may be that

she was unable to remember or repeat the message. And if she remembered and repeated it, we have no means of knowing what it was. The message may have 893 related *to some matter having no connection with the homicide. It may have been so entirely immaterial as to produce no impression on the mind of the jury. The bill of exceptions ought to have contained the answer of the witness, that this court may see whether it was material, and possibly may have affected the finding of the jury. The omission renders it impossible for us to consider the question raised by this bill of exceptions.

The evidence being concluded, the commonwealth's attorney and the prisoner by his counsel each asked for instructions, which will now be considered. The commonwealth's instruction asserts the proposition, that the bare fear that a man intends to commit a murder or other atrocious felony, however well grounded, unaccompanied by any overt act, indicative of any such intention, will not warrant killing the party by way of prevention. There must be some overt act indicative of imminent danger at the time.

The prisoner objected to this instruction, and instead thereof, he moved the court to give the jury five other instructions. The two first may be thrown out of view as they have no material bearing upon the point of controversy here. The third and fourth declare that if the jury believe from the evidence that the accused did the shooting under the immediate apprehension that his own life or that of some member of the family was in imminent danger, or under a reasonable apprehension that the deceased intended to burn the dwelling-house of his mother, or commit some other known felony, and that there was imminent danger of such design being carried into execution, then they must acquit the accused, although such danger was unreal.

These instructions, as also the first 894 and second already *alluded to, together with the commonwealth's instructions were given by the court, but the fifth asked for by the prisoner was refused. The learned counsel for the prisoner, in their petition and in their argument here, insisted that there is such conflict between the commonwealth's and the prisoner's instructions as was calculated to confuse and mislead the jury, and therefore both could not be consistently given. Upon a caref u examination it will be found that the instructions, so far from being in conflict, are in entire harmony with each other.

The prisoner's instructions, as has been seen, declare that the killing was justifiable if done under a reasonable apprehension of a felony, although it should afterwards appear that no felony was in fact intended. But the question still recurred, what is that reasonable apprehension upon which the party may act and safely kill his adversary? Is the bare fear of great bodily harm sufficient? If the slayer, alarmed by antecedent threats and menaces of danger, kills his adversary, when there is no real or apparent peril at the time, may he be justly said to have acted under such reasonable apprehension as justifies or excuses the homicide. Suppose, as was argued in this case, the prisoner honestly believed that the deceased was the mortal enemy of his family, that he intended to murder some member of it, or to burn the dwelling, and that this belief was impressed upon his mind both by the teaching of others and the previous conduct and threats of the deceased, would such a belief or apprehension justify the killing, although at the time there was no appearance of imminent danger, and no act or demonstration on the part of the deceased, indicating a present purpose to carry his designs into execution.

It is apparent that these questions 895 could not be *solved by the jury without the aid of the court. They involve difficult propositions of criminal law, in regard to which the courts have not been always unanimous; and it is not reasonable to suppose that twelve unprofessional minds, however intelligent, unaided by judicial explanation, could satisfactorily determine them.

This explanation is given, or sought to be given, by the commonwealth's instruction, and the jury are there told, that a bare fear that a man intends to commit a felony, however well grounded, will not warrant the killing the party by way of prevention. There must be some overt act indicative of imminent danger at the time. These considerations are sufficient to show there is not the slightest conflict in the instructions as given by the court, but that they simply assert mutually dependent parts of the same general proposition.

The learned counsel for the prisoner have very strenously insisted that the commonwealth's instruction is not sufficiently explicit; that the term "overt act," particularly, is an obscure one, and could not have been fully comprehended by the jury. It has been held in several cases, that an instruction may be so equivocal that to give or refuse it may mislead the jury, and thus it may have all the effect of an erroneous instruction. In such case it is the duty of the court to modify it so as to make it plain. But it would be difficult to maintain the proposition that a verdict, based upon an instruction, is to be set aside because its true import and meaning may not have been comprehended by the jury, when the instruction correctly expounds the law, and is expressed in terms familiar to the books and well understood by the judicial mind. According to this view, the appellate tribunal, in reviewing the decisions of the trying court, must have regard not merely to the legal propositions brought in 896 *question, but also to the supposed capacity of of the jury to comprehend them. It is impossible to foresee the mischief that will result from such a doctrine, as the same test must be applied to civil as to criminal cases.

In the case before us the jury did not

express any desire for an explanation of the meaning of the instruction. Had they required it, they would no doubt have asked for it. Throughout the proceedings in the court below it was at no time suggested that the jury did not fully understand the instruction; and I think we are bound to conclude they were not embarrassed by any difficulty of the kind.

The instruction presupposes a case of apparent as distinguished from real danger. It affirms that to render the killing justifiable, there must be some overt act; that is, some open manifestation of a purpose to make the attack. This is upon the idea that if the act or demonstration is concealed, it is impossible to say there is an apparent danger, which is the assumed ground of justification. As was said in Evans' Case, 44 Miss. R. 762, when we use the term apparent danger, we mean such overt actual demonstration, by conduct and acts indicative of a design to take life or to do great personal injury, as would make the killing apparently necessary to self-preservation.

The term "overt act" is used by the most approved writers on criminal law as descriptive of the facts and circumstances constituting excusable homicide in self defence upon apparent necessity. Thus, in Bishop on Criminal Law, 2 vol., § 627, it is said, although it is lawful for one to deprive of life another meditating his life, yet he must wait till some overt act is done in pursuance of the meditation. In other words, till the danger becomes imminent. The same expression occurs in Wharton Criminal Law, 2 vol., § 1027, and
897 *in East's Crim. Law, 272. Indeed, the entire instruction is taken almost literally from the latter work. East, however, lays it down that to render the killing justifiable there must be actual danger at the time, a limitation not found in the instruction.

This identical phrase is repeatedly used in the same connection by the courts of our sister states. I will cite only a few of the cases which are most accessible. They may be seen in Horigan and Thompson's Cases of Self Defence.

In Hinton's case, 24 Texas R. 454, it is declared, the belief that another intends to inflict on the party serious bodily harm must be founded in part, upon some overt act of the deceased showing that he has present intention to inflict the injury.

The Supreme court of Mississippi in Dyson's case, 26 Miss. R. 362, lays down the rule as follows: In order to justify the killing there must be some overt act indicating a present intention to kill the party or to do him some great bodily injury.

The danger of such design being accomplished must be imminent; that is to say, immediate, pressing and unavoidable at the time of the killing.

Mere fears of a design to commit a felony, or to do some great personal injury to the party, though honestly entertained, unaccompanied by any overt act indicating a design immediately to commit a felony or to do the injury, will not justify the killing. See also Nesby's case, 37 Miss. R. 327; Evans' case, 44 Miss. R. 762.

And so it has been held in North Carolina, in State v. Scott, 4 Ired. R. 409, that the belief that a person designs to kill me will not prevent my killing him from being murder unless he is making some attempt to execute his design, or at least is in
898 an apparent situation *to do so, and thereby induces me reasonably to think that he intends to do it immediately.

In Tennessee the Supreme court say: It is not enough that the defendant honestly entertains the opinion that his life is in danger, but he must believe the danger imminent. There must be some overt act indicative of a present purpose to take life. Williams' case, 3 Heiskill's R. 373.

Previous threats, or even acts of hostility, how violent soever, will not of themselves excuse the slayer, but there must be some words or overt act at the time clearly indicating a present purpose to do the injury. Riply case, 2 Head's R. 217.

In McLeod's case, 1 Hill, N. Y. R. 391, 419, Cowen, J., speaking for the Supreme court of New York, said: "Nothing is better defined, nor more familiar in any system of jurisprudence, than the juncture of circumstances which can alone tolerate the action of the law of necessity. A force which the defendant has the right to resist, must itself be within striking distance. It must be menacing, and apparently able to inflict physical injury, unless prevented by the resistance which he opposes."

These citations I think abundantly show not only that the phraseology of the commonwealth's instruction is entirely unexceptionable, but that it correctly states the principles of law governing the case. I have taken the trouble to examine with some care the numerous decisions bearing upon this perplexing question. The only cases I have been able to find, which apparently disapprove of the limitations contained in the instruction, are Granger's case, 5 Yerger's R. 459; Phillips' case, 2 Duvall's R. 328; Carieo's case, 8 Bush's R. 124; and Bohannon's case, 8 Bush's R. 411; the first named decided in Tennessee,
899 and the *three latter in Kentucky.

In Granger's case it was held that if a man, though in no danger of serious bodily harm, through fear, alarm or cowardice, kill another under the impression that great bodily injury is about to be inflicted upon him, it is neither murder nor manslaughter, but self-defence.

The Kentucky cases just cited, hold that where a person has once escaped from assassination, and his enemy still persists in his murderous designs, he is not obliged to retreat from or avoid his enemy, but may kill him wherever, in his lawful way, he may find him. These cases perhaps stand alone in opposition to the whole current of English and American authorities. They go far beyond Selfridge's Case, which at the time was regarded as pushing to its extreme limits the doctrine of justifiable hom-

icide upon apparent necessity. And yet it has been well said by an eminent authority, the illustration given by Chief Justice Parker in that case shows that he limited the application of the principle to cases where not only there is reasonable ground to believe that there is a design to destroy life, but where that reasonable belief is based not on surmises or inferences, however intelligent, but on an actual, immediate and physical attack from the assailant.

As has been already seen, the doctrine of Granger' Case has been long since repudiated or explained away in the state which gave it birth, and the decisions of the Tennessee courts are in entire accord with the current of English and American authorities. I do not deem it necessary to make any further citation from these authorities. All will acknowledge the great difficulty of laying down any general rule upon this subject equally applicable to all cases. But the general principle to be deduced from 900 the decisions is, that *while antecedent threats and acts of hostility may be looked to in connection with the present conduct of the assailant, as furnishing reasonable grounds of apprehension, such threats and acts are not, of themselves, sufficient to justify the party in slaying his adversary. The bare fear, however honestly and seriously entertained, will not constitute a justification. The right of resorting to force, upon the principle of self-defence, does not arise while the apprehended mischief exists in machination merely. There must be some act menacing present peril, or something in the attending circumstances indicative of a present purpose to make the apprehended attack. The act so done, or circumstances thus existing, must be of such a character as to afford a reasonable ground for believing there is a design to commit a felony, or to do some serious bodily harm, and imminent danger of carrying such design into immediate execution. Under these circumstances the killing will be justifiable, although it should afterwards turn out that appearances were deceptive, and there was in fact no design to commit a felony or to do great personal injury.

These principles of law apply with equal force to the defense of one's habitation. As a man may repel force by force in defense of his person or property against one who manifestly endeavors, by violence or surprise to commit a known felony upon either, and in these cases is not obliged to retreat but may pursue his adversary until he has freed himself from all danger; so with the habitation as with the person, the law does not require there should be actual danger to justify the killing. But it does require there should be reasonable ground for apprehending a design to commit a felony upon such habitation; and further, there should be reasonable ground also for 901 believing *the danger imminent that such design will be accomplished. The acts or circumstances constituting a proper foundation for a reasonable apprehension have been already discussed and explained. This branch of the case does not require further consideration. Besides the cases already cited, there are many others of equal weight and authority, fully sustaining the views here expressed. They may be found in Horrigan & Thompson's new work on cases of self defence. See also Nilberger's case, 3 Nash. C. C. R. 515.

Another point made by the counsel for the prisoner is the failure of the Circuit judge to explain to the jury what constituted an "overt act." I think, as will be hereafter seen, he did so tell them. It is sufficient now to say that he was not requested to make any such explanation. If he had been and had refused or declined to do so, the question would be before us in a very different aspect. It might, with equal propriety, be claimed, that it is incumbent upon the court to explain what is meant by "malice prepense" when informing the jury that its existence is essential in order to a conviction of murder in the first degree. That the prisoner's counsel fully comprehended the meaning of the phrase in its then connection, and desired no explanation of it, is apparent from the fact that they have also used the same expression in instruction No. 5, asked for by him and refused by the court.

The prisoner's third bill of exceptions, which was taken subsequent to the verdict, after setting out the commonwealth's instruction, and the five instructions asked for by the prisoner, and the objections thereto, states that the court sustained the objection made to instruction No. 5, and refused to give it, and overruled the objection of the accused to the instruction 902 asked *for by the attorney for the commonwealth, and gave the same to the jury with the following addition, to wit: But the jury will judge whether the conduct and acts of the deceased, at the time of the shooting, were of such a character as to create in the mind of the prisoner a reasonable fear that the deceased intended to commit murder or other felony, or do the prisoner great bodily harm.

The learned counsel for the prisoner insist that this addition is erroneous in restricting the jury to a consideration of the conduct and acts of the deceased at the time of the shooting, and in excluding his acts and declarations of a previous date, as justly affording, in connection with his conduct at the time, reasonable grounds for apprehending the committal of a felony by the deceased.

It must be borne in mind that the real point of controversy between the commonwealth and the accused was whether the prisoner, under an apprehension created by antecedent acts and declarations, might lawfully kill without some overt act on the part of the deceased, evincing a present purpose of carrying his threats into execution. The court held that such an act was essential to afford a ground of reasonable apprehension; and then, in explanation of what was meant by the expression "overt

act," the judge said, "the jury will judge whether the conduct and acts of the deceased, at the time of the shooting, were of such a character as to create in the mind of the prisoner a reasonable fear that the deceased intended to commit murder or other felony, or to do the prisoner great bodily harm." That the prisoner's counsel did not construe the observation of the judge as excluding from the jury the antecedent threats and acts of the deceased, is very apparent from the fact, that they, the
903 *counsel, made no objection to it at the time. The evidence of these threats and acts had been received without restriction or opposition. They were before the jury in the fullest manner, and they were no doubt considered and discussed in every possible aspect and bearing.

It is to be observed also that the motion for a new trial was not based upon the ground of a misdirection in this particular, but upon the ground that the refusal to give instruction No. 5, and the giving the commonwealth's instruction with the addition thereto, was calculated to mislead the jury. How mislead the jury? By excluding from their consideration proper evidence? By no means. But, in the language of the petition, because the instructions were calculated to induce the jury to come to the conclusion that the deceased had no intention to burn, as he had no torch in his hand, and no intention to take life, as he did not point his gun."

Throughout, the burden of the complaint has been, not that the jury were prohibited from considering previous threats and acts, but that they were told that these threats and acts were of themselves not sufficient to justify a reasonable apprehension, upon which the prisoner might act and safely kill his adversary.

This view becomes well nigh absolutely conclusive when we take into consideration the verbal explanation made by the judge to the jury, of the instructions as given. He stated to the jury, they would reconcile the instructions by understanding that apprehensions of danger, to justify a homicide, ought to be based, not upon surmises alone, but there ought to be coupled therewith some act on the part of the party from whom danger was apprehended, evidencing an intention to carry into execution his threats or designs.

904 *This language presupposes that the previous acts and declarations of the deceased were before the jury, and were to be considered by them in connection with what occurred at the time of the homicide, with a view to determine whether the prisoner acted under a reasonable apprehension of danger.

The learned counsel for the prisoner, as I understand, concede this; but they insist that as the instructions were in writing, the explanation ought also to have been in writing, that the jury might have both in their retirement.

There are several very satisfactory answers to this view. In the first place, if the jury carried the instructions with them into their retirement, or read them at all, after they were given—and upon these points we have no information—it is impossible to say they did not as fully and as clearly understand the explanation as the instructions. It is couched in plain and simple language, easily understood by the most ordinary mind, and we must presume was perfectly intelligible to the jury.

In the second place, the prisoner did not ask that the explanation should be reduced to writing. His counsel did not object to it because it was not in writing. They agreed it should be given as it was given, and they consented for the jury to retire without expressing the sightest dissatisfaction. These considerations would seem to be conclusive against the interference of this court for alleged error, arising under the third bill of exceptions.

There is a well established rule of law which applies as well to the verbal explanation in question as to the addition made by the judge to the instructions of which so much complaint has been made. If no objection be made to an instruction at
905 the time it is *given, and no exception taken nor the point saved, but objection be made for the first time after verdict, and in the form of a motion to set it aside, the court will consider whether, under all the circumstances, the party has been prejudiced by the instruction; and is of opinion that a just verdict has been rendered according to the law and the evidence, will not set it aside on account of that objection. Bull's case, 14 Gratt. 613; Read's case, 22 Gratt. 924.

No exception having been taken nor objection made at the time to the addition made by the judge to the instructions, or to the verbal explanation given by him, and such objection having been made in the form of a motion for a new trial only, it may be proper to consider whether the verdict is just and sustained by the evidence. Upon this point there would seem but little room for discussion.

The excuse given by the prisoner for the homicide is that the deceased had threatened to kill members of the family and burn the house; and the prisoner feared he was there for one of these purposes. At the time of the shooting the deceased was in the woods about one hundred yards from the dwelling occupied by the family of the prisoner. The deceased was easily seen. So far from making an effort particularly to conceal himself, he was making a noise, it seems, to attract the attention of his former wife, to whom it is very clear he was anxious to be reconciled. The hour of the day and all the surrounding circumstances ought to have satisfied the prisoner there was no imminent danger of the commission of a felony by the deceased. The prisoner having discovered the position of the deceased, walked to the rear of the smokehouse and deliberately shot him down. Being asked what he had shot at, he replied he had
906 shot at the *deceased. He was told

he ought not to have done so; he said he thought he was there to do some private injury to some of the family. This was all, and the subject was dismissed, as if the firing had been at some wild beast rather than a human being. It is true the prisoner expressed the opinion he had not hit the deceased; but still no effort was made to see whether the victim might not, perchance, be then bleeding and dying in the forest.

At that time there was residing upon the premises, within the enclosure, two families consisting then of three men and three adult females, a force more than sufficient to arrest the deceased, and place him in the custody of the officers of the law. In 1869, about the time of granting the divorce, the deceased had been arrested upon a peace warrant, at the instance of the mother of the prisoner, and required to give sureties for his good behaviour for a year. This was never renewed, and no effort ever thereafter made to renew it. Instead of resorting to a peaceful remedy of this sort, the prisoner adopts the dreadful alternative of taking life. The excuse for this is based purely upon antecedent acts and declarations of the deceased. It is true that the deceased had made threats against the prisoner and his family, if the evidence is to be believed; but it is clear he was not a violent or dangerous man. Nearly five years had elapsed since the divorce, which was the beginning of the hostility, and during all this time it does not appear that any member of the family had been assaulted or injured by him. At the time of the shooting, the deceased was sitting quietly in the bushes, unarmed, unresisting: not only making no attack or demonstration of a hostile character, but so situated as to be incapable of making it had he desired.

907 *It is a circumstance, worthy of observation, that all the threats and attempts to burn the dwelling are proved in every instance by the immediate family of the prisoner, and, what is very remarkable, they were never communicated to a human being outside of that family until after the homicide. It is very certain that the jury placed but little confidence in the testimony upon this point. If they believed it, they were satisfied there was nothing in the conduct of the deceased on that occasion calculated to produce the slightest apprehension that he was there with any felonious design, or that the danger was imminent or threatening, and could not have been met and provided against without peril or difficulty.

Every impartial mind must admit that either view is fully justified by the evidence. A careful examination of the facts certified, leads irresistibly to the conclusion that the killing was not upon any necessity, real or apparent, but upon a principle of deliberate revenge. The youth of the prisoner, it is very probable, only saved him from a severer fate.

For these reasons the judgment of the Circuit court must be affirmed.

Judgment affirmed.

BILLS OF EXCEPTION.

I. When Necessary.
- A. In General.
- B. Incompetent Witness.
- C. Pleas Rejected.
- D. Evidence Excluded.
- E. Instructions Refused.

II. When Bill of Exceptions Not Necessary.

III. When Objection Taken.

IV. Form of Bill.

V. Signature.
- A. Courts.
- B. Judges.
- C. Mandamus.
- D. Certificate of Clerk.
- E. Agreement of Counsel.

VI. Waiver of Objection.

VII. Verdict Contrary to Evidence.
- A. In General.
- B. Certificate of Facts.
- C. Rule of Decision When Facts Certified.
- D. Certificate of Evidence.
- E. Rule of Decision When Evidence Certified.
  - 1. Virginia Rule.
    - a. Old Rule and Exception Thereto.
    - b. Statutory Change of Rule.
    - c. Rule by Amended Statute.
    - d. Demurrer to Evidence.
  - 2. West Virginia Rule.
    - a. West Virginia Demurrer to Evidence.
- F. Number of New Trials Allowed.

I. WHEN NECESSARY.

A. In General.—When the bill of exceptions does not show that objection was made in the lower court the question cannot be raised in the appellate court. Law v. Law, 2 Gratt. 366; Roanoke, etc., Co. v. Karn, 80 Va. 589.

To obtain the benefit of an objection in the appellate court, a formal exception is necessary. And this is true though the bill of exceptions recites that the plaintiff objected to the ruling in question. Trumbo v. Street-Car Co., 89 Va. 780, 17 S. E. Rep. 124; Fry v. Leslie, 87 Va. 275, 12 S. E. Rep. 671; Ferguson v. Wills, 88 Va. 136, 13 S. E. Rep. 392; Magarity v. Shipman, 82 Va. 806, 7 S. E. Rep. 381; Roanoke, etc., Co. v. Karn & Hickson, 80 Va. 589; Whalen v. Com., 90 Va. 549, 19 S. E. Rep. 182; State v. Harr, 38 W. Va. 58, 17 S. E. Rep. 794; Halstead v. Horton, 38 W. Va. 727, 18 S. E. Rep. 953; Clark v. Com., 90 Va. 360, 18 S. E. Rep. 440.

When on a trial in the lower court verdict is for the plaintiff and defendant moves for and obtains a new trial, neither can in the appellate court call in question instructions given at the first trial: the plaintiff in error, because he secured a verdict; the defendant in error, because he did not object or except to the instructions. Marshall v. Valley R. Co., 97 Va. 655, 34 S. E. Rep. 455.

Issue Out of Chancery.—If the court, before which an issue out of chancery is tried, is dissatisfied with the verdict, this dissatisfaction must be certified on the record by the court; or if refused, it should be put on the record by a bill of exceptions; such bill is not to be supplied by affidavit, especially of counsel in the cause. Stannard v. Graves, 2 Call 310 [369]. See monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

Affidavit.—An affidavit filed in support of a motion for a continuance which was overruled, is not a part

of the record, unless it be made so by a bill of exceptions. Garland v. Bugg, 1 H. & M. 374.

Private Statutes.—The court does not take judicial notice of private acts of the legislature, (and hence a bill of exceptions is necessary to make such act part of the record). Legrand v. Hampden-Sidney College, 5 Munf. 324; Mayor v. Chapman, 4 H. & M. 270; Hairston v. Cole, 1 Rand. 461; Va. Code 1887, § 3328.

B. Incompetent Witness.—Notwithstanding some expressions in decided cases, which seem to concede that objections to the testimony of a witness on the ground of his incompetency may be properly made in this court although not made, or considered, or passed upon in the court below, we are of opinion, that such objections, unless first made in the court below, cannot be relied on here, for the reason that if allowed, parties might be taken by surprise. See opinion of MONCURE in Fant v. Miller & Mayhew, 17 Gratt. 187. Also, Beverley v. Brooke, 2 Leigh 425; Hord v. Colbert, 28 Gratt. 49, 54, 55, 56; Statham v. Ferguson, 25 Gratt. 28, 38; Simmons v. Simmons, 33 Gratt. 460; Baxter v. Moore, 5 Leigh 219; Caton v. Lenox, 5 Rand. 31.

Where the objection is to the *competency* of the witness, and the objection is sustained, the exception need not show what the party expects to prove by the rejected witness. Metz v. Snodgrass, 9 W. Va. 190; Martz v. Martz, 25 Gratt. 361; Fant v. Miller, 17 Gratt. 228; Statham v. Ferguson, 25 Gratt. 38.

Incompetent Juror.—If a prisoner does not know and could not by due diligence have known that one of the jury was a member of the grand jury, he may make that objection before any evidence is introduced, and probably at any time before verdict. Dilworth v. Com., 12 Gratt. 689; Simmons v. McConnell, 86 Va. 500, 10 S. E. Rep. 838.

C. Pleas Rejected.—A plea stricken out or rejected is no part of the record unless made so by a bill of exceptions. Fry v. Leslie, 87 Va. 274, 12 S. E. Rep. 671; Morrissett v. Com., 6 Gratt. 673; Trumbo v. Street-Car Co., 89 Va. 780, 17 S. E. Rep. 124; Herrington v. Harkins, 1 Rob. 591; White v. Toncray, 9 Leigh 347, 5 Gratt. 180; Lawrence v. Com., 86 Va. 579, 10 S. E. Rep. 840; Bowyer v. Hewitt, 2 Gratt. 193; Colley v. Sheppard, 31 Gratt. 322; Perry v. Horn, 22 W. Va. 381; Quesenberry v. Bldg., etc., Ass'n, 44 W. Va. 512, 30 S. E. Rep. 73; Shank v. Ravenswood, 43 W. Va. 242, 27 S. E. Rep. 223. But see W. Va. Code 1899, ch. 125, § 56, where it is said that plaintiff may "avail himself of the error committed in allowing such plea to be *filed*, without excepting to the decision of the court thereon." This does not apply when the plea is *rejected*. Hart v. B. & O. R. Co., 6 W. Va. 336; King v. Burdett, 12 W. Va. 694; First Nat. Bank v. Kimberlands, 16 W. Va. 557; Perry v. Horn, 22 W. Va. 381; Bank v. Showacre, 26 W. Va. 49.

Where a plea has been rejected, the appellate court will take it to have been rightly done unless defendant has excepted. White v. Toncray, 9 Leigh 347; Herrington v. Harkins, 1 Rob. 591; Morrissett v. Com., 6 Gratt. 673; Bowyer v. Hewitt, 2 Gratt. 193; Fry v. Leslie, 87 Va. 275, 12 S. E. Rep. 671; King v. Burdett, 12 W. Va. 688; Snodgrass v. Copenhaven, 34 W. Va. 171, 12 S. E. Rep. 695.

On rejection of a plea it is not necessary to set out the whole plea offered in the bill of exceptions provided the nature of the plea sufficiently appear. B. & O. R. Co. v. Bitner, 15 W. Va. 455.

West Virginia Rule.—In West Virginia when the order book expressly states the defendant's exception to the ruling of the court in rejecting a plea, no formal bill of exceptions is necessary. White v. Toncray, 9 Leigh 347, disapproved in this respect; Sweeney v. Baker, 13 W. Va. 212.

D. Evidence Excluded.—When the ground of complaint is that evidence or pleas have been improperly excluded, the bill of exceptions must show affirmatively the relevancy of the evidence and the propriety of the pleas. Otherwise the action of the court below will be presumed to have been right. Kimball v. Carter, 95 Va. 77, 27 S. E. Rep. 823; Lawrence v. Com., 86 Va. 579, 10 S. E. Rep. 840; Rowt v. Kile, 1 Leigh 216; Carpenter v. Utz, 4 Gratt. 270; Johnson v. Jennings, 10 Gratt. 1; Archer v. Archer, 8 Gratt. 539; Harman v. Lynchburg, 33 Gratt. 43; Triplett v. Goff, 83 Va. 788, 3 S. E. Rep. 525; Driver v. Hartman, 96 Va. 518, 31 S. E. Rep. 899; Valley Mut. Life Ass'n v. Teewalt, 79 Va. 421; Dejarnette v. Com., 75 Va. 867; Langhorne v. Com., 76 Va. 1012; Hooff v. Rollins, 5 W. Va. 540; Beirne v. Rosser, 26 Gratt. 547; Taylor v. Boughner, 16 W. Va. 327; Holleran v. Meisel, 91 Va 143, 21 S. E. Rep. 658; Atl. & D. Ry. Co. v. Reiger, 95 Va. 418, 28 S. E. Rep. 590; Jackson v. Com., 98 Va. 845, 36 S. E. Rep. 487; N. & W. R. Co. v. Ampey, 93 Va. 108, 25 S. E. Rep. 226.

A party complaining of the admission of improper evidence must state the facts in his bill of exceptions, from which it will appear affirmatively, to the appellate court that the evidence was improper. Carlton v. Mays, 8 W. Va. 246; Johnson v. Jennings, 10 Gratt. 1; Taylor v. Boughner, 16 W. Va. 327.

The relevancy of evidence excluded need not be shown in the bill of exceptions. If this relevancy otherwise sufficiently appears upon the record, this is sufficient. McDowell v. Crawford, 11 Gratt. 396; Archer v. Archer, 8 Gratt. 539; Valley Mut. Life Assoc. v. Teewalt, 79 Va. 421; Carpenter v. Utz, 4 Gratt. 272; Mitchell v. Baratta, 17 Gratt. 445.

Where parol evidence is excluded, which might be proper when connected with a record, it should appear that the record was offered. Otherwise, the rejection will be presumed proper. McDowell v. Burwell, 4 Rand. 317; Courtney v. Com., 5 Rand. 666.

E. Instructions Refused.—An exception to the action of the court in refusing an instruction must show the relevancy of such instruction. Hughes v. Frum, 41 W. Va. 445, 23 S. E. Rep. 604; Fitzhugh v. Fitzhugh, 11 Gratt. 300; Valley Ins. Co. v. Teewalt, 79 Va. 421; Powell v. Tarry, 77 Va. 260; Patton v. Nav. Co., 13 W. Va. 260; Shepherd v. McQuilkin, 2 W. Va. 90; Wash., etc., Tel. Co. v. Hobson, 15 Gratt. 134; Hooff v. Rollins, 5 W. Va. 540; Campbell v. Hughes, 12 W. Va. 183; Kinsley v. Monongalia County, 31 W. Va. 464, 7 S. E. Rep. 445; Lively v. Ballard, 2 W. Va. 496.

See monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192.

If, on refusal to give an instruction, the bill of exceptions does not show there was evidence to support such instruction the case will be presumed hypothetical and the action of the lower court sustained; but if another instruction is given in lieu of the one offered, the appellate court will examine both the instruction given and the one refused. Chapman v. Wilson, 1 Rob. 269.

When several instructions are asked and refused, and a general exception is taken to the refusal, if all the instructions are proper and should have been given, the exception is sufficient. Ocheltree v. McClung, 7 W. Va. 232, 257.

II. WHEN BILL OF EXCEPTIONS NOT NECESSARY.

Where the case is taken from the county court to the circuit court on a writ of error, a bill of excep-

tions to judgment of the circuit court is unnecessary. The circuit court, in such case. can only look at the record of the county court, and if it errs in its judgment, the error appearsby the record without a bill of exceptions. Morris v. Deane, 94 Va. 572, 27 S. E. Rep. 432.

No Jurisdiction.—On appeal from a decree in a chancery suit the objection that the lower court had no jurisdiction may be made for the first time in the appellate court. But otherwise when the objections are based on mere formal irregularities. Saunders v. Griggs, 81 Va. 506.

Caveat.—In a case of caveat all the facts agreed by the parties, or found by the jury, or if a jury is dispensed with, ascertained by the court, necessarily become and should be made a part of the record of the cause. Hamilton v. McNeil, 13 Gratt. 389.

Demurrer to Evidence.—Where there is a demurrer to the evidence, the evidence given in the cause on both sides is stated in the demurrer, and not set forth in a bill of exceptions. Berkeley v. C. & O. Ry. Co., 43 W. Va. 11, 26 S. E. Rep. 349; C. & O. Ry. Co. v. Sparrow, 98 Va. 630, 37 S. E. Rep. 302.

Depositions.—Where, on a trial at law, a deposition is introduced, taken regularly under a commission, and an objection is made to some of the questions as leading questions, the court cannot suppress the improper questions and answers, after the jury is sworn; but the objection should be made to the court before the jury is sworn; and the improper questions and answers suppressed. Jones v. Lucas, 1 Rand. 268; M'Candlish v. Edloe, 3 Gratt. 330. See monographic *note* on "Depositions" appended to Field v. Brown, 24 Gratt. 74.

Error Apparent on the Record.—Error apparent on the face of the record will be noticed in the appellate court though no bill of exceptions has been taken. Nutt v. Summers, 78 Va. 164; Murdock v. Herndon, 4 H. & M. 200; Strange v. Strange, 76 Va. 240; Cralle v. Cralle, 84 Va. 198, 6 S. E. Rep. 12; W. Va. Code 1899, ch. 131, § 9; Quaker City Nat. Bank v. Showacre, 26 W. Va. 48; Spence v. Robinson, 36 W. Va. 313, 13 S. E. Rep. 1004; Hughes v. Frum, 41 W. Va. 445, 23 S. E. Rep. 604.

Where the absence of a necessary party appears by the record, the objection therefor may be made for the first time in the appellate court. Armentrout v. Gibbons, 25 Gratt. 371; Clayton v. Henley, 32 Gratt. 65; Iron Co. v. Tayloe, 79 Va. 671; Hinton v. Bland, 81 Va. 593; Burlew v. Quarrier, 16 W. Va. 108.

III. WHEN OBJECTION TAKEN.

It must appear from the record that a point decided by the court has been saved before the jury retires; though the exception may be prepared, and may be signed by the judge, either during the trial or after it is ended, during the same term. If this appear from the whole record, it is sufficient, though it is not expressly stated in the bill of exceptions: but if it does not so appear from the record, the appellate court cannot review the judgment of the court below upon the point. W. & N. O. Tel. Co. v. Hobson, 15 Gratt. 122; Fawcett v. Ry. Co., 24 W. Va. 755; Powell v. Tarry, 77 Va. 250; Martz v. Martz, 26 Gratt. 361; Peery v. Peery, 26 Gratt. 320, and *note*; Page v. Clopton, 30 Gratt. 415, and *note*; Whalen v. Com., 90 Va. 544, 19 S. E. Rep. 182; Colgin v. Henley, 6 Leigh 86; Price v. Com., 77 Va. 396; Danville Bank v. Waddill, 31 Gratt. 469, and *note*; Jones v. Lucas, 1 Rand. 268; Lamberts v. Cooper, 29 Gratt. 61; Lawrence v. Com., 86 Va. 573, 10 S. E. Rep. 840; Cunningham v. Porterfield, 2 W. Va. 447; Mitchell v. Com., 75 Va. 865; Sammons v. Hawvers, 25 W. Va. 678; Wickes v. B. & O. R. Co., 14 W. Va. 165; Bull v. Com., 14 Gratt. 630; Bransford v. Karn, 87 Va. 242, 12 S. E. Rep. 404; Thornton v. Com., 24 Gratt. 672; Reinhard v. Baker, 13 W. Va. 805; Perry v. Horn, 22 W. Va. 381; Hill v. Proctor, 10 W. Va. 59; State v. Seabright, 15 W. Va. 590; Wustland v. Potterfield, 9 W. Va. 438; Liberty Bank v. Campbell, 75 Va. 534; Coleman v. Lyne, 4 Rand. 454; Strange v. Strange, 76 Va. 240; Nickels v. Kane, 82 Va. 309; Simmons v. Simmons, 33 Gratt. 451, and *note*; Shipman v. Fletcher, 83 Va. 349, 2 S. E. Rep. 198; Cralle v. Cralle, 84 Va. 198, 6 S. E. Rep. 12; Core v. Marple, 24 W. Va. 355; Tayloe v. Smith, 10 Gratt. 557; Miller v. Holcombe, 9 Gratt. 665; Dickenson v. Davis, 2 Leigh [401] 434; Tarr v. Ravenscroft, 12 Gratt. 651; Hill v. Bowyer, 18 Gratt. 380; Vaiden v. Stubblefield, 28 Gratt. 153; Williams v. Com., 93 Va. 773, 25 S. E. Rep. 659; Robinson v. Pitzer, 3 W. Va. 336; Thompson v. Boggs, 8 W. Va. 63; Gilmer v. Sydenstricker, 42 W. Va. 52, 24 S. E. Rep. 566; Dimmey v. Railroad Co., 27 W. Va. 51; Greenbrier. etc., v. Ocheltree, 44 W. Va. 626, 30 S. E. Rep. 78; Nadenbousch v. Sharer, 2 W. Va. 285; Tunis Lumber Co. v. Dennis Lumber Co., 97 Va. 682, 34 S. E. Rep. 613; Bank v. Preston, 97 Va. 222, 33 S. E. Rep. 546; Todd v. Sykes, 97 Va. 143, 33 S. E. Rep. 517; Shacklett v. Roller, 97 Va. 639, 34 S. E. Rep. 492.

But the rule as to notice of intention to take an exception, or of taking it at the time of the ruling, does not apply to a case of judgment for a fine imposed for alleged contempt, when the exceptant and the judge are the only parties concerned. The decision seems to be based on the fact that very little time had elapsed and the facts were still fresh in the mind of the judge. Page v. Clopton, 30 Gratt. 415.

Improper Remarks of Counsel.—When counsel makes improper remarks the exceptions thereto should be taken before the verdict is rendered. Price v. Com., 77 Va. 393; N. & W. R. Co. v. Shott, 92 Va. 48, 22 S. E. Rep. 811.

Commissioner's Report.—There is no rule of law or practice which would forbid or prevent a court, so long as it retained a cause under its consideration, from receiving and entertaining an exception to a commissioner's report, even after the same had been confirmed, if it should be clearly shown that the report, if carried out, would be productive of injustice and wrong. Wooding v. Bradley, 76 Va. 616; Foster v. Sutton, 4 H. & M. 401; Arnold v. Slaughter, 36 W. Va. 589, 15 S. E. Rep. 250.

Need Not Stop Trial.—Whether the court shall allow the trial to be stopped to enable counsel to prepare a bill of exceptions, is a matter within its discretion. Jones v. Com., 87 Va. 69, 12 S. E. Rep. 226; Nadenbousch v. Sharer, 2 W. Va. 285.

Exceptions to Answer.—When exceptions are filed to an answer, they must be disposed of, before any further proceeding can take place in the cause. Clarke v. Tinsley, 4 Rand. 250; Coleman v. Lyne, 4 Rand. 454; Burlew v. Quarrier, 16 W. Va. 108; First Nat. Bank v. Parsons, 42 W. Va. 137, 24 S. E. Rep. 554; Hartman v. Evans, 38 W. Va. 669, 18 S. E. Rep. 810; W. Va. Code 1899, ch. 125, § 54.

IV. FORM OF BILL.

If a party objects to the introduction of a deposition as evidence, for any irregularity in taking it, his exception to the opinion of the court overruling the objection, must state the grounds of the ojection. Barker v. Barker, 2 Gratt. 344; Richardson v. Donehoo, 16 W. Va. 685; Harriman v.

Brown, 8 Leigh 697; Dillard v. Collins, 25 Gratt. 344; Harman v. City of Lynchburg, 33 Gratt. 43; Baldwin v. Baldwin, 76 Va. 345; Crockett v. Sexton, 29 Gratt. 55; Janey v. Blake, 8 Leigh 88; Scott v. Trents, 4 H. & M. 356; Gregory v. Ohio River R. Co., 37 W. Va. 606, 16 S. E. Rep. 819.

Errors Not Mentioned in Bill.—Where exceptions are taken to specific points, the appellate court will examine no points but such as were presented to and decided by the court below, though from the matters stated in the bill of exceptions, there be apparently other points that might have been made. Newsum v. Newsum, 1 Leigh 86.

On a bill of exceptions to the opinion of the court below refusing to grant a continuance, the appellate court ought not to reverse the judgment, for a ground of continuance not stated in such exceptions. Ross v. Norvell, 3 Munf. 170. See monographic *note* on "Continuances" appended to Harman v. Howe, 27 Gratt. 676.

An exception assigning as a reason therefor a claim under part of act of assembly must be considered as waiving any claim under the other part of said act, such other part not being mentioned in the bill. Garnett v. Sam & Phillis, 5 Munf. 542.

Several Exceptions—One Bill.—Whether one exception, or more than one, certified in one and the same "bill" is not material, if each, where there is more than one, is therein distinctly set forth and not confused with others therein contained. Brown v. Hall, 85 Va. 146, 7 S. E. Rep. 182; N. & W. R. Co. v. Shott, 92 Va. 34, 22 S. E. Rep. 811; Snyder v. P., C. & St. L. Ry. Co., 11 W. Va. 14.

There may be more then one exception embraced in one bill but each exception should set forth clearly and distinctly the ground of objection relied on, so that there will be no confusion. Brown v. Hall, 85 Va. 146, 7 S. E. Rep. 182; N. & W. R. Co. v. Shott, 92 Va. 47, 22 S. E. Rep. 811; Holleran v. Meisel, 91 Va. 143, 21 S. E. Rep. 658.

Bill Uncertain.—Where the bill of exceptions is uncertain, so that the ground of rejecting the evidence cannot be determined the judgment will be reversed and the cause remanded for a new trial. Raines v. Philips, 1 Leigh 483; Barrett v. Tazewell, 1 Call [215] 187; McVeigh v. Allen, 29 Gratt. 588; Hairston v. Cole, 1 Rand. 461; Fowler v. Lee, 4 Munf. 373; Thompson v. Cumming, 2 Leigh 321; McDowell v. Crawford, 11 Gratt. 398; Lynch v. Thomas, 3 Leigh 689; Brooke v. Young, 3 Rand. 106; Town of Suffolk v. Parker, 79 Va. 665; Bowyer v. Chesnut, 4 Leigh 1; Powell v. Tarry, 77 Va. 259; Beattie v. Tabb, 2 Munf. 254.

By the later decisions, it is held that in such case the verdict must be affirmed. Wright v. Smith, 81 Va. 777; Roanoke, etc., Co. v. Karn, 80 Va. 593; Dawson v. Pritchard, 5 W. Va. 18; Patton v. Nav. Co., 13 W. Va. 261; Marion Machine Works v. Craig, 18 W. Va. 559; Moses v. Old Dom, etc., Co., 82 Va. 19; McDowell v. Crawford, 11 Gratt. 387; Joslyn v. Bank, 86 Va. 289, 10 S. E. Rep. 166; Harman v. City of Lynchburg, 33 Gratt. 43.

A bill of exceptions should be so framed as to make the error apparent: otherwise the exception will generally be unavailing. Harman v. City of Lynchburg, 33 Gratt. 37, and *note*; N. & W. R. Co. v. Shott, 92 Va. 34, 22 S. E. Rep. 811.

If the case agreed be too imperfectly stated to sustain a judgment, it will be set aside and new proceedings ordered. Brewer v. Opie, 1 Call [212] 184.

Bill Frivolous.—A bill of exceptions obviously frivolous will not prevent the court from taking up the case as a delay case. Fox v. Govan, 4 H. & M. 156.

Reference to Another Bill.—One bill of exceptions cannot be used to supply an omission of fact in another unless such bill be referred to in the other. Brooke v. Young, 3 Rand. 106; Hall v. Hall, 12 W. Va. 2; Spencer v. Pilcher, 8 Leigh 565; Corder v. Talbott, 14 W. Va. 286; Perkins v. Hawkins, 9 Gratt. 649; Crawford v. Jarrett, 2 Leigh 639; Dishazer v. Maitland, 12 Leigh 544 [529]; Gunn v. Ohio River R. Co., 37 W. Va. 421, 16 S. E. Rep. 628; Richardson v. Donehoo, 16 W. Va. 687; Craig v. Sebrell, 9 Gratt. 131.

Although it is generally true that the evidence set out in one bill of exceptions, taken in the progress of a trial, cannot be looked to in considering another, yet where a bill of exception is taken after all the evidence has been submitted to the jury, and the bill of exception purports to set out all the evidence, it seems that evidence set out in this bill of exception may be looked to in considering the question raised in another bill taken in the progress of the trial. And this, though the evidence had not been introduced when the first bill of exception was taken. Perkins v. Hawkins, 9 Gratt. 650; Corder v. Talbott, 14 W. Va. 286; Hall v. Hall, 12 W. Va. 2; Moore v. City of Richmond, 85 Va. 538, 8 S. E. Rep. 387; Acts of Assembly 1901, p. 286; Klinkler v. Wheeling, etc., Co., 43 W. Va. 219, 27 S. E. Rep. 237.

Acts of 1901, p. 286, provide that "Any evidence in the record may be considered by the appellate courts if certified in any bill of exceptions, as though certified in each.

Motion for New Trial.—A foundation must be laid for a bill of exceptions by a motion for a new trial and the refusal to grant such motion should be excepted to. Newberry v. Williams, 89 Va. 298, 15 S. E. Rep. 865; Guerrant v. Tinder, Gilmer 41; Austin v. Jones, Gilmer 341; Danks v. Rodeheaver, 26 W. Va. 274; Core v. Marple, 24 W. Va. 354; State v. Phares, 24 W. Va. 657-8; Sammons v. Hawvers, 25 W. Va. 678; State v. Rollins, 31 W. Va. 363, 6 S. E. Rep. 923; Brown v. Brown, 29 W. Va. 777, 2 S. E. Rep. 808; Arthur v. Ingels, 34 W. Va. 639, 12 S. E. Rep. 872; Magarity v. Shipman, 83 Va. 806, 7 S. E. Rep. 281.

Pollard's Supp. 1900, § 3385a provides that, "The failure to make a motion for a new trial in any case in which an appeal, writ of error, or *supersedeas* lies to a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record."

V. SIGNATURE.

A. Courts.

County Court.—Before 1819 the county court was not obliged to sign a bill of exceptions in a criminal cause. Although a county court signs bills of exceptions in a criminal cause, the bills of exception are not thereby a part of the record. Case v. Com., 1 Va. Cas. 263; Com. v. Hickerson, 2 Va. Cas. 60. See First Revised Code 1819, ch. 133; W. Va. Code 1899, ch. 39, § 48.

District Court.—The district court may make a rule upon the justices of the county court to show cause why a writ of *mandamus* should not issue, commanding them to sign and seal a bill of exceptions. Porter v. Harris, 4 Call 485; Code 1887, § 4050.

Commissioners.—Any candidate voted for at said election has the right, by himself or attorney, to be present at the count of the votes, and request the commissioners to give him bills of exceptions to their rulings against him; and he thus becomes a party to the proceedings, and has the right to have the rulings of such commissioners reviewed on *cer-*

tiorari. Alderson v. Commissioners, 31 W. Va. 633, 8 S. E. Rep. 274.

A provision is made in W. Va. Code 1899, ch. 110, § 4 allowing certificate of evidence and exceptions in cases under § 3 of that chapter. Board of Education v. Hopkins, 19 W. Va. 84; Alderson v. Commissioners, 32 W. Va. 454, 9 S. E. Rep. 868; Natural Gas. Co. v. Healy, 33 W. Va. 102, 10 S. E. Rep. 56; Bee v. Seaman, 36 W. Va. 381, 15 S. E. Rep. 173; Womer v. Ravenswood, 37 W. Va. 287, 16 S. E. Rep. 488; Arnold v. Lewis Co. Ct., 38 W. Va. 142, 18 S. E. Rep. 476; Grafton v. Davisson, 45 W. Va. 12, 29 S. E. Rep. 1028.

B. Judges.—A bill of exceptions without the signature of the judge is fatally defective; for without his signature it does not become a part of the record. Com. v. Hall, 8 W. Va. 259; Henry v. Davis, 13 W. Va. 230; Shanks v. Fenwick, 2 Munf. 478; Adkins v. Ins. Co., 45 W. Va. 384, 32 S. E. Rep. 194.

Exceptions to be of any avail, must not only be drawn up so as to distinctly present the ruling objected to, but must be signed by the judge. The mere unauthorized entry by the clerk on the minutes or order book that the prisoner excepted is not sufficient. Clark v. Com., 90 Va. 360, 18 S. E. Rep. 440; Roanoke, etc., Co. v. Karn, 80 Va. 589; Trumbo v. Street-Car Co., 89 Va. 780, 17 S. E. Rep. 124; Fry v. Leslie, 87 Va. 269, 12 S. E. Rep. 671; Whalen v. Com., 90 Va. 544, 19 S. E. Rep. 182. See monographic *note* on "Issue Out of Chancery" appended to Lavell v. Gold, 25 Gratt. 473.

A bill of exceptions to the opinion of the court (two judges being present) is not sufficient unless signed by both judges. Gordon v. Browne, 3 H. & M. 219.

A paper purporting to be a bill of exceptions and copied into the record as such, is not to be regarded as part of the record unless made so by some order or memorandum of the trial court entered on the order book. Bank v. Showacre, 26 W. Va. 53; Winters v. Null, 31 W. Va. 450, 7 S. E. Rep. 443; Phelps v. Smith, 16 W. Va. 522; Adkins v. Ins. Co., 45 W. Va. 384, 32 S. E. Rep. 194.

When Sign.—In the absence of statute a court has no authority to sign bills of exceptions in a cause after the end of the term at which final judgment is rendered. Winston v. Giles, 27 Gratt. 530, and *note*: Va., etc., Co. v. Rich Patch Iron Co., 98 Va. 700, 37 S. E. Rep. 280.

If an exception to the ruling of the court excluding a witness, is taken at the time, the bill of exceptions may be prepared, signed and settled after verdict and judgment; but this must be done before the end of the term at which final judgment is rendered. Martz v. Martz, 25 Gratt. 361. See Acts 1901, p. 186. See W. Va. Code 1899, ch. 131, § 9; Alderson v. Cunningham, 33 W. Va. 607, 11 S. E. Rep. 76.

In cases where it may be important to give time until the next term to prepare the bill of exceptions, the case should be kept open, and the judgment should not be entered until the next term. Winston v. Giles, 27 Gratt. 530; Welty v. Campbell, 37 W. Va. 797, 17 S. E. Rep. 312; Va., etc., Co. v. Rich Patch Iron Co., 98 Va. 700, 37 S. E. Rep. 280; Hudgins v. Simon, 94 Va. 659, 27 S. E. Rep. 606.

A bill of exceptions or certificate of facts upon trial, not made before the close of the term at which final judgment is rendered, nor within thirty days after its close, is no part of the record, and cannot be considered in the appellate court. State v. McGlumphy, 37 W. Va. 805, 17 S. E. Rep. 315.

A bill of exceptions cannot be properly or regularly added to the record of a case after that case has been ended by a final judgment rendered therein. Winston v. Giles, 27 Gratt. 534; Moses v. Cromwell, 78 Va. 673; Town of Suffolk v. Parker, 79 Va. 660; Bank v. Waddill, 31 Gratt. 477; Jones v. Com., 87 Va. 63, 12 S. E. Rep. 226; Wickes v. B. & O. R. Co., 14 W. Va. 166. See Acts of 1901, p. 186, amending § 3385 of Code of Va.

Virginia Statute.—Acts of 1901, p. 186, amending § 3385 provide that: "Any bill of exceptions may be tendered the judge and signed by him, either during the term at which the opinion of the court is amended, to which exception is taken, or in vacation, within thirty days after the end of such term, or at such other time as the parties, by consent entered of record, may agree upon." See also, W. Va. Code 1899, ch. 131, § 9.

Where a judgment is rendered in a case, and the court allows thirty days under the statute to make up and obtain from the judge, in vacation, bills of exception, such bills of exception, when signed by the judge, must be certified to the clerk of the court, who must enter them upon the order book of such court before they become a part of the record in the case. Griffith v. Corrothers, 42 W. Va. 59, 24 S. E. Rep. 569.

Writ of Error.—A judge in vacation may not award a writ of error in a criminal case. Baker v. Com., 2 Va. Cas. 353.

C. Mandamus.—A writ of *mandamus* will lie to compel the judge to sign bills of exception in a case, if "the truth of the case be fairly stated therein." Page v. Clopton, 30 Gratt. 415; Taliaferro v. Franklin, 1 Gratt. 332; Shanks & McRae v. Fenwick, 2 Munf. 478; Jackson v. Henderson, 3 Leigh 197; Vaughan v. Doe, *ex dem.* Green, 1 Leigh 287.

A judge will not be compelled by *mandamus* to sign a particular bill of exceptions, when he alleges in his answer to a rule that the bill does not truly state the facts. Cummings v. Armstrong, 34 W. Va. 1, 11 S. E. Rep. 742.

When a bill of exceptions is tendered which does not fairly state the truth of the case, it is the duty of the court, with the aid of counsel, to settle the bill, and when settled to sign it; and if the court refuses to do this, *mandamus* will lie to compel it to do so. Poteet v. Co. Commissioners, 30 W. Va. 58, 3 S. E. Rep. 97; Collins v. Christian, 92 Va. 731, 24 S. E. Rep. 472; Douglass v. Loomis, 5 W. Va. 542.

D. Certificate of Clerk.—A paper which is not a part of the record cannot be made so by the certificate of the clerk. Offtendinger v. Ford, 86 Va. 917, 12 S. E. Rep. 1; Roanoke, etc., Co. v. Karn, 80 Va. 589; Magarity v. Shipman, 82 Va. 806, 7 S. E. Rep. 381; White v. Toncray, 9 Leigh 352; Bowyer v. Chesnut, 4 Leigh 1; Cunningham v. Mitchell, 4 Rand. 189; Pegram v. Stortz, 31 W. Va. 220, 6 S. E. Rep. 485.

E. Agreement of Counsel.—A stipulation entered into between counsel for the commonwealth and the accused by virtue of which objections noted during the course of the trial might be taken advantage of in the appellate court as though presented in formal bills of exceptions is of no avail. The appellate court will not consent that the labor and responsibility shall be imposed upon them of searching through the record to discover the objection made in the trial court. Kibler v. Com., 94 Va. 804, 26 S. E. Rep. 858; Marion Machine Works v. Craig, 18 W. Va. 559.

Counsel cannot by agreement present issues in the appellate court which were not tried in the lower court. The appellate court must review the case and affirm or refuse it, as appears by the

record to be right. Marion Machine Works v. Craig, 18 W. Va. 567.

VI. WAIVER OF OBJECTION.

A defendant, who, after the plaintiff has given in his evidence in chief, and rested his case, then moves the court to instruct the jury to render a verdict for defendant, but, the motion being overruled, goes on with his case, will be held to have waived his exception taken to such ruling of the court. Poling v. Ohio River R. Co., 38 W. Va. 645, 18 S. E. Rep. 782.

When the court rules that certain evidence is illegal and promises to hear a motion later to exclude it, if no exception is taken and no further attention called to the matter, the objection must be deemed waived. N. & W. R. Co. v. Anderson, 90 Va. 1, 17 S. E. Rep. 757.

One defendant, F, files an exception to the commissioner's report which is relied on by R, another defendant; but at the hearing in the court below, this exception is waived. The exception having been waived, R cannot rely upon it in the appellate court. Robertson v. Trigg, 32 Gratt. 76.

When No Waiver.—Where the plaintiff objects to the reception of a plea and excepts, the exception is not waived by his subsequently taking issue in fact on the plea. Campbell v. Montgomery, 1 Rob. 392; W. Va. Code 1899, ch. 125, § 56.

When exception is taken to the admission of evidence, it is not waived by a subsequent demurrer to all the evidence. Dishazer v. Mitland, 12 Leigh 524.

An objection to the competency of a party as a witness is written at the commencement of the deposition; the objection is not waived by cross-examination. Neilson v. Bowman, 29 Gratt. 732.

A failure to except to the competency of a witness until four questions have been proponnded to him on his examination in chief is no waiver of the right to make such exception. Hord v. Colbert, 28 Gratt. 49; Warwick v. Warwick, 31 Gratt. 77.

VII. VERDICT CONTRARY TO EVIDENCE.

A. In General.—On exception for refusal to grant a new trial because the verdict is contrary to the evidence, the decision of the lower court should be affirmed unless it plainly appears that it is wrong. Blair v. Wilson, 28 Gratt. 175; Pryor's Case, 27 Gratt. 1009; Steptoe v. Flood, 31 Gratt. 342; Patteson v. Ford, 2 Gratt. 18; Grayson's Case, 6 Gratt. 712; Kate's Case, 17 Gratt. 561; Oneale's Case, 17 Gratt. 582; Kemp's Case, 18 Gratt. 977; Blosser v. Harshbarger, 21 Gratt. 216; Miller v. Ins. Co., 12 W. Va. 117; Kuykendall v. Ruckman, 2 W. Va. 332; Ramsburg v. Erb, 16 W. Va. 777; Todd v. Gates, 20 W. Va. 464; Whitehurst v. Com., 79 Va. 556; Ball v. Cox, 29 W. Va. 407, 1 S. E. Rep. 673; Russell v. Com., 78 Va. 400; Mitchell v. Baratta, 17 Gratt. 453; O'Bannon v. Saunders, 24 Gratt. 142; Kimball v. Friend, 95 Va. 144, 27 S. E. Rep. 901; Jones v. Rixey, 79 Va. 656; Lawrence v. Com., 30 Gratt. 856; Coleman v. Com., 84 Va. 8, 3 S. E. Rep. 878; Gravely v. Com., 86 Va. 400, 10 S. E. Rep. 431; Bristow v. Com., 15 Gratt. 646; Roanoke v. Shull, 97 Va. 419, 34 S. E. Rep. 34; Smith v. Com., 21 Gratt. 813; Kemp's Case, 18 Gratt. 977; Richmond, etc., R. Co. v. Snead, 19 Gratt. 355; Swisher v. Com., 26 Gratt. 974; Nicholas v. Com., 91 Va. 755, 21 S. E. Rep. 364; Priest v. Whitacre, 78 Va. 158.

If evidence is held admissible for two reasons the judgment will be affirmed if either of the reasons are sufficient. Kincanon v. Com., 6 Leigh 611.

Where, on a trial by jury, the evidence adduced does not appear on the record, all must be presumed to have been legal and right. Ford v. Gardner, 1 H. & M. 72; Wise v. Postlewait, 3 W. Va. 452; Paul v. Paul, 2 H. & M. 533; Dawson v. Pritchard, 5 W. Va. 18; Carlton v. Mays, 8 W. Va. 245; Ball v. Cox, 29 W. Va. 407, 1 S. E. Rep. 673; Kuykendall v. Ruckman, 2 W. Va. 332.

B. Certificate of Facts.—On a motion for a new trial on the ground that the verdict is contrary to the evidence, the bill should state the facts and not the evidence. Harnsbarger v. Kinney, 13 Gratt. 511; Harnsbarger v. Kinney, 6 Gratt. 287; Gimmi v. Cullen, 20 Gratt. 439; McClung v. Ervin, 23 Gratt. 519; Jackson v. Henderson, 3 Leigh 197; Bennett v. Hardaway, 6 Munf. 125; Forkner v. Stuart, 6 Gratt. 197; Mays v. Callison, 6 Leigh 231; Green v. Ashby, 6 Leigh 135; Rohr v. Davis, 9 Leigh 30; Ewing v. Ewing, 2 Leigh 337; Brooks v. Calloway, 12 Leigh 480 [466]; Schwarzbach v. Pro Union, 25 W. Va. 668; Pryor v. Kuhn, 12 Gratt. 615; Dusenberry v. Alford, 5 W. Va. 115; Morgan v. Fleming, 24 W. Va. 186; Seibright v. State, 2 W. Va. 591; Wustland v. Potterfield, 9 W. Va. 488; Keys v. M'Fatridge, 6 Munf. 18; Fawcett v. Ry. Co., 24 W. Va. 755; Farish v. Reigle, 11 Gratt. 706; Vaughan v. Green, 1 Leigh 295; Carrington v. Bennett, 1 Leigh 340; Willard v. Overseers, 9 Gratt. 139; Deems v. Quarrier, 3 Rand. 475.

Certify All the Facts.—On refusal to set aside the verdict as contrary to the evidence, if the facts are certified the bill of exceptions should show that they are *all* the facts; if the evidence is certified it should appear that *all* the evidence is certified. Otherwise the action of the lower court must be presumed to be right. Hunter v. Stewart, 23 W. Va. 549; McArter v. Grigsby, 84 Va. 159, 4 S. E. Rep. 369; Adams v. Hays, 86 Va. 158, 9 S. E. Rep. 1019; Smith v. Walker, 1 Call 24 [28]; Edgell v. Conaway, 24 W. Va. 747; Willard v. Overseers, 9 Gratt. 139.

C. Rule of Decision When Facts Certified.—Where the *facts* certified to the appellate court present but a naked question of *law* that court will not be influenced by the opinion of the jury or inferior court as to the *law* of the case, and will grant a new trial or not according to its own opinion of the law arising from the facts stated. Fisher v. Vanmeter, 9 Leigh 18; Slaughter v. Tutt, 12 Leigh 151 [147].

But in many cases the propriety of the verdict may rest on inferences properly drawn by the jury from the facts found arising out of incidents at the trial which may be omitted, or could not easily be committed to the court's certificate. In such cases a new trial should not be granted "unless in a case of plain deviation, and not in a doubtful one, merely because the court, if of the jury, would have given a different verdict." JUDGE TUCKER in Slaughter v. Tutt, 12 Leigh 151 [147]; Carrington v. Bennett, 1 Leigh 340; Hilb v. Peyton, 22 Gratt. 569; Brugh v. Shanks, 5 Leigh 649 [598]; Harnsbarger v. Kinney, 6 Gratt. 287; Patteson v. Ford, 2 Gratt. 23; Mitchell v. Baratta, 17 Gratt. 453; Steptoe v. Flood, 31 Gratt. 323; Mahon v. Johnston, 7 Leigh 317; Richmond, etc., R. Co. v. Snead, 19 Gratt. 354; Calbreath v. Va., etc., Co., 22 Gratt. 697; Collins v. Loftus, 10 Leigh 5; Hill v. Com., 2 Gratt. 594; Blair v. Wilson, 28 Gratt. 165; Goode v. Love, 4 Leigh 635; Caldwell v. Craig, 21 Gratt. 136; Blosser v. Harshbarger, 21 Gratt. 214; Muse v. Stern, 82 Va. 39; Grayson's Case, 6 Gratt. 712; Montague v. Allan, 78 Va. 598.

Though the bill of exceptions purports to certify the facts, if the facts are contradictory it will be evident that such bill really certifies the evidence and the court must proceed accordingly. Pruner v. Com., 82 Va. 115; Read v. Com., 22 Gratt. 924; Scott's

Case, 77 Va. 344; Carrington v. Bennett, 1 Leigh 340; Ewing v. Ewing, 2 Leigh 337; McClung v. Ervin, 22 Gratt. 519.

If the bill of exceptions purports to certify the evidence but it appears that the court meant to certify the whole as facts proved, the bill of exceptions is well taken. Mays v. Callison, 6 Leigh 230; Ewing v. Ewing, 2 Leigh 337; Rohr v. Davis, 9 Leigh 30; McClung v. Ervin, 22 Gratt. 519.

Refusal to Certify Facts.—The judge below is not bound to certify the *facts* proved on the trial at law, on refusing to grant a new trial, where the case depends upon the credibility of the witnesses, or the evidence is conflicting. Taliaferro v. Franklin, 1 Gratt. 332; Brooks v. Calloway, 12 Leigh [466] 480; Vaughan v. Green, 1 Leigh [287] 316; Caldwell v. Craig, 21 Gratt. 136; Patteson v. Ford, 2 Gratt. 18.

Where the evidence is contradictory, the court may refuse to state either the evidence or the facts proved. It is enough to state that the evidence was contradictory. Grayson v. Com., 6 Gratt. 712; Renick v. Correll, 4 W. Va. 627.

The cases *supra* are overruled by the later decisions. When the evidence conflicts, the court may refuse to certify the facts proved: but must certify the evidence on motion of any suitor. Powell v. Tarry, 77 Va. 250; Dillard & McCorkle v. Dunlop, 83 Va. 763, 3 S. E. Rep. 383; Vaiden v. Com., 12 Gratt. 727; Bull v. Com., 14 Gratt. 613; Caldwell v. Craig, 21 Gratt. 136; Blosser v. Harshbarger, 21 Gratt. 215; Page v. Clopton, 30 Gratt. 415.

Where Neither Facts Nor Evidence Certified.—On an exception to an opinion of the court overruling a motion for a new trial on the ground that the verdict is contrary to the evidence, if the exception states neither the facts proved nor the evidence introduced on the trial, nor refers to another bill of exceptions in which all the facts or evidence given on the trial is shown to be stated, the appellate court cannot review the judgment of the court below. W. & N. O. Tel. Co. v. Hobson, 15 Gratt. 122; Valley Ins. Co. v. Teewalt, 79 Va. 421.

On refusal of new trial the motion for which was on the ground of new evidence discovered since the verdict, a bill of exceptions which does not state the facts proved or the evidence at the trial below, is not well taken. Callaghan v. Kippers, 7 Leigh 608.

D. Certificate of Evidence.—The principle which requires that, on motion for new trial because of a verdict against the weight of the evidence, the facts and not the evidence, should be certified, is that a party shall not be permitted to so frame a bill of exception as to refer the credit of the witnesses to the appellate court.

Hence the rule would not apply when the evidence shows that there was no conflicting evidence and that excluding all the evidence against the verdict and admitting the truth of all evidence adduced in its support, the verdict still appears to be contrary to the evidence.

In such case the court would not *decide* on the credit of the witnesses; it would proceed on the admission of their credit. Ewing v. Ewing, 2 Leigh 337; Green v. Ashby, 6 Leigh 135; Goodman v. R. & D. R. Co., 81 Va. 582; McClung v. Ervin, 22 Gratt. 519; Slaughter v. Tutt, 12 Leigh 147; Pasley v. English, 5 Gratt. 148; Muse v. Stern, 82 Va. 37; Patteson v. Ford, 2 Gratt. 27; Bell v. Snyder, 10 Gratt. 353; Wickham v. Lewis, 13 Gratt. 431; Pryor v. Kuhn, 12 Gratt. 618.

When No Conflict of Evidence.—In a bill of exceptions to the refusal of the court to grant a new trial, the *evidence*, and not the facts proved, is stated. If all the evidence was introduced by the *exceptor*, the appellate court will not review the judgment; but if all the evidence is introduced by the party who recovers the judgment, the appellate court will review the judgment, and, if taking it all as true, the verdict and judgment is erroneous, will reverse it. Gimmi v. Cullen, 20 Gratt. 439; Morgan v. Fleming, 24 W. Va. 186. The same reasoning applies here as in the case of Bennett v. Hardaway, 6 Munf. 125.

In a bill of exceptions to a refusal of a court to grant a new trial, *all the evidence* adduced for the plaintiff for whom the verdict was rendered, is set out, the party excepting having offered no evidence, and there being no conflict in the evidence, nor any doubt of the credit of the witnesses. *Held*, this bill of exceptions is well taken, though it does not purport to state *the facts proved* at the trial. Green v. Ashby, 6 Leigh 135; Goodman v. R. & D. R. Co., 81 Va. 583.

Need Not State the Evidence Verbatim.—On motion for a new trial on the ground that the verdict is contrary to the evidence, the evidence need not be stated *verbatim* but it is sufficient to show the material facts proved and the evidence adduced from the judge's notes, aided by those of counsel on both sides. Com. v. Jones, 1 Leigh 598.

Need Not Re-Examine the Witnesses.—When a motion is made for a new trial, in a capital case, on the ground that the verdict is not warranted by the evidence, the court is not bound to re-examine the witnesses and state the evidence *verbatim*, but may state the material facts proved and evidence adduced at the trial from the judge's own notes, aided by those of the counsel on both sides. Com. v. Jones, 1 Leigh 598.

E. Rule of Decision When Evidence Certified.

1. Virginia Rule.

a. Old Rule and Exception Thereto.—Where the evidence is certified the *old rule* was that the appellate court would not reverse the decision of the lower court unless, on rejecting all the *parol* evidence of the party excepting, and giving full faith to the evidence of the adverse party, the judgment should still appear to be wrong. Payne v. Grant, 81 Va. 164; Scott v. Shelor, 28 Gratt. 900; Noyes v. Humphreys, 11 Gratt. 651; Scott v. Com., 77 Va. 344; Muse v. Stern, 82 Va. 33; N. & W. R. Co. v. Ferguson, 79 Va. 244; Nicholas v. Kershner, 20 W. Va. 251; Old Dom., etc., Co. v. Burckhardt, 31 Gratt. 664; Nease v. Capehart, 15 W. Va. 304; Henry v. Davis, 7 W. Va. 715; Pasley v. English, 5 Gratt. 141; Dower v. Church, 21 W. Va. 63; Carrington v. Goddin, 13 Gratt. 587; Newlin v. Beard, 6 W. Va. 111; Brumbaugh v. Wissler, 25 Gratt. 463; Danville Bank v. Waddill, 31 Gratt. 469; State v. Zeigler, 40 W. Va. 593, 21 S. E. Rep. 763; Lamberts v. Cooper, 29 Gratt. 61; Coffman v. Hedrick, 32 W. Va. 131, 9 S. E. Rep. 69; Daingerfield v. Thompson, 33 Gratt. 136; Grayson v. Com., 6 Gratt. 712; Farley v. Tillar, 81 Va. 275; Taylor v. Com., 77 Va. 692; Roanoke Nat. Bank v. Hambrick, 82 Va. 135; Pruner v. Com., 82 Va. 116; Hartman v. Strickler, 82 Va. 225; State v. Baker, 33 W. Va. 319, 10 S. E. Rep. 639; Moffett v. Bowman, 6 Gratt. 219. And the same rule applies in criminal cases. Proctor v. Spratley, 78 Va. 264; Vaiden v. Com., 12 Gratt. 717; Bull v. Com., 14 Gratt. 613; Dean v. Com., 32 Gratt. 912; Moses v. Old Dom. Iron, etc., Co., 82 Va. 21; Wolverton v. Com., 75 Va. 909; Jones v. Rixey, 79 Va. 656; Morgan v. Fleming, 24 W. Va. 186, 195; Farish v. Reigle, 11 Gratt. 720;

Newlin v. Beard, 6 W. Va. 110; Black v. Thomas, 21 W. Va. 709; State v. Baker, 33 W. Va. 319, 10 S. E. Rep. 639; Finchim v. Com., 83 Va. 690, 3 S. E. Rep. 343; State v. Thompson, 21 W. Va. 741; State v. Flanagan, 26 W. Va. 119; Cluverius v. Com., 81 Va. 816-863; Hanriot v. Sherwood, 82 Va. 3; R. & D. R. Co. v. Morris, 31 Gratt. 208; Henry v. Davis, 7 W. Va. 715; Chenowith v. Ritchie Co. Ct., 32 W. Va. 628, 9 S. E. Rep. 910; Sheff v. City of Huntington, 16 W. Va. 307; Webb v. Dye, 18 W. Va. 376; Varner v. Core, 20 W. Va. 472; Smith v. Townsend, 21 W. Va. 486; State v. Chambers, 22 W. Va. 779; Town of Suffolk v. Parker, 79 Va. 660.

Exception to Old Rule.—But when the whole case is submitted to the court, and the exception certifies the *evidence*, the rule of decision is said to be as on demurrer to evidence by the party excepting. This rule is well established by the later decisions. Phelps v. Smith, 16 W. Va. 523; Board v. Parsons, 24 W. Va. 551; Goodman v. R. & D. R. Co., 81 Va. 583; Clafin v. Steenbock, 18 Gratt. 842; Mitchell v. Baratta, 17 Gratt. 445; Wickham v. Martin, 13 Gratt. 427; Backhouse v. Selden, 29 Gratt. 581; Old Dom. Steamship Co. v. Burckhardt, 31 Gratt. 666-67; Hodge v. Bank, 22 Gratt. 57; Dobson v. Culpepper, 23 Gratt. 352; Randolph v. Longdale Iron Co., 84 Va. 457, 5 S. E. Rep. 30; Hamilton v. McNeil, 13 Gratt. 389; Carrington v. Bennett, 1 Leigh 340; Ewing v. Ewing, 2 Leigh 337; Joslyn v. Bank, 86 Va. 287, 10 S. E. Rep. 166.

Waiver of Jury.—Where the parties by consent waive a jury and submit the whole matter of law and fact to the court, if either party be dissatisfied with the decision he must generally have the whole evidence certified and made a part of the record, either in a bill of exception or in some other manner recognized by law. Ramsburg, Koogle & Co. v. Erb, 16 W. Va. 783; Ramsburg, Miller & Co. v. Erb, 16 W. Va. 787; Smith v. Townsend, 21 W. Va. 493.

Bill of Exceptions Not a Demurrer to Evidence.—A bill of exceptions cannot in the absence of statute be considered as a demurrer to evidence. In the latter, the court may, if the case be clear, refuse to compel the other party to join, and may instruct the jury or leave the question with them. Wroe v. Washington, 1 Wash. [357] 461; Creekmur v. Creekmur, 75 Va. 430.

b. Statutory Change of Rule.—Va. Code 1887, § 3484, made the rule that in such case the appellate court should consider the decision "as on demurrer to the evidence by the party excepting." Tucker v. Sandidge, 85 Va. 546, 8 S. E. Rep. 650; Ice Co. v. King, 86 Va. 97, 9 S. E. Rep. 506; So. W. Imp. Co. v. Smith, 85 Va. 306, 7 S. E. Rep. 365; Sutton v. Com., 85 Va. 128, 7 S. E. Rep. 323; Mears & Lewis v. Dexter, 86 Va. 828, 11 S. E. Rep. 538; Stearns v. City of Richmond, 88 Va. 992, 14 S. E. Rep. 847; Tucker v. Com., 88 Va. 20, 13 S. E. Rep. 298; N. & W. R. Co. v. Groseclose, 88 Va. 267, 13 S. E. Rep. 454; Bell v. Com., 88 Va. 365, 13 S. E. Rep. 742; Lyles v. Com., 88 Va. 396, 13 S. E. Rep. 802; Ins. Co. v. Buck, 88 Va. 517, 13 S. E. Rep. 973; R. & D. R. Co. v. Burnett, 88 Va. 538, 14 S. E. Rep. 372; Gaines v. Com., 88 Va. 682, 14 S. E. Rep. 375; Adams v. Hays, 86 Va. 153, 9 S. E. Rep. 1019; Nat. Bank v. Nolting, 94 Va. 265, 26 S. E. Rep. 826.

c. Rule by Amended Statute.—But when there have been two trials in the lower court the rule of decision is for the appellate court to look first to the *evidence* and proceedings on the first trial, and if it discovers that the court erred in setting aside the verdict on that trial, it shall set aside and annul all proceedings subsequent to the said verdict and enter judgment thereon. Mears v. Dexter, 86 Va. 828, 11 S. E. Rep. 538; Stearns v. City of Richmond, 88 Va. 992, 14 S. E. Rep. 847; Pollard's Supp. 1900, § 3484.

d. Demurrer to Evidence.—The rule of decision in case of demurrer to evidence is that demurrant admits the truth of his adversary's evidence, and all just inferences which can be properly drawn therefrom by a jury, and waives *all* his own evidence, whether *oral or documentary*, which conflicts with that of his adversary, and all inferences from his own evidence (though not in conflict with his adversary's) which do not necessarily result therefrom. Whittington v. Christian, 2 Rand. 357; Green v. Judith, 5 Rand. 1; Hansbrough v. Thom, 3 Leigh 147; R. Co. v. Miles, 76 Va. 773; R. & D. R. Co. v. Anderson, 31 Gratt. 819-820; Rudd v. R. & D. R. Co., 80 Va. 546; Creekmur v. Creekmur, 75 Va. 432; Johnson v. C. & O. Ry. Co., 91 Va. 171, 21 S. E. Rep. 238; Va. Imp. Co. v. Hoover, 82 Va. 449; Jones v. Old Dom. Cotton Mills, 82 Va. 140; Farley v. R. & D. R. Co., 81 Va. 783.

2. West Virginia Rule.—Under section 9, c. 131, Code, when exception is taken to the action or opinion of the court upon a question involving evidence upon motion *for a new trial or otherwise*, all the evidence, whether conflicting or not, must be certified, and this court must consider all such evidence on both sides, though conflicting, not rejecting any. Laidley v. Kanawha County Court, 44 W. Va. 566, 30 S. E. Rep. 109; Johnson v. Burns, 39 W. Va. 658, 20 S. E. Rep. 686; Deering v. Coberly, 44 W. Va. 606, 29 S. E. Rep. 512; Yeager v. City of Bluefield, 40 W. Va. 484, 21 S. E. Rep. 752; State v. Zeigler, 40 W. Va. 593, 21 S. E. Rep. 763; Poling v. Ohio River R. Co., 38 W. Va. 645, 18 S. E. Rep. 782.

a. West Virginia Demurrer to Evidence.—By demurring to evidence the demurrant is now, under section 9 of chapter 131, not held to waive any part of his competent evidence; but where it conflicts with that of the other party it will be regarded as overborne, unless it manifestly appears to be clearly and decidedly preponderant. He admits the credit of the evidence demurred to, and all inferences of fact that may be fairly deducible from the evidence, but only such facts as are fairly deducible; and refers it to the court to deduce such fair inferences. Mapel v. John, 42 W. Va. 30, 24 S. E. Rep. 609.

F. Number of New Trials Allowed.—There are no exceptions to the law that not more than two new trials shall be granted to the same party in the same case. But if, on the face of the record, it appears that a verdict is void, and that no judgment could at common law be properly entered upon it, as, for instance, because it was too uncertain, ambiguous, or defective, the court may declare such a verdict void, and direct a new trial, without regard to the number of new trials which may have been granted to the same party in the same case. Williams v. Ewart, 29 W. Va. 659, 2 S. E. Rep. 881; Code W. Va. 1899, ch. 131, § 15; Code Va. 1887, § 3392; Jones v. Old Dom. Cotton Mills, 82 Va. 140; Smith v. Rawlings, 83 Va. 674, 3 S. E. Rep. 238; Bertha Zinc Co. v. Black, 88 Va. 303, 13 S. E. Rep. 452. See generally, Code Va. 1887, §§ 3385, 4050; Pollard's Supp. 1900, § 3484; Code W. Va. ch. 131, § 9.

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908 *Clarke v. The Commonwealth.*

June Term, 1874, Wytheville.

1. **Burglary.**—D and H rent a room jointly of S. of which each has a key. C rents an adjoining

*For monographic note on Burglary and Housebreaking, see end of case.

room, the doors of the two rooms entering upon the same porch near each other. They frequently interchanged visits. On the night of March 11th, 1874, D locks his door, takes out the key, and starts to church. On the way he meets H, who says he is going to his room, and will follow him to the church soon. H and C conspire to steal D's goods in the absence of D on this night, and H opens the door with his key, and they enter the room, and take and carry away the trunk of D with its contents. This is not such a breaking as will constitute buglary in C.

2. **Same—What Constitutes.**—The breaking which will constitute burglary may be actual or constructive. For what will be a constructive breaking, see the opinion of MONCURE, P.

3. **Same — Indictment — Larceny.** — The indictment charging not only the breaking and entering, but the stealing of the trunk and its contents, of a stated value, C, though acquitted of the burglary, may be found guilty of the larceny.

The case is stated by Judge Moncure in his opinion.

H. A. & J. S. Wise, for the prisoner.

The Attorney General, for the commonwealth.

MONCURE, P. This is a writ of error to a judgment of the Court of Hustings of the city of Richmond, convicting the plaintiff in error, Philip Clarke, of burglary, and sentencing him therefor to confinement in the penitentiary for the term of five years. There were two counts in the indictment, in one of which the dwelling house is described as that of Joseph Dabney, and in the other as that of Fanny Straus; and in each of them the accused was charged
909 with having *broken and entered the said house, not only with intent to commit a larceny therein, but also with having actually committed such larceny, to wit: of one trunk and its contents of certain specific values respectively as set out, and all of the aggregate value of eighty-five dollars and eighty-five cents, of the goods and chattels of the said Joseph Dabney, in the said dwelling house then and there being found. The accused, upon his arraignment, plead not guilty to the indictment; and being put upon his trial, the jury found him guilty, and ascertained his term of confinement in the penitentiary at five years. Thereupon the accused moved the court to set aside the verdict and grant him a new trial; which motion was overruled by the court: and judgment was pronounced against him according to the verdict.

During the progress of the trial, the prisoner excepted to two decisions of the court given against him, and tendered two bills of exceptions, which were accordingly signed and sealed by the court, and made a part of the record.

The first bill of exceptions states, that on the trial of the cause it was proved, on the part of the commonwealth, that Joseph Dabney and Edward Henderson jointly rented and occupied a room in the house of one Fannie Straus, in the city of Richmond; that each of them had and kept a key to the door of the said room; that the prisoner, Clarke, at the same time rented and occupied an adjoining room up stairs in the same house, the doors of the two rooms opening near each other on the same porch, and Dabney and Henderson and Clarke frequently interchanged visits from one room to the other; that on the night of the 11th day of March 1874 Dabney locked his door and took his key with him, and
910 in going to church met *Henderson, who said he was going back to their room, and would join him (Dabney) at church soon; that the windows were nailed, and Dabney left in the room a trunk, which contained nearly all his clothes, and several other articles enumerated in the indictment and exhibited in court; that when he returned to his room he found the door locked and the windows nailed as he had left them, and there was no appearance of any breaking of the premises in doors, windows or elsewhere, but his trunk and its contents were missing, and after search for it the next day, in the evening, he found it at a room (in another house) which was rented by Clarke that day; that Clarke disappeared from the city of Richmond, and, when he was afterwards arrested, he confessed, freely and voluntarily, after but little hesitation, that Henderson led him into the act; agreed with him to take Dabney's trunk; that they went to the room together and unlocked the door, and they entered and took the trunk with intent to take it away and steal it, and it was removed to a place whence it was taken to Clarke's room, the place where it was found, the said Henderson having assisted him in the removal of the trunk from the room into the yard, and put it upon prisoner's shoulder, who carried it off. On the part of the defence it was proved that the trunk and all its contents would not bring twenty-five dollars at auction. This was all the material evidence in the case. Whereupon the prisoner moved the court to instruct the jury as follows, to wit:

"If the jury believe from the evidence that Edward Henderson was a renter, in part, of the room charged to have been broken and entered, occupied by him and Joseph Dabney in common, and that the said Henderson, as one of the legal tenants of that room, had one key and Dabney
911 another key to the same *door thereof, and that he, Henderson, voluntarily opened the door of the room, in the exercise of his right as tenant to open the door, then there was no breaking of the same; and to constitute burglary there must be a breaking as well as an entering with the intent charged in the indictment."

Which instruction the court refused to give as offered, but gave with an addition in these words: "But if the jury believe that the prisoner and Henderson agreed together that Henderson should open the door with his key, for the purpose and with the intent of stealing the property alleged to be stolen in the indictment; and that

Henderson, the prisoner, being present and consenting, did so open the door in the night time; and that in pursuance of said agreement they entered the room and stole the said property, then the prisoner is guilty of burglary." To which ruling of the court the prisoner excepted.

The second bill of exceptions was to the decision of the court overruling the motion of the prisoner to set aside the verdict of the jury as contrary to the law and evidence, and grant him a new trial.

To the judgment pronounced against the prisoner as aforesaid, he applied to a judge of this court for a writ of error; which was accordingly awarded.

Burglary is defined to be, a breaking and entering of the mansion-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not. 1 Russell on Crimes, 785.

Each of the facts constituting this definition must be proved by the prosecutor, in order to sustain the charge of burglary.

In this case, there was no doubt or difficulty in regard to any of these facts save one, and that was in regard to the breaking; whether there was a sufficient 912 *breaking to constitute burglary within the meaning and definition of that offence. That is the only question arising in this case; and that question is presented by each of the two bills of exceptions taken in the case.

There are two kinds of breaking within the meaning of the said definition; one an actual breaking, and the other a breaking by construction of law.

It is not pretended that there was an actual breaking in this case; and therefore it is needless to inquire what will and what will not constitute an actual breaking in the meaning of the law. If there was any breaking within such meaning in this case, it was only a breaking by construction of law.

Was there a breaking in this case by construction of law?

Such a breaking is not by violence, which, more or less, is supposed to be embraced in every actual breaking; but is, "where an entrance is obtained by threats, fraud or conspiracy." 1 Russell on Crimes, 792.

That writer gives instances of a constructive breaking by each of these three modes; as,

1st. By threats. Where, in consequence of violence commenced or threatened in order to obtain entrance to a house, the owner, either from apprehension of the violence, or in order to repel it, opens the door and the thief enters, such entry will amount to breaking in law; for which some have given as a reason, that the opening of the door by the owner being occasioned by the felonious attempt of the thief, is as much imputable to him as if it had been actually done by his own hands. And in a late case, where the evidence was that the family within the house were forced by threats and intimidation to let in the offenders, Thompson, B., told the jury that although 913 the *door was, literally, opened by one of the family, yet if such opening proceeded from the intimidations of those who were without, and from the force that had been used, knocking at and breaking the windows, calling out and insisting on the door being opened, and firing of guns; if, under these circumstances, the persons within were induced to open the door, it was as much a breaking by those who made use of such intimidations to prevail upon them so to open it, as if they had actually burst open the door. Id. 792, 793.

2dly. By fraud. Where an act is done in fraudem legis, the law gives no benefit thereof to the party. Thus, if thieves having an intent to rob, raise hue and cry and bring the constable, to whom the owner opens the door, and they, when they come in, bind the constable and rob the owner. it is burglary. And upon the same principle, the getting possession of a dwelling house by a judgment against the casual ejector, obtained by false affidavits, without any color of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing the goods therein. So, if a man go to a house under pretence of having a search warrant, or of being authorized to make a distress, and by these means obtain admittance, it is, if done in the night time, a sufficient breaking and entering to constitute burglary. If admission to a house be gained by fraud, not carried on under the cloak of legal process, as by pretence of business, it will also amount to a breaking by the construction of law." As "where thieves came to a house in the night time with intent to commit a larceny, and knocked at the door, pretending to have business with the owner, and being by such means let in, robbed him; they were held guilty of burglary. And so where some persons took lodgings in a house, and 914 *afterwards, at night, while the people were at prayers, robbed them; and it was considered that the entrance into the house, being gained by fraud, with an intent to rob, the offence was burglary. For the law will not endure to have its justice defrauded by such evasions. A case is also reported where the entrance to the house was gained by deluding a boy who had the care of it. It appeared upon the evidence that the prisoner was acquainted with the house, and knew that the family were in the country; and that upon meeting with the boy who kept the key, she desired him to go with her to the house; and by way of inducement, promised him a pot of ale. The boy accordingly went with her, opened the door and let her in; upon which she sent him for the pot of ale, and when he was gone robbed the house and went away. And this being in the night time, it was adjudged that the prisoner was clearly guilty of burglary. Id. 793, 794.

3dly. By conspiracy. "Thus where a servant conspired with a thief to let him into his master's house to commit a robbery,

and in consequence of such agreement, opened the door or window in the night time and let him in; this, according to the better opinion, was considered to be burglary in both the thief and the servant; and this doctrine is confirmed by a subsequent decision. Two men were indicted for burglary, and upon the evidence it appeared that one of them was a servant in the house where the offence was committed; that in the night time he opened the street door, let in the other prisoner, and showed him the sideboard, from whence the other prisoner took the plate; that he then opened the door and let the other prisoner out; did not go out with him, but went to bed: and upon these facts being found specially, all the judges were of opinion that both the
915 prisoners *were guilty of burglary, and they were accordingly executed."
Id. 794.

If the case now under consideration be a case of constructive breaking, it must come under one of the three heads into which that subject is divided by Russell as above set forth. It cannot come under the first or the second, as the entrance was certainly not obtained by threats or fraud. If it comes under any of them, it can only be the third, and on the ground that the entrance was obtained by a conspiracy. Was it obtained by a conspiracy, so as to be constructive breaking within the meaning of the law in regard to burglary?

The conspiracy, if any, was between the prisoner Clarke and Henderson, who, with Dabney, jointly rented and occupied a room in the house of Fannie Straus, in which room was the trunk of Dabney, which, with its contents, was charged to have been stolen. If there were any such conspiracy what was its object? Could it have been to break and enter the room of which Henderson and Dabney were joint tenants and occupants, of which each kept a key, and which, of course, each had, at all times, either by day or by night a right to enter at pleasure? or must it not have been only to steal the trunk of Dabney and its contents, which were in the room, and which were actually stolen, as charged in the indictment? They had no occasion to form a conspiracy to break and enter the room. They had a ready and a lawful mode of entering that through the door, which Henderson could at any time unlock. Dabney and Henderson and Clarke had rooms in the same house, the doors of the two rooms opening near each other on the same porch, and they frequently interchanged visits from one room to the other.
916 Suppose Clarke had visited *Henderson and Dabney's room in the latter's absence, and in the night time, and that Clarke and Henderson had then agreed to steal Dabney's trunk, and had stolen it accordingly. Of course there would have been no burglary in that case. Can it make any difference that the agreement to steal was made before they unlocked the door and entered the room? Suppose it had been, as it may have been, made in Clark's room, and the parties had then, immediately, stepped from Clark's room into Henderson and Dabney's room and stolen the trunk of Dabney. Would the unlocking of the door of the latter room by Henderson, in that case, be breaking of the room within the meaning of the law in regard to burglary, either as to Clarke or as to Henderson? The case stands upon the same ground on which it would have stood, in this respect, if Henderson had been the sole renter and occupier of the room jointly rented and occupied by himself and Dabney. Each joint tenant had the same right of entry, at pleasure, into the joint room, as he would have had into his several room.

Then, can a man commit burglary by breaking his own house, even by actually breaking it by violence, much less by unlocking the door and entering in the usual way? Can he break it by mere construction of law?

We see nothing in any of the books to warrant the opinion that he can; and it would be contrary to principle, and the very definition of the offence to say that he can. That definition is, "A breaking and entering the mansion house of another," &c., not of one's own house. The offence is aimed at the dwelling house of another, which is his castle, and which the law protects both against civil and criminal injuries. Here the offence was aimed, not at the dwelling house of Henderson,
917 *that was thrown open to Clarke by the owner or the occupant, but at the trunk of Dabney. It may be said that the joint room was the dwelling house of Dabney as well as of Henderson, and so it was, but that, as before said, can make no difference. Dabney consented to rent a room jointly with Henderson, and thus consented that it should be the dwelling house of Henderson, with all the right of entry possessed by a sole occupant.

The cases of constructive breaking by conspiracy are cases in which one of the conspirators is not the owner of the house, but a servant of the owner, or one having a bare charge and not actual possession thereof; where there is a bare charge, the person having such charge may open the door and enter at pleasure, so long as he is acting in pursuance of such charge, and of the powers and duties which it confers or imposes. But whenever he conspires with another wrong doer to open the door and let him in to commit a felony, and the opening and entering are accordingly done, both parties are guilty of burglary. There has been in that case a breaking and entering of the mansion house of another, in strict pursuance of the definition of the offence. The house is in no sense the house of the servant, who had only a bare charge in regard to it, and the power conferred by that charge ceased to exist when the servant sought to pervert it to the injury of his employer by opening an entrance into his dwelling house to a felon by night. Henderson stood in no relation of a servant to Dabney in regard to the room which they

jointly occupied, but had the actual possession and legal right of possession of that room jointly with Dabney.

There is a case referred to in 1 Russell on Crimes, 816, 817, in which a guest
918 at an inn broke open and *robbed the room of another guest at the same inn, being aided in such breaking by the landlord, to whom he pretended that the other guest had stolen his goods. Mr. Baron Adams, who tried the prisoner, doubting whether the bed-chamber could properly be called the dwelling house of the prosecutor, as stated in the indictment, the case was submitted to the consideration of the judges. They all thought that though the prosecutor had for that night a special interest in the bed-chamber, yet that it was merely for a particular purpose, viz: to sleep there that night as a travelling guest, and not as a regular lodger; that he had no certain and permanent interest in the room itself, but that both the property and possession of the room remained in the landlord, who would be answerable civiliter for any goods of his guest that were stolen in that room, even for the goods then in question, which he could not be unless the room were deemed to be in his possession. They thought also that the landlord might have gone into the room when he pleased, and would not have been a trespasser to the guest. The landlord in this case, says Russell, does not appear to have been privy to the felonious intent of the prisoner; but even if the landlord had been an accomplice in the act of the prisoner, it seems that his offence would not have been burglary; for though it had been said that if the host of an inn break the chambers of his guest in the night to rob him, it is burglary, that doctrine is questioned; and it was well observed that there seems to be no distinction between that case and the case of an owner residing in the same house, breaking the chamber of an inmate, having the same outer door as himself, which would not be burglary; and for this doctrine is cited 2 East P. C., ch. 5, sec. 15, p. 502.

That authority, cited from Russell
919 and from East, *shows that if the landlord or owner residing in the same house, breaking open the room of a guest or an inmate of the house, would not be guilty of burglary, a fortiori a joint tenant would not be guilty of that offence in unlocking the door of the joint tenement and taking therefrom the goods of his room-mate. In the former case the guest or inmate may be said to have in some sense a separate possession of his chamber during his occupancy of it, so as to make it, by construction of law, his dwelling-house and not that of his host; but in the latter case, beyond all question, the joint tenement is as much the dwelling of one of the joint tenants as the other; and that is precisely this case.

There can be no doubt but that Clarke and Henderson stand upon the same footing in regard to the offence committed by them; and if it was not burglary in Henderson, it was not burglary in Clarke. If Henderson had a right to unlock the door and enter, he certainly had a right to permit Clarke to enter.

The cases before stated from Russell, of constructive breaking by threats and fraud, are cases in which though the entry by the felon may have been by the act of the owner, yet such act was not freely and voluntarily done, but was induced by force or the apprehension thereof, or fraud; and so was not, in contemplation of law, the act of the owner. It was done invito domino.

We have seen no case, and think there has been none, in which the entry was by the voluntary act and consent of the owner or occupier of the house, which has been held to be burglary. And were we to affirm the judgment in this case, we would establish a doctrine of constructive burglary which would not only be new, but contrary to the well known definition
920 *of that offence. While the legislature might make such a change, we think it would be judicial legislation in us to do so. If the question, upon principle, were more doubtful than it is, we would be inclined in favorem vitae, not to apply the doctrine of constructive burglary to this new case. The offence of burglary may be punished with death.

We are therefore of opinion that the Hustings court erred, both in refusing to give the instruction asked for by the prisoner, and in giving, in lieu thereof, the instruction which was given, and also in overruling the motion of the prisoner to set aside the verdict and grant him a new trial. The judgment must therefore be reversed, the verdict set aside, and the cause remanded to the Hustings court, for a new trial to be had therein in conformity with the foregoing opinion. On which new trial the prisoner may be acquitted of the felonious and burglarious breaking and entering into the dwelling-house, but convicted of the larceny as charged in the indictment. See Code, ch. 202, §§ 27 and 30, pp. 1248 and 1249.

ANDERSON, STAPLES, and BOULDIN, Js., concurred in the opinion of Moncure, P.

CHRISTIAN, J., dissented.

Judgment reversed.

BURGLARY AND HOUSEBREAKING.

I. In General.

II. Essentials.
- A. Breaking and Entry.
- B. Kind of House.
- C. Ownership.
- D. Time.
- E. Intent.

III. Evidence.
- A. Possession as Evidence.
- B. Circumstantial Evidence.

IV. Conviction of Larceny on Indictment for Burglary.

V. New Trial and Writ of Error.

I. IN GENERAL.

Definition.—Burglary is defined to be, "A breaking and entering of the mansion house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not." Clarke v. Com., 25 Gratt. 911. See Code Va. 1887, §§ 3704-3705-3706.

Indictment.—In State v. Meadows, 22 W. Va. 770, it was held, if a house was occupied as a dwelling house, and a person broke and entered it in the nighttime with intent to commit a felony, the indictment charging the offence must necessarily aver that it was done "burglariously."

In State v. McDonald, 9 W. Va. 460, the indictment was for burglary, and the house entered was a dwelling house. The indictment did not say the breaking and entering was "feloniously and burglariously" done. The court doubted the sufficiency of the indictment but the case was decided on another point. State v. Cottrell, 45 W. Va. 887, 32 S. E. Rep. 162.

In State v. Vest, 21 W. Va. 806, it was held that the omission of the word "feloniously" in an indictment for a felony was a fatal defect.

In Randall v. Com., 24 Gratt. 647, it was said: "The court is further of opinion that the indictment itself is fatally defective, as an indictment for felony, in not averring that the act charged was done 'feloniously.'"

In State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654, on an indictment for a felony, it was held fatal error that no count in the indictment concluded "against the peace and dignity of the state" as is required by Const. W. Va., art. 2, § 8. See Lemons v. State, 4 W. Va. 755. See Code Va. 1887, § 3999. See Const. Va. art. 6, § 26.

Venue.—An indictment laying the offence as committed in the county of N in the parish of H, without the words, *within the jurisdiction of this court*, or *within the county, or the district composed of the counties* for which the court is held, was bad, after verdict, until the act of Jan. 24th, 1804. Com. v. Richards, 1 Va. Cas. 1.

In Richardson v. Com., 80 Va. 124, it was said, an indictment cannot be sustained without proof that the offence was committed in the county where the venue is laid. This case was followed in the case of Butler v. Com., 81 Va. 163.

II. ESSENTIALS.

A. Breaking and Entry.—The breaking which is an essential part of the crime of burglary may be either actual or constructive. Constructive breaking includes entrance effected by threats, fraud, or conspiracy. Clarke v. Com., 25 Gratt. 912.

The word "break" used in the statute as to housebreaking is borrowed from the law in regard to burglary. If then, in any case, a party shall by even slight force remove or displace anything attached to the house as a part thereof, and relied on by the occupant for safety of the house, it is housebreaking within the meaning of the statute, if the other constituent parts of the offense exist. Finch v. Com., 14 Gratt. 643.

In Hunter v. Com., 7 Gratt. 641, there is a dictum by JUDGE FIELD to the effect that the removal of a cloth from one of the nails by which it hung over a window was not a sufficient breaking to constitute burglary.

B. Kind of House.—An indictment for housebreaking need not negative the idea that the bar room, which was broken into and entered, adjoined any dwelling house except that of the prosecutor's. Lawrence v. Com., 81 Va. 484.

An instruction that "If the jury believe from the evidence that John B. Morrison held the possession of said house at the time alleged in the indictment, and that he used and occupied said house as a dwelling, then, in contemplation of law, said house was the dwelling house of John B. Morrison, although he may have absented himself therefrom for several months, and although he may have had another dwelling house during the same time" sufficiently describes the house as a dwelling house and was properly given. State v. Williams, 40 W. Va. 268, 21 S. E. Rep. 721.

The words "or other house" in ch. 145, § 12, of Code W. Va. include a dwelling house. State v. McDonald, 9 W. Va. 456. See Code Va. 1887, § 3705; State v. Williams, 40 W. Va. 268, 21 S. E. Rep. 721.

C. Ownership.—An indictment for burglary must state the owner of the property, and the proof of ownership must be as charged in the indictment. State v. Hill, 47 W. Va. —, 35 S. E. Rep. 831.

One who rents a barn, though he gave another the privilege of keeping a horse therein, is still the owner and should be so described in an indictment for burglary. State v. Betsall, 11 W. Va. 730.

In Webster v. Com., 80 Va. 598, it was held, that an indictment for housebreaking which describes the property as "a certain mill house not adjoining to or occupied with the dwelling-house of Frances Newman," was a sufficient allegation of ownership by said Frances Newman. See in accord, Speers v. Com., 17 Gratt. 570; Butler v. Com., 81 Va. 159; State v. Reece, 27 W. Va. 375. See *contra*, State v. Hupp, 31 W. Va. 355, 6 S. E. Rep. 919, *overruling* State v. Reece, 27 W. Va. 375.

An indictment charging the prisoner with feloniously stealing and carrying away a lot of queensware, is good after verdict, though it does not specify the articles or state they were the property of L or any other person. Vaughan v. Com., 17 Gratt. 576; Wright v. Com., 82 Va. 183. See Code Va. 1887, § 3996; Code W. Va. ch. 158, § 7.

D. Time.—In every indictment for burglary it must distinctly and plainly appear that the offence was committed in the nighttime, but an indictment omitting to state such time may still be good as an indictment for larceny. Com. v. Marks, 4 Leigh 712 [660].

In Cool v. Com., 94 Va. 799, 26 S. E. Rep. 411, where the indictment was for breaking and entering a "mill house" with intent to commit larceny therein, the judgment was reversed for failure to state the time of the offence charged. If committed between Feb. 12, 1894 and Jan. 9, 1896 it was a misdemeanor; if before or after that period it was a felony. Time, therefore, was of the essence of the offence and should have been stated.

E. Intent.—The allegation of actual larceny in an indictment for burglary or housebreaking is simply to show the intent to commit a felony, which intent is an essential part of these crimes. Speers v. Com. 17 Gratt. 573.

Since the allegation of actual larceny in an indictment for burglary is only to show the intent, such allegation need not be made with the same formality as in an indictment for larceny itself. Vaughan v. Com., 17 Gratt. 579; Wright v. Com., 82 Va. 185; State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654. See dissenting opinion of ENGLISH and BRAN-

NON, JJ., in State v. Caddle, 35 W. Va. 73, 12 S. E. Rep. 1098.

The intent constitutes an essential part of the crime of burglary and should be both alleged and proved. Vaughn v. Com., 10 Gratt. 758.

That property is taken openly, in the presence of the owner, affords a strong presumption that it was not taken feloniously but under a *bona fide* claim of right. State v. Shores, 31 W. Va. 491, 7 S. E. Rep. 420; State v. Caddle, 35 W. Va. 73, 12 S. E. Rep. 1098.

It is peculiar the province of the jury to determine the intent with which any act is done. Starkie v. Com., 7 Leigh 756.

III. EVIDENCE.

A. Possessionas Evidence.—The possession of stolen property, recently after the theft, raises a *prima facie* presumption of fact that the person found in possession is the thief; but to have this effect such possession should be exclusive. Price v. Com., 31 Gratt. 846; Taliaferro v. Com., 77 Va. 413. But see State v. Heaton, 23 W. Va. 793-795, and State v. Reece, 27 W. Va. 379; Porterfield v. Com., 91 Va. 801.

If the property was not stolen but lost, mere possession is not even *prima facie* evidence of guilt. Hunt v. Com., 13 Gratt. 757.

Certainly the recent possession of stolen property is important evidence, and in connection with other evidence may sustain a conviction for larceny. Walker v. Com., 28 Gratt. 969.

In Taliaferro v. Com., 77 Va. 413, it was said: "It has never been decided in the state that such possession is even *prima facie* proof of guilt in cases of burglary and housebreaking."

In Gravely v. Com., 86 Va. 400, 10 S. E. Rep. 431, it was decided that in cases of larceny the possession of goods recently stolen is *prima facie* evidence of guilt, and throws upon the accused the burden of accounting for that possession. But this rule has never been held by this court to apply with the same effect in cases of burglary and housebreaking, and the decided weight of authority is that it does not.

Though mere possession does not raise a *prima facie* presumption of the burglary or housebreaking charged, yet in connection with other evidence of such burglary or housebreaking, evidence of possession of stolen goods is admissible to determine the guilt of the prisoner. Wright v. Com., 82 Va. 188; Gravely v. Com., 86 Va. 400, 10 S. E. Rep. 431; Walker v. Com., 28 Gratt. 969; Hall's Case, 3 Gratt. 593; Porterfield v. Com., 91 Va. 806, 22 S. E. Rep. 352; Henderson v. Com., 98 Va. 794, 34 S. E. Rep. 881, 5 Va. Law Reg. 855. (1900.)

B. Circumstantial Evidence.—The rule here as in other cases is that the circumstantial evidence should be acted on with the utmost caution. See Johnson v. Com., 29 Gratt. 796, and *note*; Porterfield v. Com., 91 Va. 801, 22 S. E. Rep. 352; Bundick v. Com., 97 Va. 787, 34 S. E. Rep. 454; Hite v. Com., 88 Va. 882, 14 S. E. Rep. 696.

IV. CONVICTION OF LARCENY ON INDICTMENT FOR BURGLARY.

On an indictment for housebreaking if actual larceny be properly stated there may be a conviction for such larceny though the prisoner is acquitted of the housebreaking. Vaughan v. Com., 17 Gratt. 576; State v. Reece, 27 W. Va. 375; State v. Flanagan (W. Va.), 35 S. E. Rep. 862.

If in an indictment for housebreaking, there be a separate count charging larceny, there may be a conviction for both crimes and a separate punishment inflicted for each. Speers v. Com., 17 Gratt. 570.

Housebreaking with intent to commit larceny, and grand larceny are distinct offences under the law, and to each is affixed its own penalty, but they may be and often are one continued act, and may be charged in the same count of an indictment. Upon such count the accused may be found guilty of either of the offences, but there can be only one penalty imposed. If it is desired to punish for both offences in a case of this kind, there must be inserted in the indictment a separate count for the larceny. An acquittal, where there is but one count, is a bar to prosecution for all offences therein charged. If there is a conviction generally, or of the grand larceny only, and it is submitted to, it is a bar to further prosecution. State v. McClung, 35 W. Va. 280, 13 S. E. Rep. 654; Benton v. Com., 91 Va. 788, 21 S. E. Rep. 495.

On an indictment for housebreaking which charges actual larceny, a general finding of guilty would lead to a sentence for housebreaking, and not larceny. Speers v. Com., 17 Gratt. 574; Butler v. Com., 81 Va. 162; State v. Williams, 40 W. Va. 268, 21 S. E. Rep. 721. See in general, on the subject of *Burglary*: monographic *note* on "Accessories" appended to Maybush v. Com., 29 Gratt. 857; monographic *note* on "Continuances" appended to Harman v. Howe, 27 Gratt. 676; monographic *note* on "Confessions" appended to Schwartz v. Com., 27 Gratt. 1025; monographic *note* on "Autrefois Acquit" appended to Page v. Com., 26 Gratt. 943.

A person found guilty by the verdict of a jury, under a bad count for burglary, cannot be sentenced for housebreaking, although the indictment contains a good count charging the latter offence. State v. Cottrell, 45 W. Va. 837, 32 S. E. Rep. 162.

V. NEW TRIAL AND WRIT OF ERROR.

If on conviction of prisoner he obtains a writ of error, which is directed to operate as a *supersedeas*, and then escapes from jail, the appellate court will discharge so much of the order awarding the writ of error as directed it to operate as a *supersedeas* to the judgment, and will further direct that the writ of error be dismissed by a certain day, unless it shall be made to appear to the court by that day, that the plaintiff in error is in proper custody. State v. Conners, 20 W. Va. 1; State v. Sites, 20 W. Va. 13.

In a case tried by jury a foundation must be laid for a bill of exceptions to rulings of the court by making a motion for a new trial. State v. Phares, 24 W. Va. 657; State v. Rollins, 31 W. Va. 363, 6 S. E. Rep. 923; State v. Thompson, 26 W. Va. 150; Danks v. Rodeheaver, 26 W. Va. 274.

This rule has now been changed in Virginia by statute. See Pollard's Supp., § 3885a; Newberry v. Williams, 89 Va. 298, 15 S. E. Rep. 865. See monographic *note* on "Instructions" appended to Womack v. Circle, 29 Gratt. 192; monographic *note* on "Accessories" appended to Maybush v. Com., 29 Gratt. 857; monographic *note* on "Arguments of Counsel" appended to Coleman v. Com., 25 Gratt. 865.

On indictment for a felony the record must show that the prisoner was present in court when the pleadings were made up and pleaded in person. Hooker v. Com., 13 Gratt. 763; State v. Sutfin, 22 W. Va. 771; State v. Conkle, 16 W. Va. 736; Sperry v. Com., 9 Leigh 623.

921 *Little v. Commonwealth.

September Term, 1874, Staunton.

1. **Murder—Jurors—Competency.***—A person called as a juror in a trial for murder, says in answer to a question—I have expressed an opinion from what I have heard. What I have heard was not from any witness. My opinion was not a fixed one. I think I can give the prisoner a fair trial without reference to the opinion I have expressed. He is a competent juror.

2. **Same—Evidence—Res Gestæ.**†—On the trial of a prisoner for murder, a statement made by him to a person, in a few minutes after the homicide was committed, and near to the place, and in the presence and hearing of eye witnesses of the homicide, who were not introduced as witnesses by the commonwealth, should be admitted as evidence at the instance of the prisoner, as part of the *res gestæ*.

3. **Same—Same—Same.**—At least the statement should have been heard by the court below, so that the court might determine whether all or any part of it was admissible evidence, and that the appellate court might revise the judgment in that respect.

4. **Same—Same—Examination of Witnesses.**—After a witness for the commonwealth has given his testimony and left the stand, if the prisoner wishes to show that he has made a different statement at another time, he is entitled to have him recalled, and to examine him on the point, that the evidence in contradiction may be introduced; and this whether the failure to examine him when he was on the stand, was because he or his counsel were not informed of the evidence to contradict him, or from inadvertence.

5. **Same—Same—Same.**—Upon a criminal trial, the prisoner may prove, by a person who was present, that the statement made before the grand jury by a witness for the commonwealth, was altogether different from that made by him on the trial; and *quære*, if a grand juror is not a competent witness to prove it.

6. **Same—Same—Same.**—A witness for the common wealth is asked if he had said on last Wednesday in the front porch of the courthouse, in conversation with gentlemen, whose names were not known, "If I had my way I would kill the damned rascals;" referring to the prisoners. And he denies it. The prisoner will be allowed to
922 prove that the witness used *the expression; though the names of the two gentlemen to whom it was spoken cannot be given.

In July 1873, Lycurgus Little and Oscar P. Little were jointly indicted in the County court of Clarke county for the murder of their brother Clinton L. Little. The prisoners pleaded "not guilty," and elected to be tried separately, and to be tried in the Circuit court of the county.

In October 1873, the case of Lycurgus Little was taken up for trial; and on the empanelling of the jury, the prisoner objected to William A. Riely's forming one of the panel. The ground of his objection was based upon his answer to a question put to him by the court as follows: "Have you made or expressed a fixed opinion as to the guilt or innocence of the prisoner at the bar?" Answer. "I have expressed an opinion from what I have heard; what I have heard was not from any witness. My opinion was not a fixed one. I think I can give the prisoner a fair trial, without reference to the opinion I have expressed." The court overruled the objection; and the prisoner excepted.

There were several exceptions to rulings of the court taken by the prisoner in the progress of the trial, and these are set out in the opinion of the court delivered by Judge Moncure.

The jury found the prisoner guilty of murder in the second degree, and fixed the term of his imprisonment in the penitentiary at fourteen years; and the court sentenced him accordingly. And the prisoner thereupon applied to a judge of this court for a writ of error and supersedeas; which was allowed.

Conrad & Son, for the prisoner.

The Attorney General, for the Commonwealth.

923 *MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit court of Clarke county, convicting Lycurgus Little of murder in the second degree, and sentencing him therefor to confinement in the penitentiary for the term of fourteen years, the period by the jurors in their verdict ascertained. There are seven assignments of error in the judgment, which arise on as many bills of exceptions taken to opinions of the court given during the progress of the trial. We will consider the questions thus presented for the decision of this court, or such of them as it may be necessary for us to decide, or as we may think it proper to decide, in the order in which they arise on the bills of exceptions.

1. The first bill of exceptions was taken by the prisoner to the action and ruling of the court in overruling his objection to William A. Riely as a competent juror for his trial. It is very clear that the objection was invalid, and the juror was competent, and that there was no error of the court in this respect. Jackson's case, 23 Gratt. pp. 919, 927-933, and the cases there cited. Indeed, this objection, though taken in the court below, does not seem to be relied on in this court.

2. The second bill of exceptions was taken by the prisoner to the ruling of the court in excluding, as incompetent evidence, a statement of the prisoner, made to Miss Hattie Prichard, a witness introduced by the commonwealth; the prisoner, by his counsel, contending that the statement was admissible as part of the res gestæ.

The surrounding circumstances of a fact in controversy are generally admissible

*Competency of Jurors.—See Shinn v. Commonwealth, 32 Gratt. 899, and *note*, collecting cases.

†Evidence—Res Gestæ.—See monograhic *note* on "*Res Gestæ*," appended to Jordan v. Commonwealth, 25 Gratt. 943.

evidence as reasonably tending to explain the nature of such fact, even
924 *though such circumstances consist of mere declarations, and be of the character of hearsay evidence. "These surrounding circumstances," says Greenleaf, "constituting parts of the res gestæ, may always be shown to the jury along with the principal fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character. Thus, on the trial of Lord George Gordon for treason, the cry of the mob who accompanied the prisoner on his enterprise was received in evidence as forming part of the res gestæ, and showing the character of the principal fact." 1 Greenl. on Ev., § 108.

Now let us apply the principle as thus laid down to this case, which is thus stated in the second bill of exceptions. The commonwealth proved that Clinton Little came to his death by a wound received in the basement of the house, and that the door leading to said basement entered upon the south side of the house, under a porch; and introduced a witness, Miss Hattie Prichard, who testified that on the morning of the 5th of July 1873, after having breakfasted at the usual hour, she, in company with Amanda, the sister of the deceased, and Miss Villary, had gone to an apple tree in the garden, not a great distance from the house; it was the first tree in the garden; that there was a fence between the yard and garden; that she remained but a short time at the tree—about five minutes—
925 *likely not that long; whilst there she heard shots fired; it seemed as if only one shot; from the sound it must have been from the basement; when she heard the sound she came to the house; the ice house obstructed the view; "when I got to the yard I saw Columbus and Gilbert Little in the south porch, that looks towards the stable; I call it the back porch; I saw Oscar Little and the prisoner at the bar in a slow walk, not in a run, going towards the stable; in a minute, in a second, they came back;" "I do not know what caused them to return; Columbus and Gilbert were walking around carelessly; Columbus had a pistol in each hand; Gilbert had a gun; don't know what sort; they had left the porch; when the prisoner and Oscar came back, Oscar was wounded; he was limping, which I then first observed; the prisoner told me when I met them"— The attorney for the commonwealth, at this point in the evidence of the witness, objected to her repeating the statement of the prisoner then made. The prisoner, by his counsel, moved the court that the witness be allowed to repeat the statement as part of the res gestæ, but the court overruled said motion, and excluded said statement.

We think that the court erred in refusing to permit the witness to state what was said by the prisoner on the occasion referred to. What was so said might well have been, in whole or in part, admissible evidence, either for or against the prisoner. It was very closely connected, both in time and place, with the homicide, which was the subject of the prosecution, and might well have tended to elucidate that fact as part of the res gestæ. It was said when the deceased was lying close by, in a dying state, from the effect of the wounds he had received, and in the presence, and it seems the hearing, of Columbus and Gilbert Little,
926 *the former of whom had a pistol in each hand and the latter a gun in his hand, and also in the presence and hearing of Oscar Little, who was also wounded. It is not probable that the prisoner had either time or motive to fabricate a statement under such circumstances. There were present on that occasion those who were eye-witnesses to the homicide, and who could disprove any misstatement which the prisoner might have made in regard to it. As the commonwealth did not, as she might have done, produce those eye-witnesses to testify upon the trial, it seems to be more reasonable on that account, that the statement made by the prisoner at the time of the transaction should not be excluded. At all events, that statement ought to have been heard by the court below, so that that court might determine whether all or any part of it was admissible evidence, and this court might revise the judgment in that respect. We certainly cannot say, a priori, that no part of that statement could have been legal evidence. It would have been competent for the court, after hearing the evidence, to exclude the whole or any part of it, if illegal; and it would have devolved on the jury to attach to the statement, or so much of it as the court might have held to be admissible, only so much weight as they might have considered it entitled to. The question of credibility of the evidence being one exclusively for the jury.

3. The third assignment of error is the subject of the third bill of exceptions, and is, that "the court erred in refusing to allow James F. Milton, jr., to be recalled for the purpose of enabling the prisoner to ask him a question with a view to impeaching his testimony, and also to show malice on the part of said Milton towards the prisoner; it appearing that this evidence was only discovered after the said Milton had
927 *left the stand, and after the commonwealth had closed its evidence." It does not appear from the bill of exceptions, on what ground the court refused to permit the witness, Milton, to be recalled, though the petition for the writ of error states, that "the ground taken by the court in refusing to allow the witness to be recalled was, that the application came too

late, although it appeared by the affidavit of Mr. Hesser (which is set out in the bill of exceptions), and by the averment of counsel, that the proposed evidence was just discovered." But in the view of the court it is immaterial whether the refusal was upon that ground or not, and that whether it was or not, the court erred in so refusing.

"The credit of a witness," says Greenleaf, "may also be impeached by proof that he has made statements out of court contrary to what he has testified at the trial. But it is only in such matters as are relevant to the issue, that the witness can be contradicted; and before this can be done, it is generally held necessary, in the case of verbal statements, first to ask him as to the time, place and person involved in the supposed contradiction. It is not enough to ask him the general question whether he has ever said so and so, nor whether he has always told the same story, because it may frequently happen that, upon the general question, he may not remember whether he has so said; whereas, when his attention is challenged to particular circumstances and occasions, he may recollect and explain what he has formerly said. This course of proceeding is considered indispensable, from a sense of justice to the witness; for as the direct tendency of the evidence is to impeach his veracity, common justice requires that, by first calling his attention to the subject, he should have an opportunity to recollect the *facts, and, if necessary, to correct the statement already given, as well as by a re-examination to explain the nature, circumstances, meaning and design of what he is proved elsewhere to have said." 1 Greenl. on Ev., § 462.

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In the Queen's case, 2 Brod. & Bing. R. 313, this subject was very much discussed, and the rule and the reason of it were laid down to the same effect in the unanimous opinion of the learned judges, which was delivered by Abbott C. J. See that part of the opinion set out in note 1 to 1 Greenl. on Ev., § 462.

In the United States the same course has been generally adopted, as appears from the cases cited in the same note. Though in Massachusetts and some of the other states the rule appears to be different, as appears from cases also cited in the same note. In this state the existence of the rule was affirmed in Unis &c. v. Charlton's adm'or &c., 12 Gratt. 484, 494, in which the question was for the first time distinctly presented to this court for its decision; though no doubt always our practice has conformed to the rule as laid down by Greenleaf, which we consider a good rule, and one that ought to prevail here. Conceding that it is our rule, we think that the court ought to have permitted the witness to be recalled, in order to comply with the requisition of the rule. Certainly it ought, if, as is alleged, the prisoner and his counsel were uninformed of the fact set forth in the affidavit of Hesser until after the witness, Milton, had left the stand. But the court ought to have given such permission, even if the fact was known to the prisoner and his counsel before the said witness had left the stand, and the omission then to ask the question of him was a mere oversight. The testimony of that witness was all important, and upon the question of his credibility depended no doubt *the issue of life and death, which the jury had to determine. It would have been very unreasonable to make the life of a human being depend upon a mere rule of practice adopted for the sake of convenience only. But in fact the rule is founded on a sense of justice to the witness, and was established for his benefit. If it could be considered that the rule does not exist here (as it certainly does), then the prisoner would have had a right to introduce Hesser when he offered to do so, for the purpose of contradicting the witness for the commonwealth. So, that in any view of the rule, and whether it be considered as existing here or not as a rule of practice, the court certainly erred either in refusing to permit the witness, Milton, to be recalled as aforesaid, or in refusing to permit Hesser to be examined as a witness to contradict the testimony of Milton, if in fact the court did so refuse, as seems to have been the case.

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4. The fourth assignment of error is the subject of the fourth bill of exceptions, and is that the court refused "to permit the prisoner to prove by Col. Washington Dearmont that the witness, James F. Milton, Jr., had made before the grand jury that indicted the prisoner, a statement of the alleged confession, altogether different from the statement made by him at the trial; and that he did not make before said grand jury the statement made by him" at said trial.

It does not appear from the bill of exceptions what was the ground of the court's refusal; but in the petition for the writ of error it is said that "the court refused to permit Col. Dearmont to prove what Milton had stated in the grand-jury room, upon the ground that such testimony was contrary to public policy." We can conceive of no other ground on which such refusal could have been based.

*We are of opinion that the court erred in such refusal, whatever may have been the ground on which it was based. The proceedings of grand jurors seem to be regarded as privileged communications, and upon grounds of public policy. "It is the policy of the law," says Greenleaf, "that the preliminary enquiry as to the guilt or innocence of a party accused should be secretly conducted. And in furtherance of this object," he further says, "every grand juror is sworn to secrecy." 1 Greenl. on Ev., § 252. And by Bigelow, J., in Commonwealth v. Hill, 11 Cush. R. 137, 140, it is said, that "the extent of the limitation upon the testimony of grand jurors is best defined by the terms of their oath of office, by which the commonwealth's counsel, their fellows, and their own, they

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are to keep secret." But the form of the oath required by our law to be administered to grand juries is very different, and they are not required to be sworn to secrecy. Code, ch. 200, § 6, p. 1237. If the obligation of secrecy arises alone from the form of the oath, there is therefore no such obligation in this state. But the rule for the exclusion of such evidence is, no doubt, not founded alone on the form of the oath, but also upon public policy. It has not been precisely determined, however, how far the rule extends, and what is the reason of it. "One reason," says Greenleaf, "may be to prevent the escape of the party should he know that proceedings were in train against him; another may be to secure freedom of deliberation and opinion among the grand jurors, which would be impaired if the part taken by each might be made known to the accused. A third reason may be to prevent the testimony produced before them from being contradicted at the trial of the indictment by subordination of perjury on
931 the part of the accused." *1 Greenl. on Ev., § 252. None of these reasons seem to require or authorize the exclusion even of a grand juror as a competent witness to prove that a statement made by a person before the grand jury on the finding of an indictment, was different from the statement made by the same person before the jury on the trial of the indictment. And in 4 Chitty's Bl., p. 126, note 4, it is said—that a few years ago, at York, a gentleman of the grand jury heard a witness swear in court upon the trial of a prisoner directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumstance to the judge, who, upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed, and the witness was committed for perjury, to be tried upon the testimony of the gentlemen of the grand jury. It was held, the object of this concealment was only to prevent the testimony produced before them from being counteracted by subordination of perjury on the part of the persons against whom bills were found. This is a privilege which may be waived by the crown. See 1 Chit. Cr. Law p. 317, marg. Such seems to have been held to be the law even in England, where, by the express terms of the grand juror's oath, he is bound to secrecy. It cannot be said, therefore, at least as a matter free from grave doubt, that even if the witness in this case had been one of the grand jury that found the indictment, he would have been incompetent to testify as to the evidence of the witness Milton before the grand jury.

But, however that may be (and we do not mean to decide the question, because it is unnecessary in this case), we consider it very clear that Dearmont was a
932 *competent witness to testify as to the said evidence, and ought not to have been excluded by the court. Though the rule has been said to include not only the grand jurors themselves, but their clerk, if they have one, and the prosecuting officer, if he is present at their deliberations; all these being equally concerned in the administration of the same portion of penal law; 1 Greenl. on Ev. § 252; yet it has been expressly held, in England, on the trial of an indictment for perjury committed in giving evidence before the grand jury, that another person who was present as a witness in the same matter, at the same time, is competent to testify to what the prisoner said before the grand jury; and that a police officer in waiting was competent for the same purpose; neither of these being sworn to secrecy. Regina v. Hughes, 1 Car. & Kir. R. 519; cited in note 4 to 1 Greenl. supra. This case comes directly within the principle of that decision, and if it be sound law, as we think it is, it follows, a fortiori, that the testimony of Dearmont was competent for the purpose for which it was offered in this case.

5. The fifth assignment of error is the subject of the fifth bill of exceptions, and is that "the court erred in ruling that the question put to the witness James F. Milton, Jr., by counsel for the prisoner, viz: If he Milton, had not stated on last Wednesday, on the front porch of the courthouse, in conversation with two gentlemen whose names were not known, 'If I had my way I would kill the damned rascals,' referring to the prisoners, was improper, and in excluding the same on the ground that the names of the two gentlemen were not given."

The question presented by the fifth bill of exceptions is not accurately stated in the fifth assignment of error, though the effect is the same. It appears from
933 *the bill of exceptions that the question was actually put to and answered by the witness Milton; and that William Lewis, a witness for the prisoner, was asked if he had not heard said Milton, at the time and place referred to in the above interrogatory, in a conversation with two gentlemen (whose names the counsel for the prisoner stated were not known at the time the above question was asked said Milton, and had not been ascertained till afterwards), make use of the expression quoted in the above interrogatory. To which question the attorney for the commonwealth objected, and the court sustained the objection, upon the ground that a proper foundation had not been laid for the question by informing the witness of the names of the persons with whom the alleged conversation was held, and would not permit the witness to answer. To which ruling of the court the prisoner, by his counsel, excepted.

We think that the court erred in so ruling; and that there was a sufficient specification as to the time, place and persons involved in the supposed contradiction, within the meaning of the law on this subject. 1 Greenl. on Ev. § 62. The name of the persons could not be given because it appears

they were unknown; but they were otherwise sufficiently described, and that is all that the law requires.

6. The sixth bill of exceptions was taken to the refusal of the court to set aside the verdict and grant a new trial, upon the ground that the verdict was contrary to the evidence; which is the subject of the first assignment of error. The facts proved in the case are certified in the bill of exceptions, except that in some respects therein stated the testimony was conflicting, in which respects, therefore, the facts were not certified.

934 *We think it very clear that the refusal of the court to set aside the verdict and grant a new trial affords no good ground for reversing the judgment, according to the well settled law of this state, as may be seen by reference to Read's case, 22 Gratt. 924, in which all the other cases on the subject are referred to. We deem it unnecessary to say anything further on this subject.

7. The question presented by the sixth assignment of error and the seventh bill of exceptions (both of which present the same question), is rendered immaterial by our decision of the question arising on the third assignment of error, and we will therefore take no further notice of it.

8. The last assignment of error is, that "it is not proven that the felony with which the prisoner was charged was committed within the county of Clarke, as the indictment alleges, or within the jurisdiction of the court that tried him."

No notice was taken of any such point in the court below, but it is noticed for the first time in the petition for a writ of error. Had it been noticed in the court below, the alleged defect would no doubt have been at once supplied. The omission in the proof, if any, was a mere oversight. The prisoner is charged in the indictment with committing the offence in the county of Clarke. It was proved that the act was done in the house of Franklin Little, the father of the prisoner and the deceased, the location of which in the county of Clarke was no doubt notorious to all the jury and all the parties concerned in the trial. The jury found the prisoner guilty of committing the offence in the county of Clarke, as charged in the indictment. And we think the ground relied on in the last assignment of error for the reversal of the judgment, is insufficient for that purpose.

935 *But upon the grounds relied on in the second, third, fourth and fifth assignments of error and bills of exceptions, as aforesaid, we think the judgment is erroneous and ought to be reversed, the verdict of the jury set side, and the cause remanded for a new trial to be had therein in conformity with the foregoing opinion.

The judgment was as follows:

This day came as well the plaintiff in error by counsel, as the attorney general on behalf of the commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the Circuit court erred in refusing to permit the witness, Miss Hattie Prichard, to repeat the statement made to her by the prisoner as mentioned in the second bill of exceptions. That statement might well have been, in whole or in part, admissible evidence, either for or against the prisoner. It was very closely connected, both in time and place, with the homicide, which was the subject of the prosecution, and might well have tended to elucidate that fact as part of the res gestæ. It was made when the deceased was lying close by in a dying state from the effects of the wounds he had received, and was made in the presence, and no doubt in the hearing, of those who, it seems, were eyewitnesses to the homicide, but who were not examined by the commonwealth as witnesses in regard to the same. At all events, that statement ought to have been heard by the court below, so that such court might determine whether all or any part of it was admissible evidence, and this court 936 might revise *the judgment in that respect. We certainly cannot say a priori, that no part of that statement could have been legal evidence. It would have been competent for the court, after hearing the statement, to exclude the whole or any part of it if illegal; and it would have devolved on the jury to attach to the statement, or so much of it as the court might have held to be admissible, only so much weight as they considered it entitled to.

The court is further of opinion that the Circuit court erred in overruling the motion of the prisoner, that the witness James F. Milton, Jr., might be again put on the stand for the purpose of allowing the prisoner to cross-examine him with a view to his contradiction, as mentioned in the third bill of exceptions.

The court is further of opinion that the Circuit court erred in refusing to permit Washington Dearmont, a witness introduced in behalf of the prisoner, to state what the witness James F. Milton, jr., said before the grand jury, as mentioned in the fourth bill of exceptions.

The Court is further of opinion that the Circuit court erred in sustaining the objection of the attorney for the commonwealth to the question propounded to William Lewis, a witness for the prisoner, as mentioned in the fifth bill of exceptions.

The court is further of opinion that there is no error of the court in any of its other rulings in this cause, except that this court does not decide the question presented by the seventh bill of exceptions, the decision of which is unnecessary. Therefore, for the reasons aforesaid, it is considered by the court that the said judgment of the Circuit court be reversed and annulled, that the verdict of the jury be set aside, and that

the cause be remanded to the said Circuit *court for a new trial to be had therein in conformity with the foregoing opinion. Which is ordered to be certified to the said Circuit court of Clarke ounty.

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Judgment reversed.

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938 *Commonwealth v. Lewis & Diviney.

December Term, 1874, Richmond.

1. **Judgment—Finality—Circuit Courts—Appeal.**—On a trial for a misdemeanor in a County court, there is a verdict and judgment against the defendants, and they take the case to the Circuit court; where the judgment is reversed, and the cause retained for a new trial. There may be a writ of error to the Court of Appeals from the judgment of the Circuit court.

2. **Misdemeanors—Joint Indictment.***—Where two persons have been indicted jointly for a misdemeanor, they cannot claim any right to be tried separately.

The case is stated in the opinion of Judge Moncure.

The Attorney General and Montague, for the commonwealth.

There was no counsel for the appellees.

MONCURE, P., delivered the opinion of the court.

The defendants in error, with several others, were indicted in the County court of Middlesex county, on the 24th day of December 1874, for unlawfully taking and catching oysters with dredges and scrapes, in the waters within the jurisdiction of this commonwealth, and in the county aforesaid; the said defendants being then and there non-residents of the state of Virginia. The indictment was founded on section 22 of chapter 333 of the Acts ofAssembly 1872-73, page 316. It contained three counts, the last of which charged the defendants with unlawfully using and employing the schooner belonging to and the property of one of the defendants, Michael Diviney, and hailing from the city of Baltimore, in the state of Maryland, for the *purpose of taking and catching oysters, and with taking and catching oysters on board of said schooner, with dredges and scrapes, in the waters and within the jurisdiction aforesaid. On the same day on which the indictment was found, the defendants pleaded not guilty; to which the attorney for the commonwealth replied generally. And then the defendants moved the court to permit them to sever in their defence; which motion, being considered, was overruled by the court. And thereupon the issue joined was tried by a jury, who found the defendants, Charles Lewis and Michael Diviney (being the defendants in error), guilty, and assessed each of them with a fine of two hundred dollars; and found the other defendants not guilty. The defendants moved the court for an arrest of judgment, which motion was overruled. The court then rendered judgment against the defendants in error for the said fines and the costs of the prosecution; and also made an order that unless the said fines and costs should be forthwith paid, the sheriff of the county should sell the said vessel and all her tackle (which, it appeared, the inspector had seized and then held), for the satisfaction of the said judgment. Then the defendants in error moved the court to set aside the verdict and judgment, and grant them a new trial; which motion was also overruled. No exception was taken to any action or ruling of the court in the case.

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On the 4th day of February 1874, upon the petition of the defendants in error, a writ of error to operate as a supersedeas to the said judgment of the County court, was awarded by the judge of the Circuit court of said county. And afterwards, to wit: on the 19th day of March 1874, the cause being heard in the said Circuit court, it seemed to that court that the County court erred in refusing to allow the defendants to sever *in their defense, and to have a separate trial; and therefore the Circuit court reversed and annulled the said judgment of the County court, and set aside the verdict, and ordered the cause to be retained in the said Circuit court for a new trial to be had therein. To the said judgment of the Circuit court, the commonwealth applied to this court for a writ of error; which was accordingly awarded.

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There can certainly, now, be no doubt that the judgment of the Circuit court is such a final judgment as that a writ of error will lie thereto; though the cause was ordered to be retained in said court for a new trial to be had therein, which order was interlocutory in its nature. Nothing was ever done under that order; and very soon after the judgment of the Circuit court was rendered, the commonwealth applied for and obtained a writ of error thereto. The judgment of the County court was in all respects final, and the finality of that judgment is imparted to the judgment of the Circuit court, and makes it final for the purpose of having it reviewed and reversed by this court. This subject has been twice recently before this court, and on both occasions it was declared that such a judgment of the Circuit court is final, and a writ of error will lie thereto from this court. Brumbaugh v. Wissler's ex'or, supra, 463; and Crawford v. The Valley Railroad Co., Id. 467.

This court, then, having jurisdiction of the case, the question now arises, whether there is any error in the judgment of the Circuit court?

The defendants in error did not appear by counsel in this court, and though they appeared by counsel both in the County and Circuit courts, yet the record does not disclose the grounds of their defense to the

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***Joint Indictment.**—Upon this subject, see Jones v. Commonwealth, 31 Gratt. 836, and *note*.

prosecution. The Circuit court seems
941 to have awarded *a writ of error to the judgment of the County court without any petition or other assignment of errors; at least none appears in the record. The Circuit court places its reversal of the judgment of the County court upon a single ground of error, to wit: the refusal of the County court to allow the defendants to sever in their defense and to have a separate trial; and as no other ground of error is noticed by the Circuit court, the presumption is that none other was relied on in that court.

In regard to that ground of error this court can have no difficulty. Even on a joint indictment against two or more for felony, the defendants were not entitled, as matter of right at common law, to have a several trial, but the court, or officer prosecuting for the crown or the commonwealth, might at its or his election, have a joint or several trial in such a case; though such election was always exercised with due regard and tenderness to the accused. 3 Rob. Pr., old ed., 150-152, and the cases there cited. In The United States v. Marchant, 12 Wheat. R. 480, this question was fully considered, all the authorities bearing upon it were reviewed, and the practice was settled by the Supreme court in an opinion delivered by Mr. Justice Story. The common law on this subject, however, has been changed in this state in cases of felony; in consequence, no doubt, of the difficulties arising from the exercise of the right of peremptory challenge on joint trials in such cases. So that now, by statute, persons indicted jointly for felony, may elect to be tried jointly or severally, on certain terms prescribed by the statute. Code, ch. 202, §§ 13, 14 and 15. But this statutory right of election given to the accused is subject to the right of the commonwealth, which still exists, to try the accused severally, notwithstanding
942 *they may elect to be tried jointly. Curran's case, 7 Gratt. 619, 627. But never, in a case of misdemeanor, have persons, jointly indicted, been entitled as matter of right, to be tried severally; the common law on that subject having never been changed by statute. If it can properly be said that the court has a discretion to order a joint or several trial in such a case, and that it ought to exercise such discretion soundly; certainly it devolves on the accused to show that it was not exercised soundly in refusing to allow them to have a separate trial; and as, in this case, no exception was taken to the action of the court in that respect, we must presume that the discretion of the court was soundly exercised. We do not mean, however, to decide in this case, because it is unnecessary for the purposes of the case to decide the question, that the action of the court in this respect is proper ground of exception or complaint on the part of the accused.

We are therefore of opinion that there is no error in the judgment of the County court on the only ground on which it was reversed by the Circuit court; and seeing no error in that judgment, we are of opinion that the Circuit court erred in reversing it.

Therefore the judgment of the Circuit court is reversed and annulled and that of the County court affirmed.

Judgment of the Circuit court reversed.

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943 *Jordan v. Commonwealth.*

December Term, 1874, Richmond.

1. **Robbery — Evidence—Res Gestæ — Identification.**—On a prosecution for a robbery, a witness gives a description of the robbers received from the wife of the prosecutor a few minutes after the occurrence, and he states that he pursued after the parties and found the prisoner and another, at a place he describes. The commonwealth's attorney may then properly ask him whether the prisoner and the other person corresponded on that night, in dress and appearance, with two of the men described by the wife of the prosecutor. And his answer that they did, was proper evidence.
2. **Same—What Constitutes.**—The prisoner is prosecuted for the robbery of a pistol. If he snatched the pistol from the hands of the prosecutor simply to prevent the prosecutor from using it against his assailants, without at the time intending to appropriate it, though he afterwards takes it away and sells it, this is not robbery of the pistol; though he and others went together to the house of the prosecutor for the purpose of committing a robbery.
3. **Same—Same.**—But in such case, if the prisoner, when he snatched the pistol, had the intention to deprive the prosecutor of it, though he may have also had the purpose to prevent the use of it by the prosecutor, this is robbery.
4. **Same—Same.**—To constitute a robbery it is not necessary that the prisoner should intend to appropriate the property to his own use. If he intended to deprive the prosecutor of his property, that is sufficient.
5. **Jurisdiction.**—The criminal jurisdiction of the Hustings court of the city of Richmond extends one mile beyond the city limits, on the north side of James river.

This was an indictment in the Hustings court of the city of Richmond, against Henry Jordon for the robbery of Elijah Priddy of a pistol. Priddy lived in the county of Henrico, beyond the limits of the city, but within one mile of the corporation line, and the robbery was charged to
944 have been committed at *his house. On the second trial of the prisoner he was found guilty by the jury, and the term of his imprisonment in the penitentiary was fixed at five years; and there was a judgment according to the verdict.

On the trial the prisoner took two bills of exceptions to rulings of the court; and applied to a judge of this court for a writ of error to the judgment; which was awarded. The questions are sufficiently stated in the opinion of the court, delivered by Judge Staples.

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*For monographic note on Res Gestæ, see end of case.

Young, for the prisoner.

The Attorney General, for the commonwealth.

STAPLES, J., delivered the opinion of the court.

The first assignment of error arises upon a question asked a witness, and set out in the first bill of exceptions. This witness had testified that he went to the prosecutor's house within a few minutes after the robbery was attempted; that the persons implicated in the robbery were described to him by Mrs. Priddy, the wife of the prosecutor; that he went immediately in pursuit of these persons, and found the prisoner and a man named Thos. Oakley, who is also under indictment for the same offence, and several other persons, in a bar-room about a mile distant from the prosecutor's house; and after the witness had described the dress and general appearance of the prisoner, he was asked by the commonwealth's attorney "Whether the prisoner and the said Oakley corresponded on that night, in dress and appearance, with two of the men described by Mrs. Priddy?" The witness answered "that they did." The counsel for the prisoner insists that this was error; that the witness ought 945 to have been *asked to describe the appearance and dress of the prisoner and his companion, so that the jury might judge whether they answered to the description given by the prosecutor's wife in her testimony.

Now, as a matter of fact, that precise course was pursued. The wife of the prosecutor did describe to the jury the appearance and dress of the persons engaged in the attempted robbery; and the other witness described the persons he saw in the bar-room. The jury were thus enabled to judge whether there were any material discrepancies in the description given by these witnesses respectively. But the commonwealth was not necessarily restricted to this mode of examination. The description of the prisoners given a few minutes after the occurrence, was more likely to be correct than any given on a subsequent occasion. On the trial the wife of the prosecutor might fail to remember many particulars or details observed and remembered at the time of the robbery. Her description given to the witness a few minutes afterwards was a part of the res gestæ. And it was entirely competent to the commonwealth to prove before the jury the particulars of that description, as was done by the witness without objection by the prisoner. This proof being adduced, there could be no valid objection to an enquiry of the witness whether the appearance and dress of the prisoner and his companion, as seen at the bar-room, corresponded with the description thus given. If it be conceded that the witness was thus requested to express an opinion, it is sufficient to say that upon questions of identity it is competent to the witness to give his opinion; the grounds upon which it rests being always open to the investigation of the adverse party. When the witness states that the prisoner at the 946 bar is the same person *seen on a particular occasion, he is giving his opinion; and when he undertakes to describe the dress and appearance of the prisoner, it is still an opinion. The weight to which it is entitled depends upon his integrity, his intelligence, his accuracy and means of observation. In the present case the question asked the witness was not a violation of the rule, and the evidence thus elicited was clearly admissible.

The second error assigned was the refusal of the court to give the instruction asked for by the prisoner, and in giving another in lieu thereof, as set out in the second bill of exceptions. We do not deem it at all necessary to quote the language of either of these instructions. That given by the court in effect affirms the proposition, that if the prisoner, along with other persons, made an assault upon the prosecutor, intending to rob him of his property; and in the course of a scuffle between the parties, one of the assailants snatched a pistol from the hands of the prosecutor and carried it away, and converted it to the use of either of them, this constituted the offence of robbery by the prisoner.

The manifest objection to this instruction is, that it affirms as a conclusion of law, that certain enumerated acts constitute the crime of robbery, without the slightest reference to the intention with which those acts were done. It assumes, that although the prisoner, in taking the pistol, had no design to steal it, but simply to prevent the prosecutor from using it against his assailants, the prisoner may nevertheless be convicted, if he intended to rob the prosecutor of other property not mentioned in the indictment.

We do not understand the learned judge of the Hustings court as denying that the animus furandi is an essential element in the crime of robbery. On the 947 *contrary, he affirms that it is. Indeed, the rule upon this subject is too well settled to be now called in question. The taking must in all cases be accompanied with the felonious intent, and no subsequent felonious purpose will render the previous taking felonious. As expressed by Lord Coke, "the intent to steal must be when it cometh to his hands or possession; for if he hath the possession of it unlawfully, though he hath animum furandi afterward and carrieth it away, it is no larceny."

It is not enough that the prisoner had at the same time an intent to steal other goods; the felonious intent must exist with regard to the goods charged in the indictment. Roscoe 838; 2 Arch. Cr. Pr. & Plead. 508.

This principle is exemplified by a case in which it was held, that the taking was a mere trespass, although the original assault was clearly with a felonious intent. A assaulted B on the highway, cum animo furandi, and searched his pockets for money; but finding none, A pulled off the

bridle of B's horse and threw that and some bread which B had in pannels, about the highway; but did not take anything from B. It was resolved, upon conference with all the judges, that this was no robbery, because nothing was taken from B. But East, in his pleas of the crown, says that the better reason seems to be, that the particular goods taken were not taken with a felonious intent; for surely there was a sufficient taking and separation of the goods from the person. The same view of the case was taken by Russell and other writers on the criminal law.

In Rex v. Holloway, 24 Eng. C. L. R. 688, the prisoner was indicted for stealing a gun from the prosecutor, who was a game keeper. Vaughan, B., in summing
948 *up, said, the prisoner might have imagined that the prosecutor would use the gun so as to endanger his life; and if so, his taking it under that impression would not be felony; but if he took it intending at the time to dispose of it, it would be felony. It was a question peculiarly for the jury.

And so in the case at bar, the prisoner and his associates in snatching the pistol from the prosecutor may not have intended at the time to steal it. If they did not so intend, if the only object was to prevent its being used against them, then the subsequent carrying away and conversion would not constitute robbery. On the other hand, if the intention at the time was to deprive the prosecutor wholly of the pistol, the offence is robbery, although the assailants on snatching the pistol, may also have intended to prevent its being used against them. Both intents may have existed at the time. The jury may infer the felonious intent from the immediate asportation and conversion of the property, in the absence of satisfactory countervailing evidence by the prisoner. The whole question is one peculiarly for their consideration, to be determined upon all the facts and circumstances.

This view renders it unnecessary to notice particularly the instruction asked for by prisoner's counsel. It may not be amiss, however, to say it is liable to one grave objection. It affirms that the goods must have been taken with the felonious purpose existing at the time to appropriate them to the use of the taker. This is a misapprehension; it is not essential that the person taking shall intend to appropriate the same to his own use. It is sufficient that his purpose is to deprive the owner wholly of them. For although a taking lucri causa is larceny, a taking in order to deprive the owner of his property is equally so.
949 2 Arch. *391. This principle of law, though sometimes not adverted to in the cases, is well understood and sustained by the authorities.

The third ground of error ought regularly to have been the first considered. We have, however, deemed it best to follow the order adopted by the counsel, and to notice the various assignments of error as they are presented. By the third and last it is insisted that the Hustings court of Richmond, as at present organized, has no jurisdiction to try offences committed outside of the corporate limits and within one mile of those limits. It is conceded that this jurisdiction existed down to the period of the adoption of the present constitution. It was first conferred by an act to amend an ordinance of the city passed in 1803; reaffirmed by the act of 1841-'2; and continued in the revisal of 1860. It has existed for more than fifty years, and has been always regarded as an important and beneficial jurisdiction. If under the new arrangement it has been taken away, it has been done by implication, and without being so intended.

In Chahoon's case, 21 Gratt. 822, this court held that the courts provided by the fourteenth section of the sixth article of the constitution (of which the Hustings court is one) are continuations and successions of the Corporation courts then in existence, invested with the same jurisdiction and powers, subject to such modifications and changes as were made by the constitution, or might be made by acts thereafter passed. One of these changes is that the Hustings court has been deprived of the greater part of its civil jurisdiction. Another is that it has been clothed with exclusive, original jurisdiction in criminal matters, within the city of Richmond, with the exception of proceedings against convicts in the penitentiary.
950 *The acts of 1803 and 1842, conferring upon the court criminal jurisdiction outside of the city limits to the distance of one mile, has never been repealed, and must be held to be still in force. Whether the jurisdiction in civil matter over the same territory still remains or has been distributed among other courts, is a question we are not called upon to decide. It is sufficient that the power of the court in criminal cases still exists unaffected by any modifications or changes resulting from the constitution or from statutory enactment.

From what has been stated, it will be perceived the only error committed by the Hustings court was in giving the instruction already considered. For that error the judgment must be reversed, the verdict set aside, and the case remanded, to be proceeded with in conformity with the views here expressed.

Judgment reversed.

RES GESTÆ.

I. Definition.

II. The Actual Transaction.

III. Verbal Acts.

IV. Spontaneous Declarations.

V. Acts before or after the Transaction in Question.

VI. Declarations before or after the Transaction in Question.

I. DEFINITION.

It is a great mistake to suppose the *res gestæ*, in the legal sense, is, in case of murder, confined to the fact of thrusting the knife into the body, and therefore depriving of life. The *res gestæ* is the murder, and the murder is made up of the homicide, and the intent with which it was committed. Actions, therefore, which seem to demonstrate the *quo animo* are a part of the *res gestæ*, and words which are a part of these actions are admissible. State v. Abbott, 8 W. Va. 741.

II. THE ACTUAL TRANSACTION.

Conduct of Prisoner.—On indictment for larceny the commonwealth may prove the presence of the prisoner in the hotel on the night in question, and his acts and conduct therein; not for the purpose of establishing another distinct felony, but as a part of the whole transaction. Burr v. Com., 4 Gratt. 534.

Instruments of Crime.—The carrying of burglar's nippers by the prisoner and his possession at the time of the crime of a pistol of calibre corresponding to the bullet found in the body of deceased is part of the *res gestæ*. Williams v. Com., 85 Va. 613, 8 S. E. Rep. 470.

Insult—Cause of Homicide.—A gross insult offered to defendant is admissible in evidence as part of the *res gestæ* on his trial for an assault committed the day after such insult. It was the immediate accompaniment of the act, such immediateness being tested not by closeness of time but by casual relation. Ward v. White, 86 Va. 212, 9 S. E. Rep. 1021; Davis v. Franke, 33 Gratt. 416.

Letters—Casual Relation.—On indictment for the murder of a girl in Richmond a letter written to her by the prisoner is admissible in evidence to show her reason for going to that place. Such letter is part of the *res gestæ* or of those acts—verbal or written or done—which stand in "*casual relation*" to the crime. The declarations "characterized her act of going" and was one of its "immediate accompaniments," such immediateness being tested not by closeness of time, but by casual relation. Cluverius v. Com., 81 Va. 806.

Declarations of Agent—Dum Opus Fervet.—Where the acts of the agent will bind the principal, there, his representations, declarations, and admissions, respecting the subject-matter, will also bind him, if made at the same time, and constituting part of the *res gestæ*; but his declaration not made *dum opus fervet*, but at another time and at a different place are not part of the *res gestæ* and have no binding force on the principal. Coyle v. B. & O. R. Co., 11 W. Va. 94-108; B. & O. R. Co. v. Christie, 5 W. Va. 325.

When two parties are interested in a contract on one side the declarations of one, who was practically the agent of the other, *made during the negotiations* though in the absence of the other are admissible in evidence against that other as part of the *res gestæ*. Steptoe v. Pollard, 30 Gratt. 689-704.

Statement of Deceased.—On indictment for homicide evidence is admissible to show deceased said she was going to a certain place near which her body was found. Such evidence is part of the *res gestæ*. Tilley v. Com., 89 Va. 153, 15 S. E. Rep. 526.

III. VERBAL ACTS.

Declarations as parts of the *res gestæ*, made at the time of the transaction, are regarded as *verbal acts* indicating a present purpose and intention, and are, therefore, admitted in proof like any other material fact to be weighed by the jury for what they are worth. Beckwith v. Mollohan, 2 W. Va. 477; Corder v. Talbott, 14 W. Va. 277.

Declarations Accompanying Gifts Mortis Causa.—Declarations of one during his last illness accompanying a delivery of personal property are admissible in evidence as part of the *res gestæ* to show the purpose of such gifts. Thomas v. Lewis, 89 Va. 57, 15 S. E. Rep. 389.

Declarations Accompanying Deed.—Evidence of *parol* declarations previous to the execution of a deed *and at the moment* of executing it are admissible to show the intention of such deed. Land, etc., v. Jeffries, etc., 5 Rand. 214-268. Hopkins, Brother & Co. v. Richardson, 9 Gratt. 485; Walthol v. Johnson, 2 Call 282 [275]; Jones v. Robertson, 2 Munf. 191.

The intention of the parties in the execution of a bond and deed of trust may be shown by the circumstances attending that transaction. Niday v. Harvey, 9 Gratt. 454-464.

The statements of the grantor in a deed which is in evidence, made at the time of its execution, are always admissible in evidence as part of the *res gestæ*. State *ex rel.* Mundy v. Andrews, 39 W. Va. 35, 19 S. E. Rep. 385.

Declarations in Favor of Declarant.—The declarations of a party are not generally admissible as evidence in his own favor, but they are so admissible whenever they form part of the *res gestæ*. To come within the terms and operation of the rule, the declarations must accompany and explain the act done. Scott & Boyd v. Shelor, 28 Gratt. 891; Haynes v. Com., 28 Gratt. 943; State v. Abbott, 8 W. Va. 741.

Declarations of a party in his own favor, though a part of the *res gestæ*, of a collateral fact introduced into the case merely to contradict a witness of the other side, but in no way otherwise connected with the material fact or enquiry involved in the issue, are not admissible. Corder v. Talbot, 14 W. Va. 277-290.

In Barley v. Byrd, 95 Va. 316, 28 S. E. Rep. 329, it was held that a memorandum of an attorney of James Wilson, through whom plaintiff claims, reciting a conveyance by deed to the said James Wilson is not admissible as a part of the *res gestæ* to prove the execution of such deed; nor is it admissible as a declaration against interest.

IV. SPONTANEOUS DECLARATIONS.

When deceased was killed two persons ran rapidly away in the same direction: one said to the other in a jerky voice as they both ran by a by-stander, "Will, you have killed him." This declaration is admissible as part of the *res gestæ*. It was a circumstance which was closely connected with the crime; words said between the participants under the immediate spur of the transaction. Briggs v. Com., 82 Va. 562.

The cry of a woman *in articulo mortis*, of "Oh, I am bound to die, and I am not prepared, my husband put me in this fix; hold me down and let me die; tell everybody my husband did it" is admissible as part of the *res gestæ*, as a dying declaration and as a charge made in his presence and not denied by him. Puryear v. Com., 83 Va. 51, 1 S. E. Rep. 512.

In Hill v. Com., 2 Gratt. 594-605, it was said, "All that is necessary, according to these cases, to make the declaration part of the *res gestæ*, is that it should be made recently after receiving the injury, and before he had time to make up a story." In this case a declaration that "Hunter Hill asked me to walk out and stabbed me here," made five or ten

minutes after the act, was held admissible as part of the *res gestæ*. Some of the judges considered the declaration not a part of the *res gestæ* but admissible as a dying declaration.

On indictment for felonious stabbing, a cry of "Charles Crookham has stabbed me" is admissible in evidence against the accused as part of a *res gestæ*. Crookham v. State, 5 W. Va. 510; Kirby v. Com., 77 Va. 681.

On a trial for murder, statements made by the prisoner a few minutes after the homicide near the place thereof and in the presence of witnesses to the homicide who were not called by the commonwealth, should have been heard by the court in order to determine if they were admissible. Little v. Com., 25 Gratt. 921.

Whenever the bodily or mental feelings of the individual are material to be proved, the usual expressions of such feelings, made at the time in question, may be given in evidence. And whether they were real or feigned is for the jury to determine. Livingston v. Com., 14 Gratt. 592.

V. ACTS BEFORE OR AFTER THE TRANSACTION IN QUESTION.

Facts which constitute the *res gestæ*, must be such as are so connected with the very transaction or fact under investigation as to constitute part of it. A quarrel of prisoner with R was held inadmissible as part of the *res gestæ* for the purpose of showing motive on his part in the alleged shooting of P. Joyce v. Com., 78 Va. 287.

On trial of a woman for homicide, evidence that deceased had two months before made an assault upon her with intent to commit rape, is not admissible as part of the *res gestæ*. Hodges v. Com., 89 Va. 265, 15 S. E. Rep. 513.

VI. DECLARATIONS BEFORE OR AFTER THE TRANSACTION IN QUESTION.

Conspiracy.—Though a previous conspiracy has been proved, statements of a conspirator made *after* the commission of the offence and *after* the object of the conspiracy had been accomplished are inadmissible in evidence against a co-conspirator. Oliver v. Com., 77 Va. 590; Hunter v. Com., 7 Gratt. 641; Jones v. Com., 31 Gratt. 836, and *note*; Danville Bank v. Waddill, 31 Gratt. 469, and *note*.

Narration.—A statement of a prosecutor after the alleged crime, that he was robbed is not admissible as part of the *res gestæ*. The court says: "It would be dangerous, to the last degree, to permit a party making a criminal charge against another to support his own evidence by proof of declarations made by him *subsequent* to the alleged crime." Haynes v. Com., 28 Gratt. 942; Jones v. Com., 86 Va. 743-744, 10 S. E. Rep. 1004.

The description of the prisoner, given by the *prosecutor's wife*, who was an eyewitness of the offence, such description being made soon after the crime is admissible as part of the *res gestæ*. Jordan v. Com., 25 Gratt. 948.

Declarations as to the execution of a deed made before *there was any treaty or negotiation* in relation to the subject-matter conveyed are not admissible to impeach the deed. Nor can declarations of one who is a mere agent to procure a deed bind the grantor, if such declarations are made after the execution thereof. He is in such a case *functus officio*. Smith v. Betty, 11 Gratt. 752.

Statements of a brakeman as to the condition of the train and the road bed, made sometime before the accident and some miles from the place thereof are not admissible as part of the *res gestæ*. Nor are such statements made sometime after the accident admissible. Va. & Tenn. R. Co. v. Sayers, 26 Gratt. 328; Hawker v. B. & O. R. Co., 15 W. Va. 628; Norfolk & C. R. Co. v. Suffolk Lumber Co., 92 Va. 413-444, 23 S. E. Rep. 737.

In an action for libel the admissions of the general manager of the defendant corporation are not admissible as part of the *res gestæ* to show the purpose of the publication, such declarations being made several weeks after the letter complained of was written. Reusch v. Roanoke, etc., Co., 91 Va. 537, 22 S. E. Rep. 358.

The declarations of the conductor made shortly after an accident, as to where he was when the accident occurred are neither admissible as part of the *res gestæ* or as admissions. Jammison v. C. & O. Ry. Co., 92 Va. 327, 23 S. E. Rep. 756.

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951 *Commonwealth v. Moore & Goodsons.

January Term, 1875, Richmond.

Taxation—Constitutionality of Statutes.—The act, ch. 240, § 104, Sess. Acts of 1874, which imposes a license tax on merchants, is constitutional.

At the September term 1874 of the Hustings court of the city of Richmond, Moore & Goodsons, partners, were indicted for that they did unlawfully transact business as merchants in the city of Richmond without having obtained a license according to law. The case came on to be tried at the October term of the court, when the jury found the defendants not guilty; and the court, overruling a motion on behalf of the commonwealth to set aside the verdict, entered a judgment in favor of the defendants. Whereupon, upon the application of the attorney general, a writ of error was granted by a judge of this court.

On the trial the commonwealth excepted to an instruction given to the jury, and also excepted to the refusal of the court to set aside the verdict. The only question in the cause is whether the act, ch. 240, § 104, Sess. Acts of 1874, imposing a license tax on merchants, is constitutional. The court certified that the defendants, before the presentment against them, were doing a general merchandise business in Richmond, buying and selling merchandise for profit, and that they had taken out no license to do such business: that the said firm had a capital in their business of at least fifteen hundred and fifty dollars.

952 *The Attorney General, for the commonwealth.

Ould, Crump and Williams, for the appellees.

Taxation—Constitutionality.—See Norfolk v. Norfolk Landmark Co., 95 Va. 566, 28 S. E. Rep. 959; Helfrick v. Commonwealth, 29 Gratt. 848; Mackin v. Taylor County Court, 38 W. Va. 388, 18 S. E. Rep. 632; Wheeling Bridge & T. Ry. Co. v. Paull, 39 W. Va. 142, 19 S. E. Rep. 551.

CHRISTIAN, J. The act of the general assembly whose constitutionality is drawn in question in this case, is the 104th section of chapter 240, Sess. Acts 1874, which is in the following words:

"Section 104. On every license to a merchant or mercantile firm the tax to be paid shall be graduated as follows: If the amount of purchases shall not exceed two thousand dollars, the specific tax shall be ten dollars; and for all purchases over two thousand dollars and less than sixty thousand dollars, there shall be paid a tax of one-half of one per centum. Upon all purchases over sixty thousand dollars and less than eighty thousand dollars, there shall be paid a tax of forty cents on the one hundred dollars of said purchases in excess of sixty thousand dollars. Upon all purchases over eighty thousand dollars and less than one hundred thousand dollars, there shall be paid a tax of thirty cents on the one hundred dollars of said purchases in excess of eighty thousand dollars. Upon all purchases over one hundred thousand dollars there shall be paid a tax of ten cents on the one hundred dollars of said purchases in excess of one hundred thousand dollars. The tax imposed under and by virtue of this section shall be in lieu of all tax for state purposes on the capital actually employed by said merchant or mercantile firm in said business. The tax in excess of ten dollars imposed by this section shall be paid in equal instalments on the 10th of January, 10th of April, 10th of July and 10th of October, in each year, and shall be collected in the same manner that license taxes are collected. Merchant tailors, lumber merchants, dealers in coal, ice or 953 wood, shall be embraced *in this section. But this section shall not authorize any such person to sell wine, ardent spirits, or a mixture thereof."

We are now to enquire whether this act of the general assembly is invalidated by the constitution of the state; or, in other words, whether there is anything in the provisions of the constitution which, either expressly or by clear implication, forbids the legislature from imposing a license tax on merchants. We say expressly or by clear implication, for the rule which governs the court in cases like this is, that we can declare an act of the general assembly void only when such act clearly and plainly violates the constitution, and in such manner as to leave no doubt or hesitation on our minds.

This rule has been repeatedly declared by this court.

Where a plain and palpable infraction of constitutional provision is shown in a law, upon the validity which it is called upon to decide, it is, of course, one of the highest and most solemn duties of the court to declare such law to be inoperative and void. If, however, it be only upon slight implication or inconclusive reasoning that the supposed infraction can be made out, the court should never undertake to rescind and annul the solemn and deliberate act of the legislative department of the government. The presumption always is that the legislature has judged correctly of its constitutional powers, and the contrary must be clearly demonstrated before a co-ordinate branch of the government can be called upon to interfere between the people and their immediate representatives. The decisions of all the courts, state and federal, speak a uniform language on this subject. A citation of authorities which establish these principles would include nearly 954 every case in which a question *of constitutional law has ever arisen. The rule referred to has, I believe, the singular advantage of not being opposed even by a dictum.

In order to ascertain whether the act in question is a plain violation of the constitution, and a clear usurpation of authority in the law making power, the true tests to be applied are—1st, Is the act in question in the nature of legislative power? 2d, Does the constitution expressly, or by clear implication, forbid the exercise of such power?

If the act be within the general scope of legislative power, and if it be not forbidden either expressly or by clear implication, either by the state or federal constitutions, it is valid.

To make it void, it must be clearly not an exercise of legislative power, or else be forbidden so plainly as to leave the case free from all doubt.

That taxation is a legislative power, has never been questioned in this country. The power to tax rests upon necessity, and is inherent in every sovereignty. The legislature of every free state will possess it, under the general grant of legislative power, whether particularly specified in the constitution among the powers to be exercised by it or not. Cooly's Const. Lim. 479.

It was said by Chief Justice Marshall, in Providence Bank v. Billings, 4 Peters R. 514, 563: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals 955 or corporate bodies. However *absolute the right of an individual may be, it is still in the nature of that right that it may bear a portion of the public burthen; and that portion must be determined by the legislature."

But this court has declared the same principle in the most explicit and emphatic terms. In Eyre v. Jacobs, sheriff, 14 Gratt. 426, Judge Lee, delivering the opinion of the court, said: "There is certainly one proposition which will not be questioned; and that is, that the legislature possesses the full, absolute, sovereign power of taxation, excepting so far as it may have been

surrendered to the general government, or may be interdicted by the constitution of the United States, or as it may be controlled by the restrictions and mandates of the constitution of the state. And this power, it is most important, should be sustained and upheld as essential to the very existence of the government of the state, and of providing the means of vindicating her sovereign authority. We do not go to the constitution to see what powers of taxation are given to the legislature, but what restrictions and limitations upon its general sovereign powers, are imposed by its provisions.

"If, therefore, the power to tax any subject whatever is not excluded by the terms of the constitution, or by necessary and inevitable implication, it must exist in the general assembly to be exercised by that body as wisdom and a proper sense of justice shall direct."

It is clear, therefore, upon principle and authority, that the act in question is clearly within the grant of legislative power. And if there be nothing in the provisions of the constitution to limit or control the exercise of that power, it is sovereign, absolute and supreme.

Let us now enquire whether the 956 constitution has *limited or restricted this general power of taxation, conferred exclusively upon the legislative department of the government, so as to prohibit the legislature from imposing a license tax on merchants. That there is no such express prohibition will be conceded by all. If such prohibition exists at all it is only by implication, and such implication must be clear and unquestioned, before it can operate as a restriction of that supreme power over the subject of taxation, which under every system of free government is vested solely in the legislative department.

Two provisions of the constitution are invoked by the learned counsel for the appellees as furnishing, by clear implication, a prohibition upon the legislature to impose a license tax upon merchants. They are contained in the first and fourth sections of article ten of the constitution, and read as follows: § 1. "Taxation, except as hereinafter provided, whether imposed by the state, county or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained and prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than other species of property of the same value."

§ 4. "The general assembly may levy a tax on incomes in excess of six hundred dollars per annum, and upon the following licenses, viz: the sale of ardent spirits, theatrical and circus companies, menageries, jugglers, itinerant peddlers, and all other shows and exhibitions for which an entrance fee is required; commission merchants, persons selling by sample, brokers and pawnbrokers, and all other business which cannot be reached by the ad valorem system. The capital invested in all business opera- 957 tions shall *be assessed and taxed as other property. Assessments upon all stock shall be according to the market value thereof."

The argument of the learned counsel for the appellees to show that these two sections furnish, by clear implication, a prohibition upon the legislature to impose a license tax upon merchants, when succinctly stated is this: The fundamental rule of taxation as declared by the first section, is that it shall be "equal and uniform." That the exceptions to this fundamental rule are those found in the fourth scetion; and this section containing the exceptions to the fundamental rule must be strictly construed; and that the general merchant not being named in this section no license tax can be imposed on him.

Now, in the first place, I think it may well be questioned, (if it has not been already settled by this court,) if the 1st section, art. 10, where it declares the rule of equality and uniformity, does not apply that rule to taxes on property alone; for immediately following the declaration of that rule is the provision that "all property shall be taxed in proportion to its value." "No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value."

A similar provision is to be found in the constitutions of many of the other states of the Union, and the same terms, "equal and uniform," are employed in most of them. In the constitutions of Tennessee, Louisiana, Arkansas, Missouri, Massachusetts, Illinois, Texas, Wisconsin, Michigan and California, the rule of equality and uniformity is enjoined either in terms or by equivalent expressions, and in giving them construction it has been generally held that the terms "equal and uniform," apply only to a direct tax on 958 *property, and that the clause by which such equality and uniformity is prescribed, does not limit the power of the legislature as to the subjects of taxation, but is only intended to prevent an arbitrary taxation of property according to kind or quality, without regard to value. Sedgwick, 502-'3, and cases there cited and note; 14 Gratt. 422, 434-435.

Mr. Sedgwick, in his valuable work no Construction of Statute and Constitutional Law, after referring to the constitutions of the states of the Union having similar provisions to ours, declaring in some form the rule of equality and uniformity and citing decisions construing these provisions, says, "These provisions have been generally held inapplicable to licenses." Sedgwick 503, note.

But conceding that the terms in the first section are broad enough to cover every subject of taxation, yet, in the language of Judge Samuels in Slaughter's case, 13 Gratt. 767, "it can only be so applied so far as practicable." If a given subject be

only susceptible of a modified application of the principle, it must receive this, and not be rejected because the rule cannot be applied with perfect precision to its whole extent and in all its results. 14 Gratt. 422, 435; City of Richmond v. Ould & Carrington, 23 Gratt. 464.

In the construction of the words used in the constitutions of many of the states to the effect that "taxation shall be equal and uniform," the rule to be extracted from numerous decisions would seem to be this: Uniformity must be such as is compatible with the subject matter, and as to licenses the only uniformity required is, that the tax shall be the same on all those in the same business. Sedgwick, 2d ed. 504, note.

But conceding to the fullest extent the proposition of the learned counsel for
959 the appellees, that the first *section, article 10, declares the fundamental rule of taxation to be applied to all subjects of taxation, and that the fourth section only enunciates the exceptions to the general rule, the question then recurs, are merchants within the exception? That merchants are not excluded from the exceptions in express terms is certain. Are they excluded by clear implication? The argument is, that, because the general merchant is not specifically designated in section four, which includes commission merchants, that therefore the general merchant is excluded from the exception, according to the maxim of the law, expressio unius est exclusio alterius. But this argument proves too much. It would sweep away the power of taxation from a large class of subjects, the constitutionality of which has never been questioned by any one, and in some cases which have already been affirmed by this court as within the power of taxation, by a license tax. Lewellen, Sergeant v. Locharts, and Hirsh's case, 21 Gratt. 570, 785.

It would restrict the whole power of taxation by the license system to the classes and subjects named in the fourth section. This surely was never designed by the framers of the constitution. It never could have been their intention to limit the legislative power to the enumerated classes. On the contrary, a large discretion was properly and necessarily vested in the legislature by the addition of the words after the enumeration, the words, "and all other business which cannot be reached by the ad valorem system."

It is clear, from the use of this language in the 4th section, that the framers of the constitution did not design to enumerate all the subjects or classes upon which a license tax might be imposed; but, on the contrary, the language plainly indicates that
960 there *were other occupations and businesses not named, which could not be reached by the ad valorem system. What business can or cannot be reached by the ad valorem system, is not determined by the constitution itself. How is it to be determined? By legislative authority or judicial authority? By that department which makes laws or by that department which expounds them? If the discretion is left somewhere, as it undoubtedly is, by the constitution, to determine what "business" can or cannot be reached by the ad valorem system, is it a legislative discretion or judicial discretion which must be invoked to determine that question? In a doubtful case, certainly it is a matter within the discretion of the legislature, and not a question of judicial determination. Whether the "business" of a merchant is such a "business as cannot be reached by the ad valorem system," is not so plain a question as to remove it beyond legislative discretion. The power to provide the manner of assessment and taxation is peculiarly a legislative power, and much is necessarily left to the discretion of the legislature as to the subjects of taxation and the mode of assessment. Indeed, as we have seen, the legislative power over the whole subject of taxation is supreme, except where it is limited by the organic law; and the judiciary will only enforce those limitations which the constitution clearly imposes, and not those which may be argumentatively implied from a doubtful construction of its provisions.

But this clause of the constitution has already received a judicial construction by this court. In Lewellen, Sergeant &c. v. Lockhart, 21 Gratt. 570, the president, speaking for the whole court, said: "The legislature must, in the nature of things, have a very large discretion in deter-
961 mining the question as to what *business can be reached by the ad valorem system, within the meaning of the constitution. The subject is indefinite in its nature, and although the instances enumerated in the constitution afford material aid in ascertaining the meaning of its framers in the use of the general words which follow the enumeration, still much room is necessarily left for the exercise of legislative discretion in the matter." See also Hirsh's case, Ib. 785.

I am therefore of opinion that it is for the legislature and not the judiciary to determine the question whether the business of the general merchant is such a business as cannot be reached by the ad valorem system.

The legislature in its wisdom, has determined that the general merchant belongs to that class from whom a license may be required. We cannot say that it is clear he does not. It is the business of the merchant upon which the license tax is imposed. We cannot say it is clear his business can be reached by the ad valorem system. A tax upon his capital may not reach the value of his business. He may do an immense business, with large profits, on a very small capital, or upon no capital at all. He may use and disuse his capital in different amounts and at different times during the year. His purchases and sales may go on fluctuating in price and amount during the year, and the capital employed be skilfully turned over many times, with growing profits. The legislature might well deter-

mine that a business like this cannot be reached by the ad valorem system.

But it being a matter within their discretion (because, to say the least, it is doubtful whether there is any limitation on their power), their determination of
962 *the question is final, and the judicial department of the government cannot interfere.

Reference was made in the argument to the debates of the convention which framed the present constitution, and much stress was laid upon them by two of the able counsel for the appellees, as furnishing important aids in the construction of the constitutional provisions we have been considering, and as giving (as they insist) indubitable proofs that it was the intention of its framers to prohibit the legislature from imposing a license tax upon merchants.

My great respect for the learned counsel, and the earnestness with which they pressed this view of the subject, has induced me carefully to read the "Debates" referred to. But after reading all the speeches reported on the subject of the merchants license tax, I am constrained to say that at last the judicial construction must be determined by the sections themselves (sec. 1 and 4, art. 10,) as they were adopted and now appear in the constitution. It is true that there was much general discussion and vehement declamation as to whether the cities and towns or the country should bear the greater burthens of taxation, and there was a large party in the convention in favor of exempting the general merchant from a license tax, and of prohibiting the legislature from imposing a tax in that form. But the pregnant fact stands out, commanding judicial recognition upon a question of construction, that no such prohibition was incorporated in the constitution; but, on the contrary, it was left to the discretion of the legislature to impose a license tax upon certain enumerated classes and subjects, and on "all other business which cannot be reached by the ad valorem system."

963 *If it had been the purpose of the framers of the constitution to prohibit the legislature from imposing a license tax on merchants, how easy it would have been so to declare by express prohibition. It had been the policy of the state for more than half a century, to tax merchants under the form of a license system, and it was one of the largest and most valuable sources of the public revenues. If it was the purpose to change this time-honored legislative policy, why was it not done by express declaration of the organic law? A single line might have declared this restriction on legislative power. But that line was never written, and after all the discussion on the subject, article ten was adopted as it now appears in the constitution.

Much has been said in argument about the injustice and inequality of this tax in imposing unequal burthens upon a large and influential class of our fellow-citizens, and of its tendency to destroy the commercial prosperity of the cities and towns of the state. With all this, as a judicial tribunal, we have nothing to do. We cannot correct the errors, if errors there be, of the legislative department of the state. We have nothing to do with matters of legislative policy. We cannot declare a legislative act void because it may conflict with our opinions of policy, expediency or justice. We may think that the powers conferred by the constitution upon the subject of taxation are too great, and dangerous to the rights of the people, and that limitations are necessary; but we cannot affix them, if the boundaries of power have not been previously affixed by the constitution.

If the legislation complained of is unjust and unequal, unwise and oppressive, to any particular class, (about which we express no opinion), the remedy for unwise and oppressive legislation, within constitu-
964 tional *bounds, is by an appeal, not to the courts, but to the justice and patriotism of the representatives of the people. If this fails, the people, in their sovereign capacity, may correct the evil. But the courts cannot assume their rights.

In the language of Chief Justice Marshall: "The wisdom and justice of the representative body and its relations with its constituents, form the only security, where there is no express limitation, against excessive taxation and unwise legislation generally."

I am of opinion for the reasons given, that the 104th section of the act approved April 30th, 1874, entitled "An act for the assessment, levy and collection of taxes," is not in conflict with any provision of the constitution, and is therefore valid. The judgment of the Hustings court of the city of Richmond must therefore be reversed.

The other judges concurred in the opinion of Christian, J.

Judgment reversed.

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965 *Dull v. Commonwealth.

January Term, 1875, Richmond.

Absent, ANDERSON, J.

1. **Larceny—Indictment.***—An indictment for the larceny of divers notes of the "national currency of the United States," is equivalent to the phrase in the statute of "United States currency;" and the indictment is sufficient.
2. **Same—Same—Statutory Offence.**—It is always safer and better, in a prosecution for a statutory offence, to describe the offence in the indictment in the very language in which it is described in the statute; but except some technical words as "feloniously," &c., the words of the statute may be substituted by the use of synonymous words or words which plainly bring them within the meaning of the statute.
3. **United States Currency.**—There are two kinds of United States currency, both of which may properly be called national currency of the United

*Larceny.—See monographic *note* on "Larceny" appended to Johnson v. Commonwealth, 24 Gratt. 555.

States. Of these, one consists of treasury notes, and the other of national bank notes.

4. **False Pretenses—Accessories.**—If P and L, at the house of the accused, by the use of false pretences, obtained from F the sum of $570, the accused is not guilty of the offence, unless he was present, aiding and abetting therein, or suffered or permitted the said P and L to use said house, with knowledge that they intended to use the same for the employing of such pretences. But if the accused was within easy call with intent to aid or assist them in their purpose, or in escaping, or in getting rid of or misleading the person from whom such money was obtained, that is a presence, aiding and abetting, and the accused is as guilty as if he were personally present.

5. **Same—Same.**—If the accused and others concerted and conspired together to induce, by false representations, F, or any other persons who might be induced by such representations, to enter the house of the accused, and to obtain the money of such persons by false pretences, or rented his house to be used for such purpose by said conspirators; and in pursuance of such concert, one of the confederates of the accused induced F to go into said house, and by false representations and pretences did obtain from F a large sum of money; and the accused was present or within easy call to aid and assist them in
966 their purpose, or in escaping *or in getting rid of or misleading the person from whom such money was obtained; then the accused is as guilty as if he himself had obtained the money from F.

6. **Same—Penalty.**—The obtaining money by false pretences is made larceny by the statute; and the penalty for the offence is the same as in other cases of larceny.

7. **Same—Indictment.**—On an indictment for larceny, the clerk charges the jury in the usual form. If on the trial it appears that the money charged to have been stolen was obtained by false pretences, another charge by the clerk is neither necessary nor proper.

At the November term, 1874, of the Hustings court of the city of Richmond, John Dull was indicted for the larceny of "divers notes of the national currency of the United States," of the value of five hundred and seventy dollars, the property of Joseph M. Fowlkes.

On the trial, the commonwealth introduced through sundry witnesses evidence tending to prove that on or before the 7th day of October 1874, the prisoner, as lessee, occupied a certain house at the corner of Franklin and Thirteenth streets, in the city of Richmond, and that on the said 7th day of October 1874 one John H. Keisel, on Main street in the city of Richmond, by falsely representing that he was a countryman and acquaintance of Joseph M. Fowlkes (who was from Amelia county), and that he, Keisel, had just received a letter from his brother in Kentucky, informing him that he had drawn three thousand dollars in a lottery, and that being a stranger he could not find the place to get it cashed, which was the corner of Franklin and Thirteenth streets, induced said Joseph M. Fowlkes to go with him to find the place; that upon finding the place, said John H. Keisel asked Joseph M. Fowlkes to go with him up stairs into the rooms of the said house, leased as aforesaid by accused, they consisting
967 of a front and back room *on the second floor, between which rooms were large folding doors, which were closed when Joseph M. Fowlkes and John H. Keisel entered the room; that there was only one person in the said room, one Robert Purdy —John H. Keisel and he pretending to be strangers; that said Robert Purdy, upon presentation of his ticket by John H. Keisel, informed him, after looking at a large book, that it had only drawn eight hundred dollars; and then, looking at the ticket more closely, that it being only an eighth of a ticket, it only drew one hundred dollars; and then handed from a draw two fifty-dollar notes, saying he owed him in addition one dollar, but as he did not have the change he gave him a ticket upon which he might draw for another prize; and John H. Keisel agreeing, Robert Purdy, upon looking at a book, told John H. Keisel that his ticket had won forty dollars and two other tickets, which he gave John H. Keisel; John H. Keisel then insisted that Joseph M. Fowlkes, as he had been kind enough to show him the way, should take one of the tickets, and, upon Joseph M. Fowlkes declining, said he would draw the tickets and would divide with Joseph M. Fowlkes what was drawn. Robert Purdy thereupon, looking at the book again, told John H. Keisel that the tickets had drawn one hundred and fifty dollars; but this time he did not pay the money, but said that they, meaning John H. Keisel and Joseph M. Fowlkes, would, under the regulations of the society, have to make four draws; that they had been very lucky, but, as a matter of form, in order to draw a second time, they must each put up ten dollars, assuring Joseph M. Fowlkes that they would certainly get the one hundred and fifty dollars which had been already won, and the ten dollars which they had put
968 *down, and had a chance of drawing a much larger sum. The ten dollars each in national currency was put down by John H. Keisel and Joseph M. Fowlkes, and John H. Keisel taking a little slip of paper from a bundle on the table turned it over, and it corresponding with one of the several figures on a table, Robert Purdy informed them that draw had won four hundred and forty dollars, but that they must go through the form of putting down ninety dollars in order to draw again; that they were obliged to get what they had already won and what they had put down, as well as the ninety dollars, which they were obliged to put down according to the regulations; thereupon Joseph M. Fowlkes put down the ninety dollars in national currency; that John H. Keisel took another slip of paper from a bundle, turned it over, and it corresponding with one of the numbers on the table, Robert Purdy announced that it had won two hundred and ninety dollars; that by the regulations it was nec-

essary, as a matter of form, for the last draw, which might draw twenty thousand dollars or thirty thousand dollars, that four hundred and seventy dollars should be put up; Robert Purdy then explicitly and repeatedly assured Joseph M. Fowlkes that he ran no risk in putting up the four hundred and seventy dollars; that the money already drawn and that put up, and the four hundred and seventy dollars to be put up, could not be affected by the draw, and that the worst draw that could be made was a blank, and all the money drawn and put up would be paid, and whatever was drawn on the fourth draw; that by the rules and regulations he could not put up a check, but must put up the currency; thereupon Joseph M. Fowlkes went out and borrowed the four hundred and seventy dollars, and upon returning was again assured
969 *that his money was perfectly safe, and he could not lose a cent, while, by complying with the rules and putting down the money, they stood the chance of winning a very large sum; thereupon Joseph M. Fowlkes put down the four hundred and seventy dollars in national currency, and John H. Keisel, taking another ticket, turned it over, and Robert Purdy swept the money into the table drawer and locked it; that Joseph M. Fowlkes turning instantly to look for Keisel, as he demanded his money back, found that John H. Keisel, who had been by his side the moment before, had slipped away; that the folding doors were opened, and that prisoner was sitting in the other room; prisoner rose and beckoned to Joseph M. Fowlkes, who went to him, and prisoner told him that his "son or brother," meaning John H. Keisel, had gone "that way," pointing to a back door, and caught Joseph M. Fowlkes by the shoulder, leading him through some dark passages which led through another tenement out to a rear entrance way, some forty yards from the front door, where Joseph M. Fowlkes had entered, and opening on another street; but Joseph M. Fowlkes, being frightened, refused to go further in that direction, returned and went out of the front door, after being told by Robert Purdy that what went into that drawer never came out; that Joseph M. Fowlkes soon after obtained an officer and went back to the house, but the rooms were locked up and no person to be found there; that soon after the occurrence described as taking place in the room, the prisoner, Robert Purdy and two others were seen coming out of the room and going away; that later in the afternoon one John Wren, a detective, brought the prisoner (not under arrest) to the vicinity of the St. Charles Hotel, where Joseph M. Fowlkes was
970 *stopping, and Joseph M. Fowlkes, with his counsel or friend, Mr. Samuel M. Page, had a short interview with him, in which he said that Joseph M. Fowlkes had lost his money, and that the men who had got it were gone, and the prisoner didn't mean to pay a damn cent. Thereupon, at the advice of Samuel M. Page, Joseph M. Fowlkes swore out against the prisoner and others a warrant for a felony, in obtaining by false pretences the said sum of five hundred and seventy dollars, which warrant Mr. Page took possession of and withheld from execution until the next morning, with the hope of being able to secure the repayment of the money thus obtained; that while said warrant was so held by said Page the character or contents of said warrant were unknown by said John Dull; that said Joseph M. Fowlkes and Mr. Page refused to show said warrant, or to name the justice who issued it, upon request of said John Dull's attorney, George D. Wise; that on the 8th day of October 1874, the said John Dull, by agreement with Joseph M. Fowlkes, through their attorneys or friends, at the Circuit court-room, paid said Joseph M. Fowlkes two hundred and eighty-five dollars, in satisfaction and discharge of said John Dull's house and all persons for the aforesaid loss of five hundred and seventy dollars, for which said Joseph M. Fowlkes then and there, under advice of his said friend, Samuel M. Page, executed a receipt and release in writing, which receipt is in the words and figures following, to wit:

"Richmond, Va., October 8th, 1874.

"Received of John C. Dull two hundred and eighty-five dollars, in full settlement of all demands and claims against the house of Mr. Dull, hereby binding myself to make no more demands upon him, his
971 *house, or any one else, for any occurrence there, this to be a settlement in full.

"Jos. M. Fowlkes."

That when the prisoner paid the money he said it was a hard case that he should have to pay two hundred and eighty dollars when he only got two hundred dollars of it, and the others had got the balance and gone away. At this interview prisoner also called the attention of Joseph M. Fowlkes to a statement made by Joseph M. Fowlkes when at his, prisoner's house, while the pretended drawings were going on; that after this interview at the Circuit court room, the warrant was placed in the hands of the officers, and they found John Dull and arrested him at his said rooms; that when he was arrested there were two other men in the adjoining room, one being John H. Keisel, and being seen by the officers, the officers inquired of John Dull who these men were, and prisoner informed the officers that John H. Keisel's name was Smith; and the court certifies that the foregoing was all the evidence tending to prove, on the part of the commonwealth, that the prisoner was guilty of the larceny charged in the indictment.

And the accused, John Dull, on his part, introduced evidence tending to show that before the said 7th day of October 1874, he had sub-let said house to Robert Purdy and one Dr. Lewis, to be used for playing a game therein, and, for the use or rent thereof, was to receive fifteen per centum of the proceeds thereof; that at the time of

the fraud aforesaid upon said Joseph M. Fowlkes, the said Robert Purdy and Dr. Lewis were present, but said John Dull was not present in said front room where said fraud was practiced; that said two hundred and eighty-five dollars, paid to said
972 *Joseph M. Fowlkes, was not the money of said John Dull, but of other persons; and on his part introduced a witness, who testified that at the interview when the two hundred and eighty-five dollars was paid over, prisoner did not, as far as witness heard, say that it was a hard case that he should have to pay two hundred and eighty-five dollars when he got only two hundred dollars, but thought he could understand how that idea got into the head of the witnesses who testified to it; and that said John Dull did not know that he was then charged, in the warrant or otherwise, with a felony.

After the conclusion of the evidence and argument of counsel, the prisoner asked the court to give two instructions to the jury, and the attorney for the commonwealth asked for one. The court gave the second instruction asked for by the prisoner, and gave the first with an addition to it; and gave the instruction asked for by the attorney for the commonwealth. And the prisoner excepted. These are set out in the opinion of the court.

The jury found the prisoner guilty, and ascertained the term of his imprisonment in the penitentiary at three years. And thereupon the prisoner moved the court to set aside the verdict and grant him a new trial, on the grounds, first, that the court erred in giving and in refusing the instructions; and second, that the charge given by the clerk to the jury before the evidence was introduced, was allowed to remain unchanged, as the guide to the jury touching the measure of punishment. But the court overruled the motion and sentenced the prisoner in accordance with the verdict. And he again excepted; and obtained a writ of error from this court. This point is also set out in the opinion of the court.

973 *Neeson, for the prisoner.

The Attorney General, for the commonwealth.

MONCURE, P., delivered the opinion of the court.

This is a writ of error to a judgment of the Hustings court of the city of Richmond, rendered on the 21st day of November, 1874, convicting the plaintiff in error, John Dull, of grand larceny, and sentencing him therefor to confinement in the penitentiary for the term of three years; the period by the jurors in their verdict ascertained. Various errors are assigned in the judgment, which we will consider in the order of their assignment.

The first is, that the court erred in overruling the motion to quash the indictment.

The indictment charges the larceny of divers "notes of the national currency of the United States, the number and denomination of which are to the grand jurors unknown, for the payment of divers sums of money, in the whole amounting to the sum of five hundred and seventy dollars, and of the value of five hundred and seventy dollars, the property and notes of one Joseph M. Fowlkes," &c.

It is argued that this indictment charges no indictable offence, either at common law or under any statute of this State.

Certainly it charges no such offence at common law. Larceny could not, by the common law, be committed of written instruments, whether they related to real estate or concerned mere choses in action. 2 Russell on Crimes, p. 70.

Nor does it charge any such offence under any statute, unless it be under the act approved February 28th, 1874, entitled
974 "An act to amend section 6, *chapter 201, of the Code of 1873, with reference to larceny." Acts of Assembly, page 65, chap. 69.

Prior to the passage of that act, to wit, in 1870, it had been decided by this court in Leftwich's case, 20 Gratt. 716, that in an indictment for larceny, a description of the subject as "United States currency," was not sufficient. Therefore on that ground, the indictment in that case was considered to be radically defective, and the judgment of the court below was reversed.

In consequence of that decision, the act aforesaid was passed, by which, among other things, it was enacted that, "in a prosecution for the larceny of United States currency," "it shall be sufficient if the accused be proved guilty of the larceny of national bank notes, or United States treasury notes."

An indictment for an offence committed since the passage of that act, charging the offence as a larceny of "United States currency," does charge an indictable offence under that act.

The question therefore is, whether the indictment in this case is, in effect, an indictment for the larceny of United States currency?

It is certainly safer and better, in a prosecution for a statutory offence, to describe the offence in the indictment in the very language in which it is described in the statute. Commonwealth v. Peas, 4 Leigh 692; 2 Gratt. 629; same v. Hampton, 3 Gratt. 590; Howell's case, 5 Id. 664; Young's case, 15 Id. 664; Old's case, 18 Id. 915; Cousin's case, 19 Id. 807; and Taylor's case, 20 Id. 825. But as was said by the court in the last named case, while "there are certain technical words of description of an offence which cannot be substituted by the use of other words in an indictment; such as the words 'feloniously,' 'bur-
975 glariously,'" &c., *yet "descriptive words which are not of such technical character, though they generally better express their own meaning than any other words that can be used, may be substituted

by the use of synonymous words, or words which plainly bring them within the meaning of the statute." To the same effect are Young's case and Old's case, supra.

In this case the indictment charges a larceny of "divers notes of the national currency of the United States." Is not that precisely the same, in meaning and effect, as a charge of a larceny of "United States currency"? We think that it is. "Currency of the United States," is certainly the same thing as "United States currency." The addition of the word "national" in the indictment can certainly make no difference. If it has no meaning at all it must be rejected as surplusage. If it has any meaning at all it can only refer to the "nation" of the United States, and currency of the nation of the United States, must mean currency of the United States.

There are two kinds of United States currency, both of which may properly be called national currency of the United States, one of which consists of treasury notes, (2 Brightley's Dig. p. 167, title "currency,") and the other of national bank notes. (Id. p. 56, title "banking.") That both of these kinds of currency are embraced in the denomination of "United States currency," contained in the act before referred to, is shown by the act itself, which expressly declares that to sustain a charge of larceny of United States currency, "it shall be sufficient if the accused be proved guilty of the larceny of national bank notes, or United States treasury notes." So that, whatever may be said of the strict accuracy of the language "United States currency," as applied to both 976 *of the descriptions of currency aforesaid, it must be regarded as perfectly accurate in a prosecution under the statute.

We are therefore of opinion that the Hustings court did not err in overruling the motion to quash the indictment.

The second assignment of error is, that the court erred in refusing to give to the jury instruction No. 1, as prayed for by the prisoner, and especially in giving the same with an addition made thereto by the court.

Instruction No. 1, as prayed for by the prisoner, is in these words: "That if the jury believe from the evidence that Robert Purdy, Dr. Lewis, or any other persons, at the house of accused, by the use of false pretences, obtained from one Joseph M. Fowlkes, the sum of five hundred and seventy dollars, the jury cannot find the accused guilty of the larceny alleged in the indictment, unless they are satisfied from the evidence, beyond all reasonable doubt, that the prisoner was present, aiding and abetting therein, or suffered or permitted the said persons so using the false pretence, to use the said house with knowledge that such persons intended to use said house for the employing of such fraudulent pretence."

The court refused to give that instruction as it stands, but gave it with an addition in these words: "But if the prisoner was within easy call, to aid or assist them in their purpose, or in escaping, or in getting rid of, or misleading the person from whom such money was obtained, that is a presence, aiding and abetting, and the prisoner is as guilty as if he were personally present."

The court was certainly right in refusing to give the first instruction as asked for by the prisoner, for it might, and no doubt would, have misled the jury into 977 *the belief that to make the prisoner guilty of the offence charged against him in the indictment, it was necessary that he should have been actually present at the commission of the same; whereas he might have been, and the evidence strongly tended to prove that he was, guilty of the said offence as a principal in the second degree, by being constructively present and aiding and abetting in the commission of the same. "In order to render a person a principal in the second degree," says Russell, "he must be present, aiding and abetting at the fact, or ready to afford assistance if necessary; but the presence need not be a strict, actual, immediate presence, such a presence as would make him an eye or earwitness of what passes, but may be a constructive presence. So that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the fact, others to watch at proper distances and stations, to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eyes of the law, present at it; for it was made a common cause with them, each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprise." 1 Russell on Crimes pp. 26-7.

It was proper, therefore, that the court should qualify the instruction prayed for by prisoner, so as to refer to and explain this matter of constructive presence; and accordingly, the addition before mentioned was made thereto. We think that ad- 978 dition is free from *any just ground of exception, and cures the defect in the original instruction. We do not think that it was calculated to mislead the jury, as argued by the counsel for the plaintiff in error; nor that it treats him as a principal in the second degree, by proximity to the crime or principal in the crime, without regard to intent. It is certainly true, as argued by the learned counsel, that "presence alone is not sufficient to criminate;" and that "it must be with intent to aid in the crime." But there is nothing in the addition, as we understand it, and as we think the jury must have understood it, which is inconsistent with that proposition. On the contrary, the addition affirms it. To supply the words, "to aid or assist them,"

used in the addition, at other places therein where they are necessarily understood, the addition will read thus: "But if the prisoner was within easy call, to aid or assist them in their purpose, or to aid or assist them in escaping, or to aid or assist them in getting rid of or misleading the person from whom such money was obtained; that is a presence, aiding and abetting, and the prisoner is as guilty as if he were personally present." Now what is the meaning of the words, "But if the prisoner was within easy call, to aid or assist them?" Clearly we must read them as if the words "with intent," or "for the purpose," were written before the words "to aid or assist them." We think this is perfectly plain if we read the addition together with the original instruction of which it formed a part when given to the jury. The original instruction declared that the jury could not find the accused guilty of the larceny charged against him, unless they were satisfied that he was present aiding and abetting therein. But (continues the addition) if the prisoner was within easy call, to aid or assist them in their purpose, 979 *&c., that is a presence aiding and abetting, and the prisoner is as guilty as if he were personally present."

We are therefore of opinion, that the Hustings court did not err in regard to the said instruction, or the addition thereto.

The third assignment of error is, that the court erred in giving instruction No. 3, which was given on the motion of the attorney for the commonwealth, and is in these words: "If the jury believe from the evidence that the prisoner and others concerted and conspired together to induce, by false representations, the witness, Joseph M. Fowlkes, or any other persons who might be induced by such representations, to enter the house of the prisoner, and to obtain the money of such persons by false pretences, or rented his house to be used for such purpose by said conspirators, and that in pursuance of such concert, one of the prisoner's confederates induced the witness, Joseph M. Fowlkes, to go into said house, and by false representations and pretences did obtain a large sum of money from said Joseph M. Fowlkes, and that the prisoner was present, or within easy call, to aid or assist them in their purpose, or in escaping, or in getting rid of or misleading the person from whom such money was obtained, then the prisoner is as guilty as if he himself had obtained the money from the said Joseph M. Fowlkes."

Certainly the mere fact of renting a house to others to be used by them for the purpose of committing a felony therein would not make the landlord or lessor a principal, either in the first or second degree, in the felony when committed. But that fact is connected with a good many other facts in the instruction, which would clearly make the accused a principal in the 980 *second degree in the felony charged against him. The same objection which was urged to the addition to instruction No. 1, was also urged to instruction No. 3, to wit: "that in defining constructive presence, constituting guilt, it wholly omits the essential of intent to aid in the crime." But that objection has already been fully answered, and the answer applies as well in the one case as the other.

The fourth assignment of error is, that the court erred in refusing to grant a new trial on the two grounds on which the motion therefor was founded, viz: 1st, the error of the court in giving and in refusing instructions to the jury as aforesaid; and 2dly, the error of the court in regard to the charge which was given to the jury.

In regard to the first ground: we have already shown that there was no error in that respect.

In regard to the other ground: the charge given by the clerk to the jury, by direction of the court, before the evidence was introduced to them, was in the ordinary form of such a charge in a case of larceny, and is in these words: "Your charge, therefore, is to enquire whether he be guilty of the larceny of which he stands indicted, or not guilty. If you find him guilty, you are further to enquire whether the goods and chattels stolen be of the value of fifty dollars or more; and if you find them to be of the value of fifty dollars or more, you are further to ascertain the term of his confinement in the penitentiary at not less than three nor more than ten years; and if you find the goods or chattels stolen to be of less value than fifty dollars, say so and no more; and if you find him not guilty, say so and no more. So hearken to the evidence."

The learned counsel was right in arguing that this charge of the clerk was the 981 act of the court; and if *there be any error in it to the prejudice of the prisoner, it is an error for which the judgment ought to be reversed; as the case cited plainly shows. Allen v. Commonwealth, 2 Leigh 727.

The counsel admits that on the face of the indictment for larceny the charge was correct, the minimum imprisonment for larceny being three years. Code of 1873, p. 1196, § 14. But the trial, he says, made the case a case, not of larceny, but of false pretences. And he contends that the two cases, of larceny and false pretences, are different from each other, at least in regard to punishment. He seems to admit that an indictment for larceny, in the common form, is sufficient, though the case be one of false pretences; and that the charge to the jury may, in the first place, conform to the indictment. But he argues that if the trial, in other words, the evidence, make a case, not of larceny, but of false pretences, the charge ought to be changed in the course of the trial so as to suit the case thus newly made by the evidence. This, we think, would be a strange incongruity between the allegata and the probata, and would be an anomalous proceeding in a criminal case.

The law having declared that "if a person

obtain, by any false pretence, or token from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of the larceny thereof" (Code of 1873, ch. 188, § 24, p. 1197), has made the offence, to all intents and purposes, larceny; just as if the offender had feloniously stolen, taken and carried away the subject thus obtained by a false pretence or token. And the indictment and charge to the jury may be precisely in the same form in either case. And evidence that the subject was obtained by the accused by false pre-
982 tence, *with intent to defraud, will sustain the indictment and be consistent with the charge.

This court has repeatedly declared, that an indictment in such a case may be in the ordinary form of an indictment for larceny at common law; and it seems to follow, as a matter of course, that proof of the offence described in the statute will sustain the indictment, and be consistent with a proper charge upon such an indictment. Dowdy's case, 9 Gratt. 727; Leftwich's case, 20 Id. 716.

The learned counsel argues, that the two offences, of larceny and obtaining property by false pretences, with intent to defraud, are punished differently and under different sections of the law; that the former is punished more severely, under ch. 188, § 14, of the Code, which prescribes the punishment of grand larceny to be confinement in the penitentiary for not less than three nor more than ten years; and the latter is punished less severely, under section 24 of the same chapter of the Code, in which the only punishment prescribed is confinement in the penitentiary for not less than one nor more than five years; or, at the discretion of the jury, confinement in jail not more than one year, and a fine of five hundred dollars. He argues, that the punishment prescribed in the latter part of the latter section is not confined to the offence described in that part of the section, to wit: the offence of obtaining, by any false pretence or token, with intent to defraud, the signature of any person to a writing, the false making whereof would be forgery; but extends also to the offence described in the former part of the same section, to wit: the offence of obtaining, as aforesaid, money or other property which may be the subject of larceny: whereas that part of the section expressly declares that the
983 offence thereby described *shall be deemed to be larceny; after which the latter part of the section proceeds to declare how the offence therein described shall be punished. He argues, very ingeniously, that the 24th section aforesaid was taken from the 30th section of chapter 4 of what is called the Criminal Code; Acts of 1847-8, p. 103; which embraced both offences, and subjected them to the same punishment, to wit: the punishment prescribed by the latter part of the 24th section aforesaid; and that we ought not to infer an intention in the legislature to increase the punishment of the offence described in the former part of the 24th section unless such intention were more plainly manifested than is done by the words, "shall be deemed guilty of the larceny thereof," inserted in that part of the section.

Now, we can imagine no other reason for inserting those words than to change the punishment of the offence described in the former part of the section, and make it the same with the punishment of larceny as prescribed by section 14 aforesaid. The counsel seems to suppose that the 24th section creates a peculiar kind of larceny, neither grand nor petit, nor punishable as other larcenies, but punishable only as prescribed in the latter part of that section, and without regard to the value of the subject obtained by false pretences, except so far as that consideration might influence the jury in ascertaining the punishment within the prescribed limits. If this be so, why did the legislature make any such change in the language of the section? Why did they not leave the offence as it was under the Criminal Code? The legislature would no doubt have made the offence described in the latter part of section 24 larceny also, if it had been, in its nature, capable of being so made. But a
984 *person, in obtaining the signature of another to a writing, as mentioned in that part of the section, could not be said to be guilty of feloniously stealing, taking and carrying away the goods and chattels of another; and therefore the punishment of that offence was left as it had been before. The legislature, in declaring the offence of obtaining property by false pretences, described in the former part of section 24, larceny, only applied to that offence, the same principle which was applied to the offences described by sections 19, 20 and 21 of the same chapter of the Code, p. 1197, to wit: the offences of receiving stolen property, knowing it to have been stolen, and of embezzlement by officers or other persons. The principle had been applied to these latter offences by the Criminal Code of 1847-8; and the legislature, in section 24 aforesaid, only extended the same principle to a new case, to which it seemed to be equally applicable. In deciding all these offences to be larceny, they were of course to be grand or petit larceny, according to the value of the subject, as prescribed by section 14 as aforesaid.

But the Hustings court was of opinion that the evidence tended to prove an ordinary case of simple larceny, independently of section 24, and that the charge was proper on that ground also. We think this view of the court was also correct. The distinction between cases in which property, and cases in which the mere possession of property is fraudulently obtained from the owner by a person who converts the same to his own use, animo furandi, is well settled and familiar law. The offence in the latter being larceny, but not in the former. 2 Russell on Crimes, pp. 24 and 35. On page 45 several cases are referred to

which strongly resemble the one under consideration, according to the evidence;
985 as, where it appeared *that the prisoner decoyed the prosecutor into a public house, and then introduced the play of cutting cards, and that one of them prevailed upon the prosecutor (who did not play on his own account), to cut the cards for him, and then, under pretence that the prosecutor had cut the cards for himself, and had lost, another of them swept his money off the table and went away with it; it was considered to be one of those cases which should be left to the jury to determine, quo animo the money was obtained, and which would be felony, in case they should find that the money was obtained upon the preconcerted plan to steal it. Rex v. Horne &c., 1 Leech, 270. So, if there is a plan to cheat a man of his property under color of a bet, and he parts with the possession only to deposit as a stake with one of the confederates, the taking by such confederate is felonious. The prosecutor was drawn in to deposit twenty guinea notes on a bet that one of the prisoners could not guess right three times successively on the hiding of half a penny, by another of the prisoners, under a pot; he put the notes in the hands of one of the prisoners, and then the other guessing right, the notes were handed over. The question was left to the jury, whether, at the time the notes were taken, there was not a plan between the prisoners that they should be kept, under the false color of winning a bet, and the jury so found. Upon a case reserved, the judges (ten of them being present), held that the conviction was right, because, at the time of the taking, the prosecutor parted with the possession only. Russ. & Ry. 413.

Besides the two grounds relied on in support of the motion for a new trial in the court below, an additional ground was relied on in this court, that if the plaintiff in error was guilty of any offence, it
986 was no *more than a misdemeanor in cheating at a game, an offence declared by § 10, of ch. 194 of the Code, p. 1214, and this is the subject of the fifth assignment of error in this case.

What we have already said to show that the offence which the evidence tends to prove is a larceny, is a sufficient answer to this assignment of error. If the offence be a larceny it cannot be a misdemeanor, the minor being merged in the major offence.

We are of opinion that there is no error in the judgment of the Hustings court, and that it ought to be affirmed.

Judgment affirmed.

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987 *Tremaine v. Commonwealth.

January Term, 1875, Richmond.

Corporation Courts — Jurisdiction — Statute. — Under the act of April 2, 1870, ch. 38, §§ 6 & 7, Sess. Acts 1869-'70, Corporation courts in cities and towns having a population of more than five thousand, have the same jurisdiction to try offences committed within their respective limits as Circuit and County courts had; and the act of April 2, 1873, to regulate and define the jurisdiction of the County and Circuit courts does not apply to or affect the jurisdiction of said Corporation courts.

At the October term 1874, of the Corporation court of the city of Alexandria, Louisa Tremaine, alias Nettie Green, was indicted for the murder of Samuel Eichelberger. She was arraigned at the same term of the court; and upon her arraignment she filed a special plea to the jurisdiction of the Corporation court to try her for the crime of which she was indicted. To this special plea the attorney for the commonwealth demurred; and the court sustained the demurrer.

On the trial the jury found the prisoner guilty of murder in the second degree, and fixed the term of her imprisonment in the penitentiary at seven years. She thereupon moved the court for a new trial; but the court overruled the motion, and sentenced the prisoner in accordance with the verdict: and the prisoner excepted. The evidence is set out in the bill of exceptions; and shows that the deceased was killed by the prisoner; but the witnesses, who were numerous, give different accounts of the provocation. Upon the application of the prisoner, this court awarded a writ of error.

C. E. Stuart, for the prisoner.

The Attorney General, for the commonwealth.

988 *ANDERSON, J., delivered the opinion of the court.

The court is of opinion that the Corporation courts, in cities or towns containing a population of five thousand, have the same jurisdiction, by act of assembly approved April 2, 1870, to try offences committed within their respective limits, that either the Circuit courts or the County courts then had to try offences within the counties in which respectively they had jurisdiction. (Acts of Assembly 1869-'70, ch. 38, §§ 6 and 7, p. 36.) And that the act approved April 2, 1873, "to regulate and define the jurisdiction of the County and Circuit courts," &c., which, in effect, takes from the County courts their jurisdiction for the trial of presentments, informations and indictments, which was conferred by section 4 of the aforesaid act of 1870, and invests the same exclusively in the Circuit courts, does not divest the said Corporation courts of any part of their aforesaid jurisdiction; the term "exclusive" being used in said act with reference to the County courts, as appears evident from the title and scope of the act. And, consequently, that there is no error in the judgment of the Corporation court of Alexandria, sustaining the demurrer to the plea of the plaintiff in error to its jurisdiction.

The court is further of opinion that as it

is peculiarly the province of the jury to weigh the testimony and to decide upon the facts of the case; and it not appearing from the evidence certified by the court, that the verdict of the jury is plainly contrary to the evidence, the court below did not err in overruling the motion for a new trial. The court is therefore of opinion that the judgment must be affirmed.

Judgment affirmed.

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989 *Wren v. Commonwealth.

January Term, 1875, Richmond.

1. **Felonies—Accessories.**—W, a police officer, was indicted and tried as accessory after the fact to a felony committed by D. The jury put to the court the question, Are we considering the question against W, or W a detective officer? If a detective official, does the fact that he allowed D, after knowing D's offence, to go away unarrested, make him accessory after the fact?—HELD:
   1. The court should have responded directly to the question, in the negative.

In November, 1874, John Wren was indicted in the Hustings court of the city of Richmond, as an accessory after the fact of a felony committed by John Dull. John Dull was indicted and convicted for the larceny of five hundred and seventy dollars, the property and notes of Joseph M. Fowlkes. It appears that Fowlkes, who had come from the country to Richmond, was enticed into the house of Dull, where, through the pretence of a lottery, he was robbed of the above sum of money. After getting out of the house he employed John Wren, who was a Richmond detective, to hunt up the parties, in order to get back his money, and he finally compromised with Dull, who paid him two hundred and eighty-five dollars in full settlement of all demands and claims against the house of said Dull. Wren was present when this compromise was carried to completion by the payment of the money. Dull was afterwards arrested at the instance of Fowlkes.

On the trial of the cause, after all
990 the evidence had *been introduced,
and the jury had retired to consider of their verdict, they came again into court and asked the following question:

"Are we considering the question as against John Wren, or John Wren a detective officer? If a detective official, does the fact that he allowed Dull, after the compromise, to go unarrested, make him accessory after the fact?"

To this question the court gave the following reply:

"If you believe from the evidence, that at the time of the transaction detailed in the evidence, John Wren was a detective officer and police constable of the city of Richmond, it is proper for you to consider and weigh that fact in determining his guilt or innocence, it being his right and duty as such officer, to arrest any felon upon knowledge of his felony."

"If you believe from the evidence that the prisoner, a police constable and detective, with notice that John Dull had committed a felony, permitted him to go from his presence, after the alleged compromise, without arresting him, allowing him to go free of arrest, it is a material fact to be considered by the jury in connection with the other conduct of the accused, in determining upon the guilt or innocence of the accused." And to this opinion and instruction of the court the prisoner excepted.

*The jury then found the prisoner guilty, and assessed his fine at one cent. And the court passed judgment upon him for the fine, and that he should be confined in the jail of the city, for twelve months, and that during this period he should be employed at labor upon the streets of the city, &c. And thereupon Wren applied to this court for a writ of error, which was
awarded.

991 *Crump, for the prisoner.

The Attorney General, for the commonwealth.

CHRISTIAN, J., delivered the opinion of the court.

This is a writ of error to a judgment of the Hustings court of the city of Richmond.

The plaintiff in error was tried and convicted as accessory after the fact, to one John Dull, who had been convicted in the same court of a felony.

The indictment in this case, after setting out the felony committed by John Dull, charged that "John Wren, of the said city, well knowing the said John Dull to have committed the said felony in form aforesaid, to wit: since the said felony was committed, in the year aforesaid, in the city aforesaid, the said John Dull did then and there unlawfully receive, harbor and maintain, against the peace and dignity of the commonwealth of Virginia."

After the evidence was closed and the case submitted to the jury, and after some time passed in deliberation, they returned into court and propounded to the court a written enquiry in the following words: "Are we considering the question against John Wren, or John Wren a detective officer? If a detective official, does the fact that he allowed Dull, after the compromise, to go unarrested, make him (Wren) accessory after the fact?"

To this inquiry the court responded:

"If you believe, from the evidence, that at the time of the transactions detailed in the evidence, John Wren was a detective officer and police constable of the city of Richmond, it is proper for you to weigh
that fact in determining his guilt or
992 innocence, it being *his right and
duty as such officer to arrest any felon, upon knowledge of his felony.

"If you believe, from the evidence, that the prisoner, a police constable and detective, with notice that John Dull had committed a felony, permitted him to go from

his presence, after the alleged compromise, without arresting him, intending to allow him to go free of arrest, it is a material fact to be considered by the jury, in connection with the other conduct of the accused, in determining upon the guilt or innocence of the prisoner."

The court is of opinion that these instructions, in the form in which they were given, were calculated to mislead the jury, and were therefore erroneous.

They were given, as will be observed, in response to an inquiry made by the jury upon a single point—"Are we considering the question against John Wren, or John Wren a detective officer; if a detective official, does the fact that he allowed Dull, after the compromise, to go unarrested, make him accessory after the facts?"

It is apparent that the jury were seeking, at the hands of the court, a definition of what, in law, constitutes an accessory after the fact; and the particular point of the enquiry, to which the court was called upon to respond, was, if they were to consider the case against John Wren as a detective officer, and being "a detective official," does the fact that he failed to arrest Dull make him accessory after the fact?

This enquiry plainly ought to have been answered in the negative.

The question propounded by the jury was not, whether the fact that the accused was a detective officer and police constable of the city of Richmond, was a fact which they ought to consider and weigh in
993 *determining his guilt or innocence.

Nor whether, being a detective officer and having notice that Dull had committed a felony, the accused permitted him to go from his presence without arresting him, was a material fact to be considered by the jury in connection with the other conduct of the accused in determining his guilt or innocence. If the enquiry had been directed to these points, the response of the court would have been entirely unobjectionable. But the single enquiry propounded by the jury was, in effect, "Does the fact that the accused, who is a detective officer, failed to arrest Dull, make him accessory, after the fact, to the felony committed by Dull?" This was the single and pointed enquiry, and to this there ought to have been a negative response. The jury ought to have been told by the court, in response to their enquiry, that the fact that the accused was a detective officer and allowed Dull to go unarrested did not of itself make him an accessory, after the fact, to the felony committed by Dull. If such declaration had prefaced the instructions given, they would have been in all respects proper and unobjectionable. But the failure to give such negative response to the single enquiry of the jury, and giving the instructions without such direct response to their question was calculated to mislead them.

Now, it cannot be questioned that a mere failure to make arrest of a felon, taken by itself, does not in law constitute the party an accessory after the fact.

Accessories after the fact, by the common law, are those who knowing a felony to have been committed by another, receive, relieve, comfort or assist the felon. 1 Hale P. C., 618; 1 Whar. Am. C. L., § 146; 1 Bishop C. L., § 633, 634. "The true test," says Bishop, "for determining whether
994 one is accessory after the *fact, is to consider whether what he did was done by way of personal help to his principal, with the view of enabling the principal to elude punishment—the kind of help rendered appearing to be unimportant. Thus, he is an accessory who with requisite knowledge and intent furnishes the principal felon with the means of escape—money or victuals to support him, a house or other shelter to conceal him, or open force or violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break jail, or to bribe the jailor to let him escape, makes a man accessory to the felony." Ib. § 634.

"But when the thing done amounts to no more than the compounding of a felony or a misprision of it, the doer will not be an accessory. Thus, a person will not be such who merely neglects to make known to the authorities that a felony has been committed, or forbears to arrest the felon, or agrees not to prosecute him." Ib. § 633.

"Any assistance," says Wharton, "given to one known to be a felon, in order to hinder his apprehension, trial or punishment, is sufficient to make a man an accessory after the fact." The author then gives various illustrations similar to those given above, and adds, "merely suffering the felon to escape, however, will not charge the party so doing, such amounting to a mere omission." 1 Whart. § 146 and cases there cited.

We do not believe that the able and efficient judge of the Hustings court of Richmond intended by his instructions to controvert or deny these acknowledged and well settled general principles. But in the hurry of a jury trial, his instructions were so shaped, that, we are bound to say, they might have had the effect to mislead the jury as to the law of the case.

995 *Now, the failure of a police officer to make an arrest when he knows that a felony has been committed, is certainly a gross violation of duty, and a grave offence against the law; but this does not constitute him an accessory after the fact to the felony committed. Whether it does or does not is a question of law, which it was the province and duty of the court to decide, when propounded either by the jury or the prisoner's counsel.

The jury had asked whether such failure to arrest did, in law, constitute the accused an accessory to the felony committed by Dull. To this no direct response was given; but they were told it was a material fact to be considered by them.

The failure to give a negative response to this enquiry, and simply submitting it to them as a material fact to be considered

by them, might have misled them as to the law upon the subject.

The jury, composed of men (as is usually the case) without knowledge of legal principles, might have been led to believe that the judge (when he gave no negative response to those enquiries, but left it to them as a material fact to be considered along with other conduct of the accused,) intended, in effect, to affirm the proposition that the failure to arrest Dull constituted Wren an accessory after the fact to the felony committed by Dull. At any rate, the enquiry propounded was a question of law, to which the court ought to have responded; and not a question of fact, to be submitted to the jury.

The instructions given by the court would have been proper and unobjectionable if they had been preceded by the declaration that the mere failure of the accused to arrest Dull did not constitute him an accessory to the felony committed by Dull.

996 But because *the failure to make this declaration might have misled the jury as to the law of the case, this court is of opinion that for this reason the judgment of the said Hustings court should be reversed, the verdict set aside, and the cause remanded for a new trial to be had therein.

STAPLES, J., concurred in a part of Judge Christian's opinion, but he would have gone further. There were two questions submitted by the jury; both of which should have been answered. Again, the instruction given is not correct. The court says the failure to arrest was a material fact: that depends upon the motive of the party.

BOULDIN, J., concurred with Staples that both questions should have been answered. In all other respects he concurred in the opinion of Judge Christian.

Judgment reversed.

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1. It is clear that the possession of a mere intruder on the land of another, without pretence or color of title, no matter how long such possession may continue, will not be deemed in law adverse to the title of the true owner, and can never ripen into a good title.
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2. But it is equally clear, that possession under color or claim of title, does amount to adverse possession; and if held long enough, will, under our laws, ripen into a good title. And it is not necessary to constitute an adverse possession, that there should be a rightful title. *Idem*, 137

3. But the holder or claimant of property, under an equitable title derived from a vendor or grantor, who retains the legal title for future conveyance, does not hold adversely, but in subordination to the grantor's title; and no length of possession under such title will ripen into a legal title.
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APPEALS.

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1000 *2. In such case the decree is to be considered as several as to each creditor. *Idem*, 167

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Armentrout's ex'ors v. *Gibbons*, 371
Dabney v. *Preston's adm'rs*, 838

7. Where, upon a motion for a new trial because the verdict is contrary to the evidence, the motion is overruled, if the bill of exception states, not the facts proved, but the evidence, and this is conflicting, all the evidence of the party excepting, in conflict with that of the other side, must be disregarded by the appellate court.

Brumbaugh v. *Wissler's ex'or*, 463

8. A record of a suit by legatees against the executor and his sureties, is referred to as an exhibit with the bill of the sureties against the executor and purchasers of assets from him, and the evidence in that record is relied on in the Circuit court without objection in the suit by the sureties. It is too late to object to it in the appellate court.

Jones' ex'ors v. *Clark & als.*, 642

9. Where, in pursuance of the act of 1869–'70, ch. 171, § 5, p. 272, this court sent a cause, as having been pending in a District court of appeals, to a Circuit court, that was a decision of this court that the cause had been pending in the District court, and that the Circuit court had jurisdiction to rehear and decide it.

Kent, Paine & Co. v. *Dickinson, Judge*, 817

10. If in such a case the judge of the Circuit court refuses to rehear and decide the case, and directs it to be dismissed from the docket of his court, he may be compelled by *mandamus* from this court to hear and decide it. *Idem*, 817

11. An objection to a question asked and to the witnesses answering it, is overruled, and an exception taken, which does not state the answer. The appellate court cannot consider it.

Stoneman's case, 887

12. If an instruction correctly expounds the law, and is expressed in terms familiar to the books, and well understood by the judicial mind, and especially if the jury or the counsel do not ask an explanation of it, an appellate court will not set the verdict aside, because its true import and meaning possibly may not have been comprehended by the jury. *Idem*, 88

ASSIGNOR AND ASSIGNEE.

1. For the order in which bonds are 1001 to *be paid out of a fund bound for their payment. See *Liens*, No. 1, 2, 3, 4, and

McClintic v. *Wise's adm'ors*, 448

2. For the rights of assignee against the vendor of land who has recovered possession of it. See *Liens*, No 5, and *Idem*, 448

AWARDS.

1. Upon the question whether an award is within the terms of the submission, all fair presumptions shall be made in favor of the award; and if, on any fair presumption, the award may be brought within the submission, it shall be sustained.

Pollock's adm'r v. *Sutherlin*, 78
Buford v. *Pollock's adm'r*, 78

2. In this case—*Held*: The award of the arbitrator is within the submission. *Idem*, 78

3. The rules governing courts of equity in awarding new trials in actions at law, on the ground of after discovered evidence, apply equally to motions to set aside an award on that ground.

Adams v. *Hubbard*, 129

4. Where all the evidence that was before the arbitrators is not before the court on the motion to set aside the award, the motion must fail. *Idem*, 129

5. F contracts to make, burn and deliver to L a certain quantity and quality of bricks, 80 *per cent.* of the price to be paid when ready for delivery, according to kiln measure; the remaining 20 *per cent.* to be paid when the bricks are laid in the wall of the building, which L proposed to erect. The bricks have been made, and the 80 *per cent.* paid; but they are still in the kiln, when the architect of L rejects a large portion of them as not being of the quality contracted for. The quality of the bricks is the subject of difference; but, in their submission to arbitration, they say, "whereas certain differences have arisen as to the quality of the bricks manufactured under said contract, and as to the construction of said contract"—HELD:

1. The latter clause will be held to refer to the construction of the contract in relation to the quality of the brick; and the arbitrators awarding the payment by L to F of the 20 *per cent.* reserved, is beyond the submission.

Lynchburg Female Orphan Asylum v. *Ford*, 566

2. The submission is not to be extended by the counsel of F arguing in the presence of the counsel of L, that it embraces the question of the payment of the reserved 20 *per cent.* *Idem*, 566

3. That part of the award in relation to the quality of the brick being entirely distinct and not dependent upon that part directing the payment of the reserved 20 *per cent.*, that part may be sustained whilst the latter part is set aside.

Idem, 566

BANKRUPTCY.

1. In an action of slander, a plea that since the commencement of the action the plaintiff has been adjudicated a bankrupt, is not a good plea.

Dillard v. *Collins*, 343

2. Under the English bankrupt act and the bankrupt act of 1841, and the present act, the rights of action which are transferred to the assignee do not include claims for personal damages. *Idem*, 343

3. The rights of action transferred to the assignee are rights of action founded on beneficial contracts made with the bankrupt, where the pecuniary loss is the substantial and primary cause of action, and for injuries affecting his property, so far as they do not involve a claim for personal damages. *Idem*, 343

4. The proper and reasonable construction would seem to be that the statute transfers all such rights of action as would be assets in the hands of an executor for the payment of debts, and no others. *Idem*, 343

5. The 33d section of the bankrupt act of 1867, which provides that "no debt created by fraud," &c., of the bankrupt "shall be discharged under this act," applies as well to implied as to express fraud.

Jones's ex'ors v. *Clark & als.*, 642

BANKS.

1. The principles of the cases of *Exchange Bank* v. *Knox* and *Farmers Bank* v. *Anderson*, 19 Gratt. 739, and *Saunders* v. *White*, 20 Gratt. 327, approved and acted on.

Bank of the Valley, for &c., v. *Marshall*, 378

2. In a suit in the Circuit court of the United States against The Bank of the Valley, the court, on the 21st of September 1869, made an order that the receiver 1002 *receive the notes of the bank in payment of the debts due to it. After the decision of the cases of *Exchange Bank* v. *Knox*, *&c.*, the court set aside this order. A plea of tender of these notes in payment of debts to the bank, filed in a case pending in a State court, after the rescinding of the order of the United States court, the notes having been obtained after the execution and recording of the deed of the bank and notice thereof to the defendant, is not a valid defense to the action. *Idem*, 378

BILL OF EXCEPTIONS.

1. What bill of exceptions must show. See *Practice at common law*, No. 2, and

Dickinson v. *Dickinson & Co.*, 321

2. When the objection is to the competency of a witness, and the objection is sustained, it is not necessary to state in the exception what the party offering him expects to prove by him.

D. Martz' ex'or v. *D. Martz' heirs*, 361

3. When appellate court will consider the question raised by the exception. See *Practice at common law*, No. 7, and *Idem*, 321

4. An objection to a question asked and to the witnesses answering it, is overruled, and an exception taken, which does not state the answer. The appellate court cannot consider it. *Stoneman's case*, 887

BILL OF REVIEW.

1. What a proper case for a bill of review. See *Equitable Jurisdiction and Relief*, No. 3, and *Goolsby, &c.* v. *St. John*, 146

2. A bill of review is a continuation of the original suit. *Idem*, 146

3. When a petition to set aside an order for investment of funds will be treated as a bill of review. See *Executors and Administrators*, No. 1, and

Crickard's ex'or v. *Crickard's legatees*, 410

BOARD OF PUBLIC WORKS.

1. An action may be maintained against the present board of public works of the state, upon a contract made with the board as organized under the former constitution and laws.

Kelly v. *Board of Public Works*, 755

2. A contractor has two claims against the state, arising out of the same contract, one for commissions, and the other a percentage on his actual expenditures. He brings his suit, and recovers judgment for a certain amount which he alleges was the amount of the commissions. He brings another suit for the amount of the percentage on his actual expenditures; and the judgment in the first case is relied upon by the defense as having decided upon his whole claim. Parol evidence is admissible to prove that only the claim for commissions was involved in that case. *Idem*, 755

BONDS.

1. A County court, in February 1871, appointed S, who was holding over as sheriff, collector of the taxes of 1870, and he gave bond with sureties and qualified.—HELD:

1. The County court was authorized, under the facts of the case, to take the bonds; and it is a valid bond, and binds the sureties.

Chapman & als. v. *Commonwealth*, 721

2. The County court having made the appointment, and S and his sureties having executed the bond, they are estopped from denying that it is valid and binding upon them. *Idem*, 721

2. In July 1871 H became the surety of B as collector of township B. At that time the taxes for that year, by law, went into the hands of the collector on the 1st of September, and were to be accounted for on the 1st of December. After the execution of the bond by H, there were several extensions, by joint resolutions and statutes of the general assembly, of the time in which collectors should make their settlements with the treasurers.—HELD:

1. That though it is true that the law at the date of the contract enters into and forms part of the contract, yet laws which are merely directory to officers of the government form no part of the contract; and the extension of the time, as aforesaid, does not release the surety H.

Commonwealth by, &c. v. *Holmes*, 771

2. Where new duties are imposed upon a public officer by statute after the execution of his official bond by his 1003 *surety, the bond should be held good against the surety to the extent of the duties lawfully covered by it, though it may not be good as to the new duties, imposed since its execution.
Idem, 771

BURGLARY.

1. D and H rent a room jointly of S, of which each has a key. C rents an ajoining room, the doors of the two rooms entering upon the same porch near each other. They frequently interchanged visits. On the night of March 11th, 1874, D locks his door, takes out the key and starts to church. On the way he meets H, who says he is going to his room, and will follow him to church soon. H and C comprise to steal D's goods in the absence of D on this night, and H opens the the door with his key, and they enter the room, and take and carry away the trunk of D with its contents. This is not such a breaking as will constitute burglary in C.
Clarke's case, 908

2. The breaking which will constitute burglary, may be actual or constructive. For what will be a constructive breaking, see the opinion of *Moncure, P.* *Idem*, 908

3. The indictment charging not only the breaking and entering, but the stealing of the trunk and its contents, of a stated value, C, though acquitted of the burglary, may be found guilty of the larceny. *Idem*, 908

CASE.

1. F put into the hands of B two notes, to be collected and the money paid to F. B does not collect or pay over the money; and though required, does not return the notes to F. F may maintain an action on the case against the administrator of B for the damage he sustained by the failure of C to collect or return the notes.
Ferrill v. *Brewis's adm'r*, 765

2. It is not necessary that a declaration in an action on the case for tortious neglect shall contain an express averment of a consideration. The breach of a trust undertaken voluntarily is actionable; the pure trusting the party with the goods being a sufficient consideration. *Idem*, 765

CHARITABLE BEQUESTS.

1. M. died in 1868, having made a will in 1859, by which he gave the residue of his estate to the Board of the Literary Fund (a corporation created by law) and their successors forever, in trust for the benefit of the county of Albemarle, for the purpose of establishing and supporting a manual labor school for poor white children of the county, to be conducted through the agency of the County court of Albemarle—HELD:

1. The agencies appointed for carrying out the bequest, were a secondary consideration with the testator; and the object being consistent with the constitution and laws, the bequest will be held valid, though the agencies existing at the time of the bequest or the death of M. have been changed.
Kinnaird & als. v. *Miller's ex'or & als.*, 107

2. That the provision is for the education of white children does not invalidate it.
Idem, 107

3. The bequest is valid under ch. 80 of the Code of 1860. *Idem*, 107

4. It is valid as an executory devise, and an act may be passed by the general assembly, as authorized by the testator, to carry the trust into effect. *Idem*, 107

2. A bequest to "the Baptist Theological Seminary in South Carolina," held, upon the evidence, to have been intended to be a bequest to the "Southern Baptist Theological Seminary," a Baptist theological institution in South Carolina, and incorporated by an act of that state.
Roy's ex'ors v. *Rowzie & als.*, 599

3. The charter of "the Southern Baptist Theological Seminary" authorizes it to hold, possess and enjoy all property, real or personal, which may be given, granted or divised to it; not to exceed at one time more than $500,000. A bequest to the institution made by a testator in Virginia is valid; it appearing that the bequest will not increase its funds beyond the prescribed limits. *Idem*, 599

4. A devise or bequest to an incorporated theological seminary, whether located within or out of the state, is not void as against either public policy or any statute.
Idem, 599

5. The act of April 1839, ch. 12, § 11, entitled "an act concerning devises made 1004 *to schools, academies and colleges," and act, Code of 1849, ch. 80, on the same subject, refer to indefinite charities; and it is only in relation to these that theological seminaries are excepted out of the authority to make such bequests for literary purposes. *Idem*, 599

COLLECTORS AND TREASURERS OF TAXES, &c.

1. For liability of the sureties of collectors and treasurers of taxes, see *Sureties*, No. 7, 8, 10, 11, 12, and
Chapman & als. v. *Commonwealth*, 721
Commonwealth, by, &c. v. *Holmes*, 771
Smith & als. v. *Commonwealth*, 780

2. How payments by a collector or other receiver of public money is to be applied, see *Payments* No. 2, and
Chapman & als. v. *Commonwealth*, 721

3. Prior to the passage of the act of April 2, 1873, an outgoing county treasurer was not required or authorized to turn over to his successor in office any portion of the public revenue. He was to account directly to the auditor of public accounts as an outgoing sheriff.
Smith & als. v. *Commonwealth*, 780

4. The act of April 2, 1873, Sess. Acts 1872-'73, ch. 373, § 6, p. 372, whatever may

be its operation upon cases arising subsequent to its passage, is only prospective in its operation, and does not apply to the case of a treasurer who went out of office on the 1st of January 1873. *Idem*, 780

CONFEDERATE CONTRACTS.

1. In December 1862 M sells to D a house and lot for $1,000. Nothing was said as to the kind of currency to be paid, but D paid in cash at the time $600, and gave his bond for the balance payable in twelve months. The property had been offered in 1860 for $800, and at the time of the sale Confederate treasury notes was the only currency. When the bond became due, or two or three days thereafter, D tendered the amount in that currency. HELD:

1. That the contract was made with reference to Confederate States treasury notes as the standard of value.

Merewether v. *Dowdy*, 232

2. Though D tendered the money, he is not thereby released from the payment of the debt. *Idem*, 232

3. No inflexible rule can be laid down as to whether the value of the property at the time of the contract, or the gold value of the purchase money at that date, should adopted. Under the circumstances of this case, the gold value of the debt at the date of the conrtact was properly applied.

Idem, 232

CONFIDENTIAL RELATIONS.

1. A case in which the administrators of the husband were held to hold a confidential relation to the widow, which, according to the policy of the law, forbids that a fiduciary should receive any material gratuity from one whose interests are entrusted to his care, unless it appears that no undue means or influence were used to induce the gift, and that it was made by the donor voluntarily, and with full knowledge of the nature and extent of the act.

Statham & als. v. *Ferguson's adm'r & als.*, 28

2. A case in which the court held that undue influence had been used upon the widow, and that she was not sufficiently informed of the value of the husband's estate and her rights; and therefore, although no fraud may have been intended, her deed should be set aside.

Idem, 28

CONSTITUTIONAL LAW.

1. The act of March 22, 1873, Code of 1873, ch. 57, § 36, p. 544, in reference to the defense of usury by corporations, is retroactive in its operation, and applies to contracts made by a corporation before the passage of the act. And the act is not in violation of the constitution of the United States or of the State of Virginia.

Town of Danville v. *Pace*, 1

2. Under the constitution of Virginia the governor has authority to pardon a person convicted of a felony by the verdict of a jury, before sentence is passed upon him by the court. *Blair's case*, 850

1005 *3. The act, ch. 240, § 104, Sess. Acts of 1874, which imposes a license tax on merchants, is constitutional.

Moore & Goodson's case, 951

CONTRACTS.

1. The broad language of a contract in relation to the division of land between joint owners, restricted in its construction in view of the surrounding circumstances and the previous action of the parties.

Clark v. *Nunn & wife*, 287

2. *Quære:* If a Virginia court examining into contracts entered into in a foreign country, can do more than affirm the validity or invalidity of such contracts; or can in such case administer any remedies other than those afforded by the laws of Virginia.

Bowman v. *Miller & Co. & al.*, 331

CORPORATIONS.

1. The act of March 22, 1873, Code of 1873, ch. 57, § 36, p. 544, in reference to the defence of usury by corporations, is retroactive in its operation, and applies to contracts made by a corporation before the passage of the act; and this though suit had been brought upon such contract before its passage. And the act is not in violation of the constitution of the United States or of that of Virginia.

Town of Danville v. *Pace*, 1

CORPORATION COURTS.

Under the act of April 2, 1870, ch. 38, § 6 and 7, Sess. Acts 1869–'70, corporation courts in cities and towns having a population of more than five thousand, have the same jurisdiction to try offences committed within their respective limits, as Circuit and County courts had; and the act of April 2, 1873, to regulate and define the jurisdiction of the Circuit and County courts, does not apply to or affect the jurisdiction of said Corporation courts.

Tremaine's case, 987

CREDITOR AND SURETY.

1. Where one surety in a bond gives notice to the obligee to sue the obligor, the statute does not peremptorily require the obligee, after obtaining judgment, to sue out execution upon it; it only requires him to use due diligence in prosecuting "to judgment, and by execution."

Harrison's ex'or & als. v. *Price's ex'or & als.*, 553

2. In such case, where the creditor has not been guilty of laches, but the clerk has refused to issue execution, on the ground that the stay law forbade it, and the court has sustained him in it, whether the judgment of the court was right or wrong in enforcing the stay law, negligence cannot be imputed to the creditor. *Idem*, 553

3. Upon such notice to the creditor by a surety, the creditor is not required to pursue the estate of the principal in equity to impeach alleged fraudulent conveyances, or to subject an equity of the principal to the pay-

ment of his debt, or to exhaust his remedies against the principal before he can have satisfaction out of the estate of the surety.

Idem, 553

4. The statute which authorizes a surety to give notice to the obligee to sue, gives the surety a more summary remedy than he had before by bill in equity, but does not change the relation or the contract between creditor and surety. It only holds the creditor responsible, if by reason of his laches or negligence, the equity of the surety against the principal is infringed. *Idem*, 553

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. Of the competency of a witness who is alleged to be deranged, the court is the judge, whilst the weight of the testimony, the credit to be attached to it, is left to the jury.

Coleman's case, 865

2. In a prosecution for a felony, where the trial has been protracted, and much evidence introduced, and it will consume much time in preparing a bill of exceptions, the court may properly refuse to delay the trial, to permit the counsel to prepare the bill of exceptions, and postpone its preparation until the case is submitted to the jury.

Idem, 865

3. Counsel in arguing a case before the jury, refer to an instruction given by the court, and represent it erroneously. It is not error in the court to interrupt him, and to state to the jury the instruction correctly.

Idem, 865

4. An indictment for burglary charging not only the breaking and entering, but the stealing of a trunk and its contents, of a stated value, the prisoner, though acquitted *of the burglary, may be found guilty of the larceny.

1006

Clarke's case, 908

5. On a trial for a misdemeanor in a County court, there is a verdict and judgment against the defendants, and they take the case to the Circuit court, where the judgment is reversed, and the cause is retained for a new trial. There may be a writ of error to the Court of Appeals from the judgment of the Circuit court.

Lewis & Deviney's case, 938

6. On the trial of a prisoner for murder, a statement made by him to a person, in a few minutes after the homicide was committed, and near to the place, in the presence of eye witnesses of the homicide, who were not introduced as witnesses by the commonwealth, should be admitted as evidence at the instance of the prisoner, as part of the *res gestæ*.

Little's case, 921

7. At least the statement should have been heard by the court below, so that the court might determine whether all or any part was admissible evidence, and that the appellate court might revise the judgment in that respect. *Idem*, 921

8. After a witness for the commonwealth has given his testimony and left the stand, if the prisoner wishes to show that he has made a different statement at another time, he is entitled to have him recalled, and to examine him on the point, that the evidence in contradiction may be introduced; and this whether the failure to examine him when on the stand, was because he or his counsel were not informed of the evidence to contradict him, or from inadvertence.

Idem, 921

9. Upon a criminal trial the prisoner may prove, by a person who was present, that a statement made before the grand jury by a witness for the commonwealth, was altogether different from that made by him on the trial; and *quære*, if a grand juror is not a competent witness to prove it.

Idem, 921

10. A witness for the commonwealth is asked if he had said on last Wednesday in front of the courthouse, in conversation with gentlemen, whose names were not known, "If I had my way I would kill the damned rascals;" referring to the prisoners: and he denies it. The prisoner will be allowed to prove that the witness used the expression; though the names of the two gentlemen to whom it was spoken cannot be given.

Idem, 921

11. On a prosecution for a robbery, a witness gives a description of the robbers, received from the wife of the prosecutor a few minutes after the occurrence, and he states that he pursued after the parties and found the prisoner and another, at a place he describes. The commonwealth's attorney may then properly ask him whether the prisoner and the other person corresponded on that night, in dress and appearance, with two of the men described by the wife of the prosecutor. And his answer that they did, was proper evidence.

Jordan's case, 943

12. The criminal jurisdiction of the Hustings court of the city of Richmond extends one mile beyond the city limits, on the north side of James river. *Idem*, 943

13. Under the act of April 2, 1870, ch. 38, § 6 and 7, Sess. Acts 1869-'70, Corporation courts in cities and towns having a population of five thousand, have the same jurisdiction to try offences committed within their respective limits as Circuit and County courts had; and the act of April 2, 1873, to regulate and define the jurisdiction of the County and Circuit courts, does not apply to or affect the jurisdiction of Corporation courts.

Tremaine's case, 987

14. On an indictment for larceny, the clerk charges the jury in the usual form. If on the trial it appears that the money charged to have been stolen was obtained by false pretences, another charge by the clerk is neither necessary nor proper.

Dull's case, 965

15. Where two persons have been indicted

jointly for a misdemeanor, they cannot claim any right to be tried separately.

Lewis and Diviney's case, 938

DEMURRERS.

1. See *Pleading in Chancery*, No. 1, and *Jones' ex'ors* v. *Clark & als.*, 642

DEPOSITIONS.

1. Though an exception to a deposition for want of notice, or other irregularity, must be brought to the notice of the court before the hearing of the cause, that it may be passed upon, or it will be considered as waived, 1007 and will not be noticed *in an appellate court; when the exception is to the competency of a party to the cause, this rule does not apply; and the court, at the hearing, may pass upon the exception; and whether so passed upon or not, it may be passed upon by the appellate court.

Statham & als. v. *Ferguson's adm'r & als.*, 28

2. A deposition is taken to be read on a trial at law, and the witness is asked if he was acquainted with the general character of C, the plaintiff, for honesty. If so, state what it was and is. To which he answered, as far as he could see he did not see anything against the man. He never heard anything against him by any man, except D, the defendant. To this answer the defendant excepted generally. On the cross-examination it appears that witness did know enough of C's general character to authorize him to speak of it. The exception of the plaintiff should have stated the grounds of his objection to the answer. And it appearing from the whole deposition that the witness was competent to speak as to the character of C, the answer will not be stricken out.

Dillard v. *Collins*, 343

DOWER.

1. Where husband sells land and dies in possession of other land on which he in his lifetime, and his widow since his death, lived, her dower should be assigned in the land of which he died seized, in exoneration of the land he had sold.

Stimson v. *Thorn*, 278

2. How compensation may be made to a purchaser for the widow's right or estate of dower in the land sold. See *Specific Performance*, No. 3, and *Idem*, 278

3. Where a wife is induced to unite with her husband in conveying away her interest in his real estate, upon condition that certain specific property shall be settled on her in consideration of her thus parting with her rights, if such settlement is set aside and annulled, she has the right to be placed in the same position, and restored to the same rights, with which she was invested by law before she united in the deed of which the specific settlement was the consideration; provided this can be done without prejudice to the rights of creditors or purchasers.

Davis' widow v. *Davis' creditors*, 587

EQUITABLE JURISDICTION AND RELIEF.

1. Bill to recover a female slave and her children. The only allegation in the bill as ground of jurisdiction is, that plaintiffs did not know the names of the children; though a further discovery is asked of names, number, &c. It being apparent from the bill and answer that the plaintiffs did not need a discovery, the bill should be dismissed.

Hall's ex'or v. *Smith & als.*, 70

2. In an action at law in 1866 there is an insufficient return of service of the process, but there is an office judgment confirmed at the next term of the court. The stay law prevents the issue of an execution on the judgment, but there are judgments for a year's interest in 1867 and 1868; and in 1870 an execution is issued upon the original judgment. This was a judgment by default in the sense of the statute, Code of 1873, ch. 175, § 5 and 6, p. 1135, and as the defendants had notice of the judgment within two years from its date, and might have moved to set it aside in the common law court, equity has no jurisdiction to enjoin it.

Goolsby &c. v. *St. John*, 146

3. The court of equity perpetuates the injunction to the judgment, sets aside the judgment, and remands the cause to the rules. The plaintiff in the judgment may file a bill to review the decree. *Idem*, 146

4. The bill of review is a continuation of the original suit, and the court should by one decree in the cause dissolve the injunction and dismiss the original bill.

Idem, 146

5. Upon a bill by surety against the creditor, to be relieved, on the ground that the creditor had authorized the sheriff to release the property levied on under the execution, the creditor answers and denies explicitly the allegations of the bill in this respect. The sheriff is a doubtful witness to sustain the bill, and though he testifies that the creditor directed him not to sell, he not being sustained by strong corroborating circumstances, relief should be denied.

Shannon v. *McMullin*, 211

6. In a pure bill by the assignees of the lessees of salt works, to enjoin part owners of it from disturbing their possessions, the only issue is the right to an injunction, 1008 *and an account of profits cannot be decreed in that case.

Stuart, Buchanan & Co. v. *White & als.*, 300

Mitchell & als. v. *McCall & als.*, 300

7. But there being another case in the same court between the owners of the property, in which the court has taken possession of the property and rented it out by its commissioner, and the Special Court of Appeals having directed that the cases shall be heard together, the order of account may be made in both cases. *Idem*, 300

8. The assignees of the lessees of salt works hold under the lease by the court to P. at

$22,000 *per annum*, which terminated January 1st, 1861; and in 1859 P. leases to the assignees for ten years, commencing in 1859 at $20,000. The assignees hold over after January 1861, until 1869. In the suit by the assignees to enjoin the part owner from interfering with their possession, on appeal to the Special court of appeals at Abingdon, that court after reinstating the injunction, and directing the cause to be heard with the case between the joint owners, says that the Circuit court may determine whether the assignees shall be charged according to the lease to P or P's lease to them, or hold them responsible for such other reasonable rent for the property as the court may determine to be right—HELD:

1. The decree of the Special court of appeals not having been appealed from, the parties are bound thereby; and the Circuit court may direct a commissioner to ascertain and report what would be a reasonable rent of the property from January 1st, 1861, to January 1st, 1869. *Idem*, 300

2. The court may require said assignees to produce before the commissioner, on oath, all contracts in their possession or power to produce, by which leases of said salt property were made by them, or privileges granted to others to manufacture salt during said period, and all books and accounts and papers in their possession or power, showing the quantity of salt manufactured during said period, and delivered to them by their sub-lessees, or those to whom such privileges were granted under such contract. *Idem*, 300

9. Though the testator appoints his executor a trustee for legatees, a court of equity may, for good cause, appoint another trustee for the management of the fund.
Crickard's ex'or v. *Crickard's legatees*. 410

10. When equity may subject a debt due to a wife to satisfy a debt contracted by her. See *Husband & Wife*, No. 11, and
Burnett & Wife v. *Hawpe's ex'or*, 481

11. QUÆRE: If the insolvency of the plaintiff in a judgment will give a court of equity jurisdiction to enjoin the judgment, to let in a defence of set-off which might have been set up in the action at law.
Linke & Klepper v. *Fleming*, 704

12. When equity will enjoin authorities of a town from removing buildings alleged to be in a street. See *Injunctions*, No. 5, and
Manchester Cotton Mills v. *Town of Manchester*, 825

EVIDENCE.

1. There is a return by a sheriff on an execution, levied on property named; and afterwards he endorses, execution held up and property not sold, by direction of F, the creditor. This additional return is not even *prima facie* evidence against F of the fact it states.
Shannon v. *McMullin*, 211

2. Where process is returnable process, if the officer make return of the performance of acts beyond his duty, under such process, such return will be invalid as to such parts of it, and will not be evidence.
Idem, 211

3. When an answer as to the character of a party to a cause will not be struck out of a deposition. See *Depositions*, No. 2 and
Dillard v. *Collins*, 343

4. When parol evidence is admissible in relation to the object or subject of a legacy. See *Legacies and Legatees*, No. 2, and
Roy's ex'ors v. *Rowzie & als.*, 599

5. In an action of *assumpsit* there is a special and the general counts; and the jury find a general verdict for the plaintiff, on which the court renders a judgment. In another controversy between the same parties, the record is *prima facie* evidence of the facts stated in the special count.
Linke & Klepper v. *Fleming*, 704

6. When parol evidence is admissible to prove what was involved in a previous 1009 *suit between the same parties. See
Board of Public Works, No. 2 and
Kelley v. *Board of Public Works*, 755

7. On the trial of S for the murder of E, the commonwealth having shown that E and O, the sister of S, had been married, the prisoner may introduce in evidence the decree in a suit by O against E for a divorce, either to render O a competent witness for him, or to show that E being no longer the husband of O, was a mere intruder upon the prisoner's family. But the pleadings and depositions are not admissible as evidence for such a purpose.
Stoneman's case, 887

8. On the trial of a prisoner for murder, a statement made by him to a person, in a few minutes after the homicide was committed, and near to the place, and in the presence and hearing of eyewitnesses of the homicide, who were not introduced as witnesses by the commonwealth, should be admitted as evidence at the instance of the prisoner, as part of the *res gestæ*.
Little's case, 921

9. At least the statement should have been heard by the court below, so that the court might determine whether all or any part of it was admissible evidence, and that the appellate court might revise the judgment in that respect. *Idem*, 921

10. On a prosecution for a robbery, a witness gives a description of the robbers, received from the wife of the prosecutor a few minutes after the occurrence, and he states that he pursued after the parties, and found the prisoner and another at a place he describes. The commonwealth's attorney may then properly ask him whether the prisoner and the other person corresponded on that night in dress and appearance with two of the men described by the wife of the prosecutor. And his answer that they did was proper evidence
Jordan's case, 943

EXECUTIONS.

1. What return on execution by sheriff is not evidence. See *Process*, No. 1, 2, and
Shannon v. *McMullin*, 211

EXECUTORS AND ADMINISTRATORS.

1. B, as executor, filed his bill for the administration of the estate, against the widow and legatees; and in September 1859 a commissioner reports in his hands $9,543.48; and this report is confirmed by the court. B paid off the legatees who were of age; but it does not appear how he invested the balance of the fund. In June 1863, upon the petition of B, without notice to the legatees, the court made an order in the cause authorizing B to invest the fund remaining in his hands, $7,078.86, in Confederate bonds--HELD:

1. To authorize investments under the act of March 5th, 1863, three conditions must concur: 1st. The money must be in the hands of the fiduciary. 2d. It must be received in the due exercise of his trust. 3d. For some cause he must be unable to pay it over to the party entitled. If they do not all exist the order of the court is null and the fiduciary is responsible for the money.

Crickard's ex'or v. *Crickard's legatees*, 410

2. In this case none of these conditions concur. The money received by B in 1859 was gold or its equivalent. The Confederate money he proposed to invest was not received in the due exercise of his trust. And as to those parties who were not in a condition to receive it, it was his duty to have made investments for them before the war in securities which were safe and valuable. The order of the court authorizing the investment was illegal and void, and B is responsible for the amount in good money. *Idem*, 410

3. The legatees having filed their petition to the court to set aside the order, and compel the executor to pay the legacies, and a rule having been made upon B, the executor, to show cause against it, the petition must be treated as a petition to rehear and set aside the order; and the court may rehear and set it aside. *Idem*, 410

4. If B retained the money in his own hands, paying interest to the parties entitled, he became the debtor of the legatees; and having received gold cannot discharge his debt in a depreciated currency. And if he changed the investment he had made, and suffered safe and solvent securities to become converted into Confederate money, he committed a *devastavit*. *Idem*, 410

1010 *5. Though the will appoints the executor trustee for the legatees, a court of equity may for good cause appoint another trustee for the management of the fund. *Idem*, 410

2. In 1858, H sells his farm of 700 acres to his two sons, J and M, for $48 per acre, upon credits extending through a number of years; and when the purchase money is paid a deed is to be made. He dies in 1860, and leaves his estate to M and his daughters S and B. J and M divide the land, each to pay half the debt. In November 1862, J, with the concurrence of W, the executor of H, and B, sells his half of the land for Confederate money; and W conveys it to the purchaser and receives the money, and pays M and B their shares, and invests the share of S in Confederate bonds. HELD: That the debt due from J being an ante-war debt, well secured on real estate, and is not necessary for the payment of the debts of the estate, W, the executor, though he acted in good faith, yet exceeded his powers, and committed a *devastavit* in receiving Confederate money, in November 1862, in payment of the debt of J, without the consent of S; and he is liable to her for the amount of her interest so received by him.

Williams' adm'rs v. *Skinker and wife*, 507

3. There may be many cases in which an executor will be held justified in receiving Confederate money, greatly depreciated, for a debt payable in a sound currency; as where the necessities of the estate required it; where it could be used in payment of the debts of the estate; or (where there being no debts) the parties entitled to distribution consented to receive it; or where the security for the debt had become doubtful, and the estate would be benefited by receiving even a depreciated currency. *Idem*, 507

4. It is difficult to lay down any general rules applicable to all cases which arise out of the dealings by executors during the war. Each case must depend upon its facts and the circumstances at the time surrounding the executor. *Idem*, 507

5. It seems that where the exigencies of the estate do not require the collection of a debt which rests upon undoubted security, and especially when the only object of the collection is for distribution among the legatees, and the collection is made without their consent, the executor must be held personally liable when he permits the debtor to discharge his debts in a depreciated currency; and he will not be permitted to shift the responsibility, and cast the burden of loss upon the legatee. An executor who receives a depreciated currency under such circumstances commits a *devastavit*, for which the law casts upon him a personal responsibility. *Idem*, 507

6. A *bona fide* purchaser for value, and without notice, of a portion of the assets of the estate, either directly or indirectly from the executor, will acquire a good title thereto, even though the executor commit a *devastavit* by making the sale for the purpose of converting the proceeds to his own use, and by actually so converting them.

Jones' ex'ors v. *Clark & als.*, 642

7. If a purchaser of a portion of the assets be privy to the intended *devastavit* of the executor, at the time of the purchase, or fraudulently contribute to such *devastavit* in any way, such purchaser will be liable for the loss sustained by creditors, legatees or others, by reason of such *devastavit*. *Idem*, 642

8. A purchaser from an executor of personal property of the testator, for valuable consid-

eration, need not enquire, and has no adequate means of enquiry, whether the condition of the testator's estate requires a sale of the property, and is not bound to see to the application of the purchase money, but may fairly presume that the sale is rightly made, and that the purchase money will be properly applied; and such purchaser can only be made liable on the ground of a fraudulent participation with the executor in the commission of a *devastavit* of the testator's estate. The purchaser must be guilty of a fraud in that respect. *Idem*, 642

9. In such a case the fraud of the purchaser, which will make him liable, may be either constructive or actual. *Idem*, 642

10. In 1857, E, the executor of W, sells the real estate of his testator, and for the deferred payments takes bonds payable to himself as executor. Of these, one is payable on the 18th of November 1859, with interest from the 18th November 1858, and another 1011 payable on the *18th of November 1860, with like interest. In June 1859 E sells these bonds to N, at a discount of eighteen *per cent.* In July N sells them to J at a moderate discount. At the time of the sale E was possessed of a large property, and his solvency was undoubted, and so continued until 1862. He stated to N that he wanted the money to meet advances he had made for the estate of W; and his accounts, as then settled, showed him in advance; but there was no charge in them against him for money received from the sale of the real estate. The sale was not needed for the payment of debts. J was not connected with the purchase by N, and knew nothing of its terms—HELD:

1. N was guilty of a constructive fraud in purchasing the bonds at so large a discount, which is sufficient to implicate him as a participant in the *devastavit* committed by the executor; and he is liable for the amount of the bonds. *Idem*, 642

2. J was not guilty of a fraud in purchasing from N, and is not liable. *Idem*, 642

11. Though there has been great laches in seeking to subject the purchasers of the bonds, yet N will not be thereby relieved from his liability. *Idem*, 642

12. Though N is a discharged bankrupt, his discharge does not relieve him from his liability. *Idem*, 642

13. An administrator is also guardian of infant legatees and agent of the widow. His account should not be blended; but his accounts as administrator should embrace only his receipts and disbursements as such.

Hannah's adm'r v. *Boyd & wife & als.*, 692

14. A fiduciary is not warranted in receiving payment in a highly depreciated currency, of a debt payable in gold or its equivalent, unless it be made to appear, either from the condition of the estate or of the debtor or other circumstances, that the collection of the debt was expedient and proper. *Idem*, 692

15. An administrator having waived his exceptions to a commissioner's report, under the erroneous impression that the report would be sustained, and the case finally disposed of, may withdraw his waiver, and renew his exceptions. *Idem*, 692

16. A personal representative having, during the war, received Confederate money and used it in his own business, in the settlement of his account of administration after the war, the money so received will be charged to him as of its scaled value in gold at the date of its receipt, and not at the end of the year.

Moses & al. v. *Hart's adm'r*, 795

17. A personal representative will be entitled to his commissions upon moneys received by him during the war, though he did not settle his accounts until after the war. *Idem*, 795

18. In settling the account of a personal representative who acted during the war, the balance found against him should be reduced to its value in gold. And the decree against him should be for the amount, to be paid in gold or its equivalent in United States currency. *Idem*, 795

19. Where there has been a principal administration in one state, and an ancillary administration in another, whether the courts of the latter will permit the assets there being to be transferred to the former, before the legatees as well as the creditors in the state of the ancillary administration are satisfied, will depend upon the circumstances of each case. There is no inflexible rule on the subject. *Idem*, 795

20. In such a case, the foreign claimants who come here insisting on the transmission of the assets to another state, when there are domestic claimants also, ought to be required to show that their transmission is indispensable to the purposes of justice. They ought to show that distribution cannot be made here without injury, or at least great inconvenience, to parties interested in the estate. The burden is upon them to make out a case for the interposition of the court in their favor. *Idem*, 795

21. A testator having died in New York, and his executrix having qualified there, as curator of the estate in Virginia pays money to two of the testator's legatees who are in Virginia. It being probable that the debts of the estate have been paid, the curator will not be required to pay over to the representative of the estate the money paid to the legatees, until an enquiry can be directed to ascertain whether any part of the assets are needed in New York to pay debts and legacies, and to what portion of the estate the two legatees to whom the curator 1012 paid *money are entitled under the will of the testator. And the curator will be entitled to a credit on his account for so much as they are entitled to as legatees, and he has paid to them. *Idem*, 795

FALSE PRETENCES.

1. If P and L, at the house of the accused, by the use of false pretences, obtained from

F the sum of $570, the accused is not guilty of the offence, unless he was present, aiding and abetting therein, or suffered or permitted the said P and L to use said house, with knowledge that they intended to use the same for the employing of such pretences. But if the accused was within easy call, with intent to aid or assist them in their purpose, or in escaping, or in getting rid of or misleading the person from whom such money was obtained, that is a presence, aiding and abetting, and the accused is as guilty as if he were personally present.

Dull's case, 965

2. If the accused and others concerted and conspired together to induce, by false representations, F, or any other persons who might be induced by such representations, to enter the house of the accused, and to obtain the money of such persons by false pretences, or rented his house to be used for such purpose by said conspirators; and in pursuance of such concert, one of the confederates of the accused induced F to go into said house, and by false representations and pretences did obtain from F a large sum of money; and the accused was present or within easy call to aid and assist them in their purpose, or in escaping or in getting rid of or misleading the person from whom such money was obtained, then the accused is as guilty as if he himself had obtained the money from F. *Idem*, 965

3. The obtaining money by false pretences is made larceny by the statute; and the penalty for the offence is the same as in other cases of larceny. *Idem*, 965

4. On an indictment for larceny, the clerk charges the jury in the usual form. If on the trial it appears that the money charged to have been stolen was obtained by false pretences, another charge by the clerk is neither necessary nor proper. *Idem*, 965

FORGERY.

1. If in an indictment for forgery, the document alleged to have been forged is described in such manner as would sustain an indictment for stealing it, supposing it to be the subject of larceny, the indictment is sufficient. *Coleman's case*, 865

FRAUDS.

1. See *Trusts and Trustees*, No. 1, 2, 3, and *Cocke & al.* v. *Minor & als.*, 246

2. See *Executors and Administrators*, No. 7, 8, 9, 10, 11, and

Jones' ex'ors v. *Clark & als.*, 642

GUARDIAN AND WARD.

1. In 1859 testator gave his estate to his widow and six children as in case of intestacy; but those of his children who had not been educated, he wished educated out of the general fund at the charge of his estate. At the end of the year the executors turn over the land, slaves and personal estate to the widow, one daughter who is of age, and the guardian of the five minor children, who agree to hold it all together, to be managed by the guardian for the support and maintenance of the widow and children, and the education of the minor children, so far as necessary for these objects; the widow and children to live on the land. And they act on this agreement until 1868. This is an agreement obviously beneficial to the infants, and a court of equity would have approved and confirmed it.

Hannah's adm'r v. *Boyd & wife & als.*, 692

2. The guardian of the minor children was the acting administrator *de bonis non* with the will annexed of the testator; and the commissioner who takes his account, blends his receipts and payments as administrator, with his receipts and payments under the agreement between himself as guardian and the widow and the daughter who was of age. This is error. The account as administrator should embrace only his receipts and disbursements as such. His receipts and disbursements under the agreement are made not as administrator, but as guardian of the minor children and agent of the widow and daughter, and are to be stated on different principles. *Idem*, 692.

3. In taking the account of the widow and the several legatees, the commissioner made a conjectural estimate of the amounts 1013 deemed necessary for the support *and education of the younger children. Under the circumstances, the proper course would seem to be to ascertain the expense actually incurred in educating the infant children, and to allow the same, if not excessive, as a charge upon the estate, together with a reasonable allowance for their support and maintenance during the period of their minority. *Idem*, 692

HUSBAND AND WIFE.

1. A married woman is regarded by a court of equity as the owner of her separate estate; and, as a general rule, the *jus disponendi* is an incident to such estate; that is, it is an incident thereto, unless and except so far as it is denied or restrained by the instrument creating the estate.

McChesney & als. v. *Brown's heirs*, 393

2. But it is subject to such limitations and restrictions as may be contained in such instrument; which may be *sub modo* only, or withhold it altogether. *Idem*, 393

3. In regard to separate personal estate, and the rents and profits of separate real estate, this power of disposition, if it be unrestrained, may be exercised in the same way, by deed, will or otherwise, as if the owner was a feme sole. *Idem*, 393

4. In regard to the *corpus* of separate real estate, it can be disposed of only in such mode, if any, as may be prescribed by the instrument creating the estate, or, unless prohibited by such instrument, in the mode prescribed by law for the alienation of real estate of married women. *Idem*, 393

5. While the rents and profits of a wife's separate real estate remain subject to her power of disposition as personal estate so long as they continue in that form, yet when

they are. by the wife, or by her direction, converted into realty, such realty can be disposed of only as other separate real estate of a married woman; that is, in the mode, if any, prescribed by the instrument by which it is conveyed to her or to trustees for her separate use; or, unless prohibited, or except so far as it may be restrained by the instrument, in the mode prescribed by law for the alienation of the real estate of married women. She may have the realty acquired by means of such rents and profits, conveyed for her separate use, subject to any restrictions she may choose to prescribe in regard to the mode of alienation, or, if she prefers it, without any restrictions at all.
Idem, 393

6. A married woman, as to property settled to her separate use, is to be regarded as a feme sole, and has the right to dispose of all her separate personal estate and the rents and profits of her separate real estate in the same manner as if she was a feme sole; unless her power of alienation is restrained by the instrument creating the estate.
Burnett & wife v. *Hawpe's ex'or*, 481

7. As incident to this *jus disponendi* a feme covert may charge the separate estate with the payment of her debts. She may charge it as principal or surety, for her own benefit, or that of another. *Idem*, 481

8. Although the separate estate is conveyed to a trustee, his assent is not necessary to a valid alienation or charge by the wife, unless it is required expressly, or by strong implication, in the instrument under which the property is derived. *Idem*, 481

9. It is not enough that the wife has the separate estate; it must also appear that it was her intention to charge it with the debt in question. *Idem*, 481

10. If a wife contracts a debt for herself, or for her husband, or jointly with him, the instrument executed by her is sufficient to charge her separate estate without any proof of a positive intention to do so, or even a reference to such estate contained in the writing. *Idem*, 481

11. Testator gives to his daughter S real and personal estate, for her own separate use, free from the control and debts of her husband; and in like manner gives her the rents and profits of another farm for her life. And he provides that the trustee shall control all the said real and personal estate, to carry out the provisions of his will, so as not to give any control of the real and personal estate to the husband, or be subject to his debts or liabilities. And he appoints his executor the trustee. A slave belonging to the testator was in the possession of S and her husband at the death of the testator, and the executor requires them to surrender the slave, that she may be sold, or to pur-
1014 chase *her. The husband agrees to purchase the slave, but the executor is not willing to take his bond unless S will join in it. She expresses her unwillingness to sign the bond, but being told by her husband that she must do it, or the slave must be given up, she signs it.—HELD:

1. The chief object of the testator was to deprive the husband of all control over the property; and the consent of the trustee is not made necessary to the alienation of the property by the wife.
Idem, 481

2. The trustee having, as executor, sold the slave and taken the bond, his assent. if necessary, was given. *Idem*, 481

3. The concurrence of the trustee not being necessary to enable the wife to dispose of or charge the estate, he cannot be held liable for any improper alienation of it on her part. *Idem*, 481

4. If the wife may charge her estate with the payment of her husband's debts, without the consent of the trustee, the mere fact that he was a party to the transaction, giving his consent, cannot impose upon him any additional responsibility.
Idem, 481

5. What was said to the wife is not sufficient to show the exercise of any improper influence on the part of the husband or of the executor. *Idem*, 481

6. In this class of trusts the wife may execute a bond to the trustee, if it is founded on a valuable consideration, and free from the imputation of fraud or undue influence. *Idem*, 481

7. S having sold her interest in the rents and profits given to her for life, and having received some five-sixths of the purchase money, and recovered a judgment for the balance, a court of equity may subject that debt to the payment of her bond to the executor. *Idem*, 481

12. D, who was seventy years old, and his wife A thirty-five, on the consideration that A would unite with him to convey to trustees three tracts of land in trust to pay his debts, conveyed to a trustee two tracts, in trust for A for her life, and then to her children. On the same day D and A conveyed the three tracts to trustees to pay his debts. At the time it was supposed the tracts and personal estate conveyed to pay D's debts were sufficient for the purpose; but owing to the decline in prices, they fell far short of doing it. After the death of D, some of his creditors filed their bill to set aside the deed in trust for A, on the ground that the settlement was grossly excessive; and this is ascertained to be the fact.—HELD:

1. The settlement will be set aside as to the excess.
Davis' widow v. *Davis' creditors*, 587

2. Where a wife is induced to unite with her husband in conveying away her interest in his real estate, upon condition that certain and specific property shall be settled on her in consideration of her thus parting with her rights, if such settlement is set aside and annulled she has the right to be placed in the same position, and restored to the same rights with which she was invested by law before she united in the deed of which the specific settlement was the consideration: provided this can be done without prejudice to the rights of creditors and purchasers. *Idem*, 587

3. In this case A is entitled to be restored, as far as possible, to the same position, and invested with the same rights she had before she united in the deed with her husband; the value either to be commuted in money, or laid off in kind in the lands not sold by the trustees. And this may be done without prejudice to the rights of creditors or purchasers, as the value of her dower in the five tracts may be laid off to her in the two tracts conveyed in trust for her, which is still unsold. *Idem*, 587

HUSTINGS COURT OF RICHMOND.

1. The criminal jurisdiction of the Hustings court of the city of Richmond extends one mile beyond the city limits, on the north side of James river.
Jordan's case, 943

IDENTIFICATION.

1. A case of identification of a person.
Adie & als. v. *Commonwealth*, 712

INDICTMENTS.

See *Pleading—in criminal cases.*

INJUNCTIONS.

1015 *1. In a pure bill by the assignees of the lessees of salt works, to enjoin part owners of it from disturbing their possession, the only issue is the right to an injunction, and an account of profits cannot be decreed in the case.
Stuart, Buchanan & Co. v. *White & als.*, 300

2. When a defendant in an action at law files a bill to make his defense in equity, and asks for a stay of proceedings in the law court, it is a matter in the discretion of the chancellor, in granting the injunction, whether he will or will not require a confession of judgment in the action at law.
Great Falls Man. Co. v. *Henry's adm'or*, 575

3. In such case if a confession of judgment in the action at law is required, the order should require the judgment to be taken "to be dealt with as the court shall direct."
Idem, 575

4. Though the order requiring the confession of judgment is absolute, yet if the court dissolves the injunction and dismisses the bill on the ground that the plaintiffs' defense to the action is legal, and the court of equity has no jurisdiction, the decree should direct that the judgment should be set aside and the case reinstated as it was when the injunction was granted. And if this is not done, the chancery court will, on motion afterwards made, direct the judgment to be set aside.
Idem, 575

5. The authorities of the town of M gave notice to the corporation of C, that they would remove three brick tenements held by C, which the authorities of the town claim encroach on a street of the town of M. The corporation of C and those under whom they claim, having been in possession of the house for more than twenty years, and have had title to the land much longer. The authorities claim that the ground was dedicated as a street by a previous owner, under whom C claims; and this C controverts—HELD:

1. Equity will enjoin the authorities of the town of M from removing the houses until the rights of the parties are ascertained.
Manchester Cotton Mills v. *Town of Manchester*, 825

2. The evidence in the cause leaving the rights of the parties in doubt, equity cannot settle them, involving, as they do the title and boundaries of land; but will enjoin the removal of the houses until the question of right can be settled by a trial at law. *Idem*, 825

3. Such relief in equity will be more readily afforded against corporations than against private individuals. For the principles on which it will be administered, see the opinion of *Staples, J.* *Idem*, 825

4. A provision in the charter of M prohibits the interference with the authorities by injunction, unless they are transcending their powers. If the lot in controversy be the property of C, the authorities of M would transcend their powers in removing the houses; and the injunction is not forbidden by the charter. *Idem*, 825

INSURANCE.

1. The city of Norfolk has authority, under its charter, to impose a license tax upon foreign insurance companies having an agency in the city; and such companies are not exempted from this tax by the act of 1871-'72, ch. 385, § 57, p. 484.
Humphreys & al. v. *City of Norfolk*, 97

2. In a case of insurance upon property, when the insurer is induced to enter into the contract through a misapprehension as to a material matter, occasioned by the conduct or declarations of the assured, he is entitled to be released, whether the misrepresentation be produced by fraud or innocent mistake.
Continental Ins. Co. v. *Kasey*, 268

3. When an insurance company, not relying upon the statements of the insured, sends its own agent to examine the property, and thereupon issues the policy upon the faith of his representations, the insured is not responsible for a misdescription of the property, however material, though inserted in the policy and constituting a warranty; unless there was a withholding of information by the insured incompatible with good faith and fair dealing. *Idem*, 268

4. When the agent of an insurance company makes an examination of property to be insured on behalf of the company, and inserts in the policy a misdescription,
1016 *based as well upon that examination as upon the representations of the assured, then if the misdescription by the insured was not *bona fide*, or if its effect is to induce the company to issue a policy which it would otherwise have rejected, the company will not be responsible for the loss. But if the misdescription was *bona fide* and immaterial, the insured may recover; though,

according to the policy, the description constitutes a warranty. *Idem*, 268

5. An insurance company establishing a local agency, must be responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they prodeeded from the principal. *Idem*, 268

INTERNAL IMPROVEMENT COMPANIES.

1. Upon the application of a railroad company the County court appoints commissioners to ascertain the damages which will be sustained by C by the passage of the road through his land. The commissioners make their report; which is excepted to by the Company. The report of the commissioners, if no illegality or irregularity appears upon its face, is *prima facie* correct, and the *onus* is upon the Company to show that the damages are excessive.

Crawford v. *The Valley R. R. Co.*, 467

INVESTMENTS.

1. What necessary to authorize investments by a fiduciary in Confederate bonds, under the act of March 5th, 1863; and when an order authorizing such investments will be null and void. See *Executors aud Administrators*, No. 1, and

Crickard's ex'or v. *Crickard's legatees*, 410

ISSUES.

1. See *Practice—in Chancery*, No. 14, and

Lavell v. *Gold's adm'r*, 473

JUDGMENTS.

1. In an action of debt, the service of the process is insufficient, but there is an office judgment confirmed. This is a judgment by default in the sense of the statute. Code of 1873, ch. 175, § 5 and 6, p. 1135.

Goolsby &c. v. *St. John*, 146

2. The judgment of a court of competent jurisdiction, dismissing a suit agreed, upon the ground that it had been agreed by the parties, is at least *prima facie*, a final determination as to those parties of the matters litigated in that suit.

Hoover v. *Mitchell & als.*, 387

JURORS.

1. A person called as a juror in a trial for murder, says in answer to a question—I have expressed an opinion from what I have heard. What I have heard was not from any witness. My opinion was not a fixed one. I think I can give the prisoner a fair trial without reference to the opinion I have expressed. He is a competent juror.

Little's case, 921

LARCENY.

1. See *Criminal Jurisdiction and Proceedings*, No. 3, and *Clarke's case*, 908

2. See *False Pretences*, and

Dull's case, 965

LEGACIES AND LEGATEES.

1. K died in 1851, leaving a widow and six children. By his will he gives his slaves to his widow for her life; and at her death he gives them to his sons, W and R, and directs they shall be valued in the mode prescribed in the will, and W and R shall pay to each of the other children one-sixth of their value; and he appoints W and R executors; who qualify. The widow died in 1860, when W and R took possession of the slaves, and divided them between them, and held them until two died in 1862, and the others were freed by the results of the war. In 1861 H, another son of K, brought suit to have the slaves valued. In 1868 the administrators of W and K file an answer insisting that they held the slaves as executors, and were not bound to elect to take them on the condition until they were valued; which was never done—HELD:

1. On the death of the widow it was the right of W and R to take possession *of the slaves as their own, on the terms of the will, without the assent of the executors, whose office, in this respect, was fully discharged when the slaves were delivered to the life tenant. 1017

Kenny's adm'rs v. *Kenny & als.*, 29[illegible]

2. The title to the slaves passed to W and R by operation of law, immediately on the death of the life tenant, unless rejected by them. And it was competent to them to signify their acceptance of the legacies, by receiving and holding the slaves as their own property under the will while awaiting a valuation thereof. *Idem*, 293

3. Whether they did so take and hold them is a question of fact; and on the evidence this court held they did; and that it was too late in 1868 for them or their personal representatives to pretend for the first time that they held as executors and not as legatees. *Idem*, 293

4. Having in fact accepted the legacies, they must pay the other children each one-sixth of the value at the time of the death of the life tenant. *Idem*, 293

2. Where the person or object or subject referred to in a bequest is uncertain, or does not answer precisely the description given them in the will, or where there are two or more objects or subjects which answer equally the description, resort must be had to parol evidence and the surrounding circumstances to show what the testator intended by the expressions which he used; and if such intention is ascertained with sufficient certainty the bequest is valid.

Roy's ex'ors v. *Rowzie & als.*, 599

3. A bequest of all testatrix's bonds will include judgments obtained upon bonds, but not judgments upon simple contracts.

Idem, 599

4. A testator, owning real and personal estate, after several legacies to grandchildren, says: "All the remaining estate, property and credits, whether real and personal, which I may own at my death, I devise and

bequeath to my daughter S." The real estate given to S is subject to the satisfaction of the legacies.

Wood & wife v. *Sampson's ex'or & als.*, 845

5. Testator gives a legacy to his wife; but she dies before him. The legacy will not sink into the residuum of the estate, but will pass to her issue. *Idem*, 845

LIENS.

1. W sold land to M, retaining the title, for $4,100, cash $1,000, and three bonds payable in 1858, 1859, and 1860. The first was paid to W. In 1859 he assigned the bond due in 1860, to S, who assigned it to H. W died in possession of the bond due in 1859. Upon a bill by the administrators of W, to subject the land to pay the bond held by them, the land is sold, and does not produce enough to pay both bonds.—HELD: The bond held by H having been transferred by W in his lifetime, though due after the bond retained by him, is to be first paid out of the proceeds of the sale of the land.

McClintic v. *Wise's adm'ors & als.*, 448

2. In deeds of trust and mortgages, when the debt is assigned, the deed of trust or mortgage is assigned or transferred along with it. And the same principles apply to the vendor's lien, resulting from the retention of the legal title. *Idem*, 448

3. In such cases, where there are several debts secured, and there are several successive assignments of them, the first assigned carries with it the assignment of so much of the lien as is necessary to pay it, unless it is expressly provided otherwise. *Idem*, 448

4. In such a case, though the assignee may have lost his remedy against his assignor, by want of due diligence in suing the debtor, he does not thereby lose his remedy against the land. *Idem*, 448

5. If a vendor of land, retaining the title, assigns one of the bonds given for the purchase money, and then brings ejectment against the vendee, and recovers possession of the land, he recovers and holds in subordination to the rights of the assignee. The assignee having by the assignment acquired the benefit of the lien, whatever it may be, is entitled to all the remedies of the vendor to enforce it; and he cannot be deprived of these remedies by any act of the vendor. *Idem*, 448

6. See *Mechanics' Liens*, No. 1, 2, 3, and *Merch. & Mech. Savings Bank* v. *Dashiell & als.*, 616

1018 *LIMITATION OF ESTATES.

1. W. died in 1831. By his will he gave the residue of his estate to be equally divided among his children, naming them, to them and their assigns forever; "except my daughter Mary C.; and her portion, after deducting forty-nine dollars, I lend to her during her life, and after her death I give the same to the lawful issue of her body, to them and their heirs and assigns forever." Mary C. took an absolute interest in the slaves received by her under this clause of the will.

Hall's ex'or v. *Smith & als.*, 70

LUNACY.

1. When a witness will or will not be deemed incompetent on account of his derangement. See *Witnesses*, No. 7, 8, 9, 10, and *Coleman's case*, 865

MANDAMUS.

1. Where, under the act of 1869–'70, ch. 171, § 5, p. 257, a case is sent by the court of appeals to a Circuit court as having been pending in the District court of appeals, that was a decision of the court of appeals that the cause had been pending in the District court, and that the Circuit court had jurisdiction to rehear and decide it. And if the judge of the Circuit court refuses to rehear and decide the case, and directs it to be dismissed from the docket of his court, he may be compelled by *mandamus* from this court, to hear and decide the case.

Kent, Paine & Co. v. *Dickinson, Judge*, 817

MECHANICS' LIENS.

1. The term "general contractor," as used in the act of July 11th, 1870, entitled "an act in relation to mechanics' liens," includes all persons furnishing materials for, or doing work upon, a building, under a contract made by such persons directly with the owner of the building.

Merch. & Mech. Savings Bank of Norfolk v. *Dashiell & als.*, 616

2. If after contracts are made by the owner with the parties who are to furnish materials for, or do work upon, the building, and they have commenced to perform their contracts, the erection of the building is stopped by the owner, so that it is not completed, the lien in favor of the workmen, and the parties furnishing the materials for compensation for work done and materials furnished, is existing and valid without filing their claims in the clerk's office within thirty days from the time the work is stopped, or though they do not file them. And these liens will have priority over any liens upon the building created after the work was commenced under said contracts. *Idem*, 616

3. The lien exists where work is done under a verbal contract with the owner. *Idem*, 616

MERCHANTS.

1. The act, ch. 240, § 104, Sess. Acts of 1874, which impose a license tax on merchants, is constitutional.

Moore & Goodsons' case, 951

MISDEMEANOR.

1. On a trial for a misdemeanor in a County court, there is a verdict and judgment against the defendants, and they take the case to the Circuit court; where the judgment is reversed,

and the cause retained for a new trial. There may be a writ of error to the Court of Appeals, from the judgment of the Circuit court.
Lewis & Diviney's case, 938

2. Where two persons have been indicted jointly for a misdemeanor, they cannot claim any right to be tried separately.
Idem, 938

MURDER.

1. On the trial of S for the murder of E, if S shot E under a reasonable apprehension that his own life or that of some member of his family was in imminent danger, or a reasonable apprehension that the deceased intended to burn the dwelling house of his mother, or commit some other known felony, and that there was imminent danger of such design being carried into execution, he is justified in so doing, though such danger was unreal. *Stoneman's case*, 887

2. The bare fear that a man intends to commit murder, or other atrocious felony, however well grounded, unaccompanied by any overt act indicative of any such intention, will not warrant killing the party
1019 *by way of prevention. There must be some overt act indicative of imminent danger at the time. *Idem*, 887

3. There must be some act by the deceased meaning present peril, or something in the attending circumstances indicative of a present purpose to make the apprehended attack. The act so done or circumstances thus existing, must be of such a character as to afford a reasonable ground for believing there is a design to commit a felony, or to do some serious bodily harm, and imminent danger of carrying such design into immediate execution. Then the killing will be justifiable, though there was in fact no such design by the deceased. *Idem*, 887

NEW TRIALS.

1. An injunction to a judgment is obtained; and whilst it is pending the matter in dispute is referred to arbitrators, who, after reading the pleadings and depositions, and hearing oral evidence, including that of the parties, make an award that the injunction be dissolved. On a motion to set aside the award on the ground of after discovered evidence—HELD:

1. The rules governing courts of equity in awarding new trials in actions at law, on the ground of after discovered evidence, apply equally to motions to set aside an award on that ground.
Adams v. *Hubbard*, 129

2. Where all the evidence that was before the arbitrators is not before the court on the motion to set aside the award, the motion must fail. *Idem*, 129

3. Though the evidence in the cause before the reference was made might have warranted the court to direct a new trial, yet the award is in fact a new trial, and the party is not entitled to another trial on that evidence. *Idem*, 129

NORFOLK.

1. The city of Norfolk has authority under its charter to impose a license tax upon foreign insurance companies having an agency in the city; and such companies are not exempted from this tax by the act of 1871-'72, ch. 385, § 57, p. 484.
Humphreys & al. v. *City of Norfolk*, 97

NOVATION OF DEBT.

1. What is not a novation of a debt. See *Usury*, No. 2, and
Bowman v. *Miller & Co. & al.*, 331

OYSTER BEDS.

1. T having, under the act of April 1st, 1873, obtained an assignment of certain oyster beds, for the planting and sowing oysters for one year; and having paid the tax and had the beds staked off as required, before the 1st of May 1874, has such an exclusive interest in them, that he may maintain an action of unlawful detainer against a party who enters upon said beds and holds them against him.
Power & Kellog v. *Tazewells*, 786

2. Though the act of April 18th, 1874, repealed the act of April 1st, 1873, the repeal could not defeat the interest which had been vested in T, and on which he had paid the tax before the repealing act was passed, though the beds were not staked off until after its passage. *Idem*, 786

PARDONS.

1. Under the constitution of Virginia the governor has authority to pardon a person convicted of a felony by the verdict of the jury, before sentence is passed upon him by the court. *Blair's case*, 850

PAROL EVIDENCE.

1. When admissible in relation to the object or subject of a legacy. See *Legacies and Legatees*, No. 2, and
Roy's ex'ors v. *Rowzie & als.*, 599

2. When admissible to prove what was involved in a former suit between the same parties. See *Board of Public Works*, No. 2, and
Kelly v. *Board of Public Works*, 755

PARTIES.

1. When surviving husband of one of the heirs is a proper party plaintiff in a suit in equity for division of land assigned to the widow for dower. See *Partition*, No. 3, and
Persinger & als. v. *Simmons & als.*, 238
1020 *2. In a suit, by T against H, to rescind a contract for the exchange of land, it appears that H had been in possession of his land for twelve years, and had paid all the purchase money, but D, from whom he had purchased, had died, and he had brought a suit against D's widow and heirs to have the title made to T. It was error to rescind

the contract without having the widow and heirs of D before the court.
Stimson v. *Thorn*, 278

3. In a suit by G, assignee of two bonds given for the purchase money of land, against the executors of the purchaser, to subject the land to the payment of them, they answer and say, that C has sued them to establish a prior lien upon the land; that all the purchase money has been paid without notice of the prior lien, except the two bonds held by G, and one held by S, and they insist that they are entitled to have C's lien credited on the bonds held by G and S. S is a necessary party in the suit, and no decree should be made in the cause until he is made a party. And this objection may be taken at the hearing, or even in the appellate court.
Armentrout's ex'ors v. *Gibbons*, 371

4. To a bill by the administrators of a vendor of land retaining the title, to subject it to satisfy a bond given for a part of the purchase money, the holder of another of these bonds, assigned by the vendor in his lifetime. is a necessary party.
McClintic v. *Wise's adm'ors*, 448

5. The sureties of an executor who have been sued to be held liable for his *devastavit* of the estate of his testator, may maintain a suit to subject the purchasers of the assets from E, who were participants with him in the commission of the *devastavit*, to pay the amount of the assets so purchased by them, to the widow and legatee of the testator, in discharge *pro tanto* of their liabilities as the sureties of the executor.
Jones' ex'ors v. *Clark & als.*, 642

6. In such case the sureties may and should unite in one suit all the purchasers whom they seek to make liable. *Idem*, 642

7. H and P were partners, and they made a contract with D in relation to a business to be conducted by D. After the death of P, his personal representative, and H as surviving partner, filed their bill against D to have an account and settlement of the business aforesaid. The bill showed, that some time previous to filing it, H had assigned all his interest in the firm of H & P to the firm for proper settlement of accounts; and after paying his partners all he might owe them, the surplus, if any, was to be paid to C. It also appeared from the bill, that H had been declared a bankrupt. Both C and the assignee in bankruptcy of H are necessary parties; and a decree made in their absence against D will be reversed by the appellate court, though no objection was taken in the court below for want of parties.
Dabney v. *Preston's adm'rs*, 838

PARTITION.

1. The dower of a widow in the land of her husband is assigned to her; and upon bill filed the other two-thirds of the land is divided among ten of the twelve heirs; the other two refusing to bring their advancements into hotchpot. Upon the death of the widow, the heirs who refused to come into the first division may come into the division of the property.
Persinger & als. v. *Simmons & als.*, 238

2. Though there may be cases in which a court of equity would, in her lifetime, decree a division of the property assigned to the widow for dower; in a suit for partition brought during her life, in which some of the children refuse to bring their advancements into hotchpot, the decree, though broad enough in its terms to exclude them from any share of the dower lands, will be restricted to their interest in the two-thirds divided, unless the pleadings make a case for the division of the dower lands.
Idem, 238

3. One of the children who had refused to come into the first division died after the death of the widow, leaving children. Her husband is a proper party plaintiff for a division of the dower land. *Idem*, 238

4. The broad language of a contract in relation to the division of land between joint owners restricted in its construction in view of the surrounding circumstances and the previous action of the parties.
Clark v. *Nunn & wife*, 287

PARTNERSHIP.

1. In debt upon a note against three persons as partners, two of them plead 1021 *specially that the partnership was dissolved before the note was made by the third, who had been the acting partner; and that the plaintiff knew of the dissolution. No notice of dissolution had been given. An instruction stating that certain facts mentioned in the instruction, if proved to the satisfaction of the jury, are sufficient to charge the plaintiff with knowledge of the dissolution, and the jury should consider him as having such knowledge, is erroneous. It was a question of fact for the jury to determine from the evidence, whether the plaintiff had such knowledge.
Dickinson v. *Dickinson & Co.*, 321

2. If a partner contracts, in the name of the firm, with a third person, after the partnership is dissolved, but that fact is not made public or known by such third person, the law considers the contract as being made with the firm, and upon their credit; and they are all bound. *Idem*, 321

3. In such a case, in determining which was first in point of time—notice of the dissolution or the making of the note—effect must be given to the presumption that the instrument was made and issued on the day it bears date; unless some reason to the contrary can be shown. *Idem*, 321

4. Though a public notice of dissolution may be sufficient as to persons who have had no prior dealings with the firm, a person who has had such dealings must have notice, or actual knowledge of the dissolution, to release the partners who did not make or authorize the making of the note. *Idem*, 321

5. These rules as to notice or knowledge of dissolution do not apply to the dissolution of a partnership by death or bankruptcy.
Idem, 321

6. Before and up to the breaking out of the late civil war, T and H were merchants and

partners, doing business in the city of Washington. In May 1861 H left Washington and came to Virginia, making his domicil here, and remaining in the state. T and H having thus become alien enemies, their partnership was dissolved by operation of law.

Taylor v. *Hutchison*, 536

7. After H left Washington T continued the business for himself, and having the stock, debts due and fixtures valued, used the same in his business. He also had an account taken of the state of the partnership, from which it appeared that the liabilities of the partnership greatly exceeded its assets; that H had no capital then in the business, and that there was due to T a large debt. T then compromised with the creditor of the concern at forty cents in the dollar. After the war H sues T for an account and for a share of the profits made by T since the dissolution of the partnership. In this suit the account of the partnership is taken, which after giving H the benefit of the compromise, still shows that the liabilities exceeded the assets—HELD:

1. That though the disposal of the stock of a dissolved partnership by public auction is most favored, there is no general rule on the subject, but each case must depend on its own circumstances; and in this case the taking the stock at valuation was proper.

Idem, 536

2. Though it is a general rule, that when upon a dissolution of a partnership the continuing partner carries on the business with the partnership stock, he is liable to the outgoing partner for his full share of the profits; yet this rule does not apply where at the date of the dissolution, the outgoing partner has drawn out his capital, and has no property in the concern, but is indebted to it. In this case, therefore, H is not entitled to a share of the profits made by T after the dissolution of the concern. *Idem*, 536

PAYMENTS.

1. The notes of a bank obtained after the execution of a deed by the bank transferring its assets for the payment of its debts, in pursuance of the statute requiring the banks to go into liquidation, and notice thereof to the debtor, are not a good tender on the part of a debtor of the bank.

Bank of the Valley, for &c. v. *Marshall*, 378

2. A payment by a debtor who owes several debts to a creditor is to be applied to one or the other of the debts as follows:

1. The debtor may direct the application at or before the time of making such payment; and such direction may be given expressly or by implication.

Chapman & als, v. *Commonwealth*, 721

1022 *2. If the debtor gives no such direction, then the creditor may make the application according to his pleasure; and he may make it either at the time of such payment or afterwards, before the commencement of any controversy on the subject: but after he has once made the application, he cannot change it to another, without the consent of all the parties concerned. *Idem*, 721

3. Such an application by a creditor may also be made either expressly or by implication. If he enters the debits and credits in a running account, as they occur, this will be considered, in the absence of evidence to the contrary, as a general application of the credits to the debits, in the order of time in which the debits occur; thus paying first the debt first due. *Idem*, 721

4. If neither the debtor nor the creditor make the application, then the law will make it according to the circumstances of each particular case; and if there be no other controlling circumstance, the application will be made according to the order of time, paying the oldest debt first.

Idem, 721

5. But if the debts be due by a collector or other receiver of public money, under bonds with different sets of sureties, then the law will so apply the payments, if possible, as that the money collected under one bond shall be applied to the relief of the sureties in that bond. And the creditor in such a case, if he be informed as to the source from which the money with which a payment may have been made was derived, cannot apply it otherwise, even with the consent or by the direction of the principal debtor.

Idem, 721

PLEADING—AT LAW.

1. See *Slander*, No. 2, 9, 10, and
Dillard v. *Collins*, 343
Hansbrough and wife v. *Stinnett*, 495

2. See *Case*, No. 2, and *Trover*, No. 1, and
Ferrill v. *Brewis' adm'r*, 765

3. The court will treat a count in a declaration as partaking of the nature of the action; so that if the action is *ex delicto*, the count will be intended as *ex delicto* also, unless there be something in its form and structure which plainly forbids such intendment.

Idem, 765

PLEADING—IN CRIMINAL CASES.

1. If in any indictment for a forgery, the document alleged to have been forged is described in such manner as would sustain an indictment for stealing it, supposing it to be the subject of larceny, the indictment is sufficient.

Coleman's case, 865

2. An indictment for the larceny of divers notes of the "national currency of the United States," is equivalent to the phrase in the statute of "United States currency;" and the indictment is sufficient.

Dull's case, 965

3. It is always safer and better, in a prosecution for a statutory offence, to describe the offence in the indictment in the very language in which it is described in the statute: but except some technical words, as "feloniously," &c., the words of the statute may be substituted by the use of synonymous words, or words which plainly bring them within the meaning of the statute.

Idem, 965

PLEADING—IN CHANCERY.

1. A demurrer to a bill in equity in the form given in the statute, is sufficient.

Jones's ex'or v. *Clark & als.*, . 642

PRACTICE—AT COMMON LAW.

1. A writ in debt is issued in May 1870, returnable to June rules, and is served in June. The office judgment is confirmed at the October rules. The plaintiff did not object to the defendant's pleading payment, with leave to plead further, at the November term of the court. He cannot afterwards object to the irregularity.

Dickinson v. *Dickinson & Co.*, 321

2. The cause is continued generally at the March and July terms 1871, and at the August term defendants, under the leave reserved at the November term 1870, tendered the plea of *nil debit*, and two special pleas. The first was received without objection, the other two were objected to by the plaintiff, but admitted by the court. If it was too late then to plead, and this was the objection to the special pleas, the bill of exceptions should show it, or it will not be considered in the appellate court. *Idem*, 321

1023 *3. On a question of notice of dissolution of a partnership, an instruction that certain facts stated in it, if believed by the jury, are sufficient to charge the plaintiff with knowledge of the dissolution, is erroneous. It is a question of fact for the jury to determine from the evidence, whether the plaintiff had such knowledge. *Idem*, 321

4. *Quære:* If a Virginia court examining into contracts entered into in a foreign country, can do more than affirm the validity or invalidity of such contracts; or can in such case administer any remedies other than those afforded by the laws of Virginia.

Bowman v. *Miller & Co. & als.*, 331

5. If a Virginia court can administer the Maryland remedy on a defense of usury, the defendant must file such a plea as the law of that state prescribes. *Idem*, 331

6. Where the objection is to the competency of a witness, and the objection is sustained, it is not necessary to state in the exception what the party offering him expects to prove by him.

D. Martz's ex'or v. *D. Martz's heirs*, 361

7. If an exception to the ruling of the court excluding a witness is taken at the time, the bill of exception may be prepared and signed and sealed after the verdict and judgment. And if the counsel of the parties do not agree as to the fact whether the exception was taken at the time, the court not remembering may certify the facts; and the entry of the clerk in the memorandum stating that the exception was taken on the trial, the court was right in certifying the facts, and the appellate court may consider the question raised by the bill of exception. *Idem*, 361

8. After all the evidence has been introduced on the trial of an action at law, the plaintiff is not to be permitted to add another count to his declaration: the amendment being material to the merits, and therefore not allowable.

Hansbrough & wife v. *Stinnett*, 495

9. There is a demurrer to a declaration, which is overruled; but upon appeal the judgment is reversed. When the case goes back, the plaintiff may be allowed to amend his declaration. *Idem*, 495

10. A deposition which has been read to the jury may be taken with them in their retirement, if what is objectionable in it has been erased. *Idem*, 495

11. Counsel in arguing the case before the jury refer to an instruction given by the court, and represent it erroneously. It is not error in the court to interrupt him, and to state to the jury the instruction correctly.

Coleman's case, 865

PRACTICE—IN CHANCERY.

1. It is premature and error to decree a sale of real estate where there is a lien by deed on which the amount due is not certain, and also liens by judgment, until the court has ascertained and adjusted the liens thereon and their priorities.

Moran v. *Brent & als.*, 104

2. As to new trials of an action at law. See *New Trials*, No. 1, and

Adams v. *Hubbard*, 129

3. A court of equity enjoins a judgment at law, on grounds that might have been taken on a motion in the common law court, sets aside the judgment, and remands the cause to the rules. Plaintiff at law files a bill of review, and the decree is reversed on the ground that equity had no jurisdiction. It being a proper case for a bill of review, the court should not only dissolve the injunction, but dismiss the original bill; and the bill of review being a continuation of the original suit, there should not be separate decrees in the original suit and the review, but the whole should be embraced in one decree.

Goolsby &c. v. *St. John*, 146

4. In a suit in equity to subject land to satisfy a judgment, the bill states a valuation of the land, and that the judgment could not be satisfied from the rents and profits in five years. The answer says nothing on the subject, and no application is made for an enquiry; but the court in its decree expressing the opinion that the judgment could not be satisfied out of the rents and profits in five years, appointed a commissioner to sell the land.—HELD:

1. As the statute prescribes no particular mode by which it shall be made to appear that the rents and profits will not pay the judgment in five years, if none of the parties ask for an equity, there may, in a proper case, be a decree for the sale of the land without it.

Ewart v. *Saunders*, 203

2. Where no application for such an enquiry is made, and the decree appealed from is interlocutory, the appellate

1024 *court will not reverse the decree for the failure to direct the enquiry; but will amend it, allowing the defendant to have the enquiry if he chooses, and so amended will affirm it. *Idem*, 203

5. When a case in equity comes on to be heard upon the bill, the answers and exhibits, without replication to the answers, the allegations of fact, and denials of the answers, must be admitted to be true. If the answer clearly and unequivocally deny the allegations in the bill, upon which alone it can be sustained, or if the answer sets up sufficient new matter in avoidance of those allegations, in either case the bill should be dismissed. But the facts constituting the equity should be plainly denied or clearly avoided. There should be no fact admitted by the answer inconsistent with defendant's denial, no equivocal denial, no doubtful avoidance.

Cocke & al. v. *Minor & als.*, 246

6. A case in which the denials and allegations of the answers, though there was no replication to them, were held not sufficient to defeat the plaintiff's claim. *Idem*, 246

7. Bill by a plaintiff claiming to be a creditor of a trust fund against the trustee, *cestuis que trust* and purchaser from the trustee of a part of the trust fund consisting of bonds well secured. Upon the hearing in the court below upon the bill, answers and exhibits, without replications to the answers, the bill is dismissed; but upon appeal, the appellate court holds that the answers do not make out a good defense. The court will send the case back, to allow the trustee and purchaser to show, if they can, that the sale was a proper one to be made, and with instructions for an account of the trust fund, and to ascertain clearly the condition and value of the fund and the necessities of the *cestuis que trust*.

Idem, 246

8. In what suits and how accounts may be ordered and taken. See *Equitable Jurisdiction and Relief*, No. 6, 7, 8, and

Stuart, Buchanan & Co. v. *White & als.*, 300

Mitchell & als. v. *McCall & als.*, 300

9. An objection for the absence of a necessary party in a cause may be taken at the hearing, or even in the appellate court.

Armentrout's ex'ors v. *Gibbons*, 371

Dabney v. *Preston's adm'ors*, 838

10. Upon a bill by the administrators of a vendor of land retaining the title, to subject it to pay a bond given for the purchase money, the holder of another of these bonds assigned by the vendor, is a necessary party, and it is error to decree a sale of the land in his absence, and until the question of priority is settled between him and the plaintiff.

McClintic v. *Wise's adm'ors & als.*, 448

11. In such a decree for a sale and a sale of the land having been made in the absence of the assignee, and he being afterwards brought in; the purchaser at the sale is interested in thedecision of the question of priority between the plaintiff and the assignee, and ought to be heard upon any order affecting his interest. And a rule, if desired by the plaintiffs, should be awarded by the court against the purchaser, to show cause why the sale should not be set aside. *Idem*, 448

12. The assignee being entitled to priority, in no event should the sale be set aside and a resale ordered, unless the plaintiffs, or some one for them, give bond with proper security for a substantial advance upon the price for which the property was before sold.

Idem, 448

13. If no resale is made, the fund arising from the sale already made, being the proceeds of the sale of the land, is to be applied, or so much of it as may be necessary, to the satisfaction of the debt of the assignee, and the residue, if any, to that of the plaintiffs.

Idem, 448

14. In a chancery cause, the court directs an issue to be tried at its bar. This issue is tried on the common law side of the court and the verdict is certified to the chancery side of the court; and there is a motion to set it aside and for a new trial. The court sets aside the verdict and directs a new trial of the issue as amended by him; he being the same judge who presided at the trial.—HELD:

1. It is not necessary for the judge sitting on the common law side of the court to certify to himself on the chancery side, that he is dissatisfied with the verdict; but he may set it aside without such certificate.

Lavell v. *Gold's adm'r*, 473

2. Another judge holding a subsequent term cannot set aside the order 1025 *of the judge at the previous term, and reinstate the verdict.

Idem, 473

3. If the party objecting to set aside the verdict is dissatisfied with the order, he should except to it, and have the facts proved on the trial, or the evidence spread upon the record; and thus the order may be reviewed. *Idem*, 473

15. When court should decree conveyance of land claimed to have been sold for taxes to be null, and direct a reconveyance. See *Taxes and Taxation*, No. 2, and

Hale v. *Penn's heirs*, 261

16. An order is made in a cause, that on motion of the plaintiffs, and by consent of parties, the cause came on to be heard upon the bill and exhibits, and answer and exhibits, on consideration whereof the court takes time to consider. In fact a number of deeds and two records had been placed by the clerk among the papers, by direction of the plaintiffs' counsel, but had not been endorsed as filed; which were intended to rebut the defense set up in the answer. Before the case was decided, the plaintiffs' counsel discovering the error in the order, moved the court to set it aside, that the cause might be brought on on replication to the answer and the evidence. The entry is not an order, but a mere statement, and should be set aside, and the cause be heard upon the pleadings

as they were intended to be, and all the evidence.
Harrison's ex'or & als. v. *Price's ex'or & als.*, 553

17. When a defendant in an action at law files a bill to make his defense in equity, and asks for a stay of proceedings in the law court, it is a matter in the discretion of the chancellor, in granting the injunction, whether he will or will not require a confession of judgment in the action at law.
Great Falls Man. Co. v. *Henry's adm'or*, 575

18. In such a case, if a confession of judgment in the action at law is required, the order should require the judgment to be taken "to be dealt with as the court shall direct." *Idem*, 575

19. Though the order requiring the confession of judgment is absolute, yet if the court dissolves the injunction and dismisses the bill on the ground that the plaintiff's defense to the action is legal, and the court of equity has no jurisdiction, the decree should direct that the judgment at law should be set aside, and the case reinstated as it was when the injunction was granted. And if this is not done, the Chancery court will, on motion afterwards made, direct the judgment to be set aside. *Idem*, 575

20. An administrator having waived his exceptions to a commissioner's report under the erroneous impression that the report would be sustained and the case finally disposed of, may withdraw his waiver and renew his exceptions.
Hannah's adm'r v. *Boyd & wife & als.*, 692

21. A decree in the court below was made when there was no replication to the answer of the defendant; and after an appeal from the decree by him was perfected, the court, on the motion of the plaintiffs, made an order permitting them to file a replication *nunc pro tunc*. If it was a proper case for such an order, the court should have allowed the defendant time to take testimony to meet the new phase of the case presented by the issue thus taken on the answer.
Dabney v. *Preston's adm'ors*, 838

22. A decree is reversed for want of parties. When the parties are made, both parties should have liberty, if they desire it, to amend and modify their pleadings, so as to exhibit the case as they may desire respectively to present it. *Idem*, 838

PRACTICE—IN CRIMINAL CASES.

See *Criminal Jurisdiction and Proceedings.*

PRINCIPAL AND AGENT.

1. An authority by the plaintiff in a judgment in December 1861, to receive from the debtor the principal and interest of the judgment, and remit the costs, did not authorize the agent to receive the payment in Confederate money on the 10th of February 1863.
Ewart v. *Saunders*, 203

2. How far an insurance company bound by the acts of its agent. See *Insurance*, No. 2, 3, 4, 5, and
Contin'l Ins. Co. v. *Kasey*, 268

1026 *PRIORITY OF LIENS.

1. See *Liens*, No. 1, 2, 3, 4, 5, and
McClintic v. *Wise's adm'rs & als.*, 448

2. See *Mechanics' Liens*, No. 1, 2, 3, and
Merch. and Mech. Savings Bank v. *Dashiell & als.*, 616

PROCESS.

1. A sheriff endorses a return on an execution in his hands: Levied on the following property, together with other executions, to wit: one negro man, George, &c., naming a number of negroes, horses, &c. V S M. He afterwards endorses on the execution: This execution held up, and property not sold, by direction of F M. V S M, S. S. C. F M was the creditor entitled to the money. This additional return is not even *prima facie* evidence against F M of the fact it states.
Shannon v. *McMullin*, 211

2. Where process is returnable process, if the officer make return of the performance of acts beyond his duty under the process, such return will be invalid as to such parts, and will not be evidence; though the addition of such parts will not render the whole return void, but it will be good to the extent he was authorized to make return. *Idem*, 211

PUBLIC RECORDS.

1. A public record must be a written memorial, intended to serve as evidence of something written, said or done, made by a public officer authorized by law to make it; but that authority need not be derived from express statutory enactment.
Coleman's case, 865

2. Whenever a written record of the transactions of a public officer, in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that written memorial, whether expressly required so to do or not; and when kept it becomes a public document, a public record, belonging to the office and not the officer. *Idem*, 865

3. The warrant book of the sinking fund, kept by the second auditor in his office, of the transactions of the commissioners of the sinking fund of the state, is a public record, and is of itself evidence of what it contains, to be considered with the other evidence in the case. *Idem*, 865

4. The act, Code of 1873, ch. 42, § 22, in relation to the public debt, has not been repealed. *Idem*, 865

PURCHASERS.

1. When purchasers of trust funds will be liable for the fund purchased. See *Trusts & Trustees*, No. 1, 2, 3, and
Cocke & al. v. *Minor & als.*, 246

2. When purchasers of assets of estate from the executor, will and will not be held liable for the assets purchased. See *Executor and Administrators*, No. 6, 7, 8, 9, 10, 11, 12, 13.
Jones' ex'ors v. *Clark & als.*, 642

RAILROAD COMPANIES.

1. See *Internal Improvement Companies*, No. 1, and

Crawford v. *The Valley R. R. Co.*, 467

RECORDS.

In an action of assumpsit there is a special count and the general counts; and the jury find a general verdict for the plaintiff, on which the court renders a judgment. In another controversy between the same parties, the record is *prima facie* evidence of the facts stated in the special count.

Linke & Klepper v. *Fleming*, 704

ROBBERY.

1. The prisoner is prosecuted for the robbery of a pistol. If he snatched the pistol from the hands of the prosecutor simply to prevent the prosecutor from using it against his assailants, without at the time intending to appropriate it, though he afterwards takes it away and sells it, this is not robbery, though he and others went together to the house of the prosecutor for the purpose of committing a robbery.

Jordan's case, 943

2. But in such case, if the prisoner, when he snatched the pistol, had the intention to deprive the prosecutor of it, though he may have also had the purpose to prevent the use of it by the prosecutor, this is robbery.

Idem, 943

1027 *4. To constitute robbery it is not necessary that the prisoner should intend to appropriate the property to his own use. If he intended to deprive the prosecutor of his property, that is sufficient.

Idem, 943

SCALING DEBTS.

1. See *Confederate Contracts*, No. 1, and *Merewether* v. *Dowdy*, 232

2. See *Vendor and Purchaser*, No. 3, and *Walsh* v. *Hale*, 314

3. See *Specific Performance*, No. 4, and *Kemper* v. *Ewing & als.*, 427

4. A personal representative having, during the war, received Confederate money and used it in his own business, in the settlement of his administration account after the war, the money so received will be charged to him as of the scaled value in gold at the date of its receipt, and not at the end of the year.

Moses & al. v. *Hart's ex'or*, 795

SEPARATE ESTATE.

1. See *Husband and Wife*, No. 1, 2, 3, 4, 5, and

McChesney & al. v. *Brown's heirs*, 393

2. See *Husband and Wife*, No. 6, 7, 8, 9, 10, 11, and

Burnett & wife v. *Hawpe's ex'or*, 481

SLANDER.

1. In an action of slander, a plea that since the commencement of the action the plaintiff has been adjudicated a bankrupt, is not a good plea.

Dillard v. *Collins*, 343

2. In every instance of slander, whether verbal or written, malice is an essential ingredient, and must be averred. But when averred, and the language, verbal or written, is proved, the law will infer malice, until the proof, in the event of denial, be overthrown, or the language satisfactorily explained.

Idem, 343

3. Confidential or privileged communications are an exception to this rule; and in such a case the burden is on the plaintiff to prove malice. *Idem*, 343

4. Confidential or privileged communication are of four classes: 1st. Where the author or publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interest. 2d. Anything said or written by a master in giving the character of a servant who has been in his employment. 3d. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4th. Publications made in the ordinary mode of parliamentary proceedings. *Idem*, 343

5. These excepted instances so far change the ordinary rule with respect to slanderous or libelous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or in the situation of the parties, adequate to authorize the conclusion. *Idem*, 343

6. R, G and J rented land of D. They were strangers in the neighborhood. C lived on his farm in the same neighborhood. On several occasions D told R, G and J, that C and all his sons were horse-thieves, and made their living by that means; and that they frequently harbored that kind of men. There is nothing in the relation of landlord and tenants between D and R, G and J, which raises the presumption in favor of D, that the words were spoken without malice, or brings them within the class of privileged communications. *Idem*, 343

7. On the trial of an action of slander by C against D, the slanderous words having been proved, D will not be allowed to prove by his own testimony what were his feelings and motives in making the charge, whether with any ill will against C, or only for the protection of his own interests.

Idem, 343

8. In an action for slander, the defendant cannot enquire into the social intercourse of the plaintiff with his neighbors. And where the slander charged is for horse-stealing, the defendant cannot introduce evidence of rumors as to the plaintiff or his sons having stolen a hog. *Idem*, 343

9. In an action for slander at common law the words charged are, "D killed my
1028 beef." There being no colloquium, *the words not necessarily importing a fel-

ony, they cannot be extended in their meaning by the innuendo.

Hansbrough & wife v. *Stinnett*, 495

10. In such case the words themselves not being actionable at common law, unless the averment of extrinsic facts and the colloquium concerning them show that the defendant in speaking the words laid, imputed the crime of felony, they are not actionable.

Idem, 495

11. When the words laid in the declaration have been proved—and not before—proof of the speaking of like words as those laid, either before or after they were spoken, is admissible to affect the measure of damages.

Idem, 495

SPECIFIC PERFORMANCE.

1. In June 1860 G sells to H a large tract of land, supposed to contain 2,500 or 3,000 acres, and puts him in possession. In December 1860 he executes a deed, reserving a lien, conveying 2,030 acres to H, of which H has no knowledge. H dies in 1861, and his heirs remain in possession of the land. In July 1868 G files a bill against the administrator and heirs of H, to subject the land for the payment of the purchase money. The heirs file a cross-bill to rescind the contract. And it appears that when the deed was made, and the suit brought, G did not have a good title to a large part of the land. The land had greatly depreciated in value under the effect of the public events which had occurred since the purchase—HELD:

Though G may be able to make a good title at the time of the decree, the court will not enforce specific performance of the contract, but will rescind it.

Hendricks & als. v. *Gillespie*, 181

2. In this case there were numerous judgments against a previous owner of the land, docketed before he conveyed it in 1859; and it did not appear that they had been released or satisfied. Though it may be improbable that the lien of these judgments may be enforced against the land, the purchaser will not be compelled to take the title.

Idem, 181

3. Upon a bill filed by T against H, to rescind a contract for the exchange of land, it appears that H had been in possession of his land for twelve years, and had paid all the purchase money; but D, from whom he purchased, had died, and he had brought suit against D's widow and heirs to have the title made to T—HELD:

1. Under the circumstances of this case H should be allowed a further reasonable time to get in the title; and it was error to decree a rescission of the contract.

Stimson v. *Thorn*, 278

2. It was error to rescind the contract without having the widow and heirs of D before the court. *Idem*, 278

3. If D died seized of other real estate on which he in his lifetime and his widow since his death lived, her dower should be assigned to her out of that land in exoneration of the land sold by D to H.

Idem, 278

4. If the land contracted to be exchanged by H with T be in fact encumbered by the right, title or estate of dower of the widow of D, and that be the only defect in the title of H to said land, such defect is not sufficient to prevent the specific performance of the said contract; but the same may be executed, with an allowance of compensation for such defect, on the terms prescribed in the Code, ch. 106, § 12, p. 855.

Idem, 278

4. W, and his sisters E, R and M, were the joint owners of a tract of land. In 1863, E and R, without authority from W and M, but believing that they would concur, sold the whole tract to K for $30,000 cash. On the 1st of April, 1863, a contract was prepared, to be signed by the four owners. E and R and K then signed it, and on that day and the next K paid E and R $25,509.33. Before the writing was signed, E wrote to W, stating what they proposed to do, and W replied that he would sell his interest to K for $7,500; K to give his bonds for one-half on demand, and the balance in one and two years, all secured by a lien on the land. This letter was shown to K, who proposed to pay $1,000 cash, and give his bonds for the balance of the purchase money. R agreed to this, and K paid her the $1,000, and executed his bonds to W, which he delivered to R, and R handed the $1,000 to the wife of W, and K was then put in possession of the land by E and R, and continued to hold it. 1029 In *June W returned home on sick leave, and after a brief interview with K, W signed the contract. At this time W says he had not seen the bonds, and did not know that K had paid the $1,000. M did not sign the contract, and refused to concur in the sale, though K says he did not know it until she filed her answer in his suit. In 1868 K filed his bill against W, E, R and M, to enforce the contract.—HELD:

1. The arrangement between R and K, as to the interest of W, not having been authorized by him, he was not bound by it.

Kemper v. *Ewing & als.*, 427

2. But W having after his interview with K signed the contract, K had a right to suppose that W knew what he had done, and it was W's negligence if he did not know, and he is therefore bound to carry out the contract. *Idem*, 427

3. M not having signed the contract, or ever agreed to the sale, she is not bound.

Idem, 427

4. E and R are bound, and it is the privilege of K to take the three-fourths of the land, or to give it up and receive back the purchase money he has paid.

Idem, 427

5. K electing to take the land, he must pay to W the scaled value of the bonds at the date of the contract, with interest from that date. *Idem*, 427

6. M is entitled to rent on her one-fourth, only from the filing of the bill, with interest. *Idem*, 427

7. E and R having received the money for M's part of the land, expecting she would concur in the sale, and K not having relinquished his claim to enforce the contract against M, E and R could not pay it to M, who refused to concur in the sale, nor return it to K, who had not relinquished his right as against her; and the money not having been used by E and R, but invested in Confederate bonds, they will not be required to pay it to K. *Idem*, 427

STAKE-HOLDER.

1. When a party holding Confederate money, which should be paid to one or other of two parties, each of whom claims that it should go to the other, will not be responsible for the loss. See *Specific Performance*, No. 4, and
Kemper v. *Ewing & als.*, 427

STATUTES.

1. The act of March 22, 1873, Code of 1873, ch. 57, § 36, p. 544, in reference to the defense of usury by corporations, construed in
Town of Danville v. *Pace*, 1

2. The act, Code of 1873, ch. 172, § 21, 22, in relation to parties testifying, construed in
Statham & als. v. *Ferguson's adm'or & als.*, 28

3. The act of 1871-'2, ch. 385, § 57, p. 484, in relation to exemption from taxes, construed in
Humphreys & al. v. *City of Norfolk*, 97

4. The act, Code of 1860, ch. 80, in relation to charitable bequests, construed in
Kinnaird & als. v. *Miller's ex'or & als.*, 107

5. The act, Code of 1873, ch. 175, § 5 and 6, p. 1135, in relation to judgments by default, construed in
Goolsby &c. v. *St. John*, 146

6. The act, Code of 1873, ch. 172, § 21, 22, in relation to the testimony of parties construed in
D. Martz's ex'or v. *D. Martz's heirs*, 361

7. The act of March 5th, 1863, in relation to the investment of funds by fiduciaries, construed in
Crickard's ex'or v. *Crickard's legatees*, 410

8. The act, Code of 1873, ch. 143, § 4, 5, in relation to notice by sureties to creditor, to sue, construed in
Harrison's ex'or & als. v. *Price's ex'or & als.*, 553

9. The act of April 1839, ch. 12, § 11, in relation to devises to schools, &c., and the act, Code of 1849, ch. 80, on the same subject, construed in
Roy's ex'ors v. *Rowzie & als.*, 599

10. The act of July 11th, 1870, Code of 1873, ch. 115, § 3, 4, in relation to mechanics' liens, construed in
Merch. and Mech. Savings Bank v. *Dashiell & als.*, 616

11. The 33d section of the bankrupt act of congress, of 1867, construed in
Jones' ex'ors v. *Clark & als.*, 642

1030 *12. The act of April 2, 1873, Sess. Acts. 1872-'73, ch. 373, § 6, p. 372, in relation to county treasurers, construed in
Smith & als. v. *Commonwealth*, 780

13. The act, Code of 1860, ch. 122, § 13, construed in
Wood & wife v. *Sampson's ex'or & als.*, 845

14. The act, Code of 1873, ch. 42, § 22, in relation to the public debt, is not repealed.
Coleman's case, 865

15. The Constitution, art. 4, § 5, in relation to the power of pardon by the governor, construed in
Blair's case, 850

16. The act, ch. 240, § 104, Sess. Acts of 1874, imposing a license tax on merchants, is constitutional.
Moore & Goodsons' case, 951

17. The Constitution, art. 10, § 1 and 4, in relation to the taxing power, construed in *Idem*, 951

18. The act, Code of 1873, ch. 188, § 14 and 24, in relation to false pretences, construed in
Dull's case, 965

19. The act of April 2, 1873, to define the jurisdiction of the County and Circuit courts, construed in
Tremaine's case, 987

SURETIES.

1. It is settled law that a surety is entitled to be relieved from his liability to pay the debt of his principal, either *in toto* or *pro tanto*, as the case may be, if the creditor, without the consent of the surety, make a new contract with the principal, founded on valuable consideration, to postpone the day of payment of the debt for a certain period, however short, beyond the day on which it was to be paid by the terms of the contract on which the surety is liable; or if the creditor, without the consent of the surety, release any lien which he may have on any property of the principal for the security of the debt. In the first case, the relief of the surety is *in toto*, without regard to the extent of the damage actually sustained by the surety by reason of such new contract, or whether such damage was sustained or not; and in the latter case, being *in toto* or *pro tanto*, according as the value of the property released was as much as, or less than, the amount of the debt.
Shannon v. *McMullin*, 211

2. For the liabilities and duties of a surety, and the right of the creditor to enforce his debt against both principal and surety, or either, see opinion of *Moncure, P.*
Idem, 211

3. Where one surety in a bond gives notice to the obligee to sue the obligor, the statute does not peremptorily require the obligee, after obtaining judgment, to sue out execution upon it; it only requires him to use due diligence in prosecuting suit "to judgment, and by execution."

Harrison's ex'or & als. v. *Price's ex'or & als.*, 553

4. In such case, where the creditor has not been guilty of laches, but the clerk has refused to issue the execution, on the ground that the stay law forbade it, and the court has sustained him in it, whether the judgment of the court was right or wrong in enforcing the stay law, negligence cannot be imputed to the creditor. *Idem*, 553

5. Upon such notice to the creditor by a surety, the creditor is not required to pursue the estate of the principal in equity to impeach an alleged fraudulent conveyance, or to subject an equity of the principal to the payment of his debt, or to exhaust his remedies against the principal before he can have satisfaction out of the estate of the surety. *Idem*, 553

6. The statute which authorizes a surety to give notice to the obligee to sue, gives the surety a more summary remedy than he had before by bill in equity, but does not change the relation or the contract between creditor and surety. It only holds the creditor responsible, if by reason of his laches or negligence, the equity of the surety against the principal is infringed. *Idem*, 553

7. In February 1871, the County court appoints a collector of taxes of 1870, and takes bond with sureties from him—HELD:

1. In that case the County court was authorized, to make the appointment and take the bond; and it is a valid bond, and binds the sureties.

Chapman & als. v. *Commonwealth*, 721

2. The County court having made the appointment, and S and his sureties having executed the bond, they are estopped from denying that it is valid and binding upon them. *Idem*, 721

8. S collects a part of the taxes of 1870, and pays it to the auditor before he exe-
1031 cuted *his bond, and directs it to be applied to his indebtedness for taxes of 1869, which is done by the auditor, he not knowing that the money was derived from that source. All the rest of the taxes of 1870 are properly accounted for; but there is a deficit in the account of S to the amount so collected and paid. The sureties are liable for the deficit. *Idem*, 721

9. How payments by a collector or other receiver of public money are to be applied. See *Payments*, No. 2, and *Idem*, 721

10. In July 1871 H became the surety of B as collector of township B. At that time the taxes for that year, by law, went into the hands of the collector on the 1st of September, and were to be accounted for to the county treasurer on the 1st of December. After the execution of the bond by H, there were several extensions, by joint resolutions and by statutes of the general assembly, of the time in which collectors should make their settlements with the county treasurers.—HELD:

1. That though it is true that the law at the date of the contract enters into and forms part of the contract, yet laws which are merely directory to officers of the government form no part of the contract; and the extension of the time, as aforesaid, does not release the surety H.

Commonwealth by, &c. v. *Holmes*, 771

2. Where new duties are imposed upon a public officer by statute after the execution of his official bond by his surety, the bond should be held good against the surety to the extent of the duties lawfully covered by it, though it may not be good as to the new duties imposed since its execution. *Idem*, 771

11. The surety of a public collector or treasurer is not discharged from his liability for his principal on his official bond by an act of assembly passed subsequent to the execution of the bond, without the surety's assent, extending the time within which, by the law in force at the date of the bond, the officer was required to settle his accounts and make payment of the public money in his hands.

Smith & als. v. *Comm'th*, 780

12. The regulations prescribed by law for the settlement of such accounts at stated periods, being intended for the benefit of the government, to secure punctuality and promptness in its officers, are directory merely, and do not enter into and form part of the surety's contract, so as to prevent the legislature from altering the time of settling at pleasure, without the surety's assent; and therefore, from the nature of the officer's obligations and duties, and of the conditions of his bond, such extension does not operate as a discharge of the surety. *Idem*, 780

TAXES AND TAXATION.

1. See *Norfolk*, No. 1, and

Humphreys & al. v. *City of Norfolk*, 97

2. P's heirs, living in Louisiana, owned two tracts of land in the county of Carroll, adjoining each other, one of one hundred and thirty and the other of one hundred and thirty-eight acres, on which they had tenants, who paid the taxes up to 1858. In 1860 the one hundred and thirty acre tract was sold for delinquent taxes of 1858 and 1859, and was purchased by H; for which he paid the said taxes, $3.93, and all other charges, amounting in all to $4.37. Within three years, and before a deed was made to H, P's heirs paid to the clerk of the County court the said sum with ten *per cent. per annum* interest and charges, all amounting to $7.72; H not then being in the county, and they not knowing that H had paid taxes on the land. H refused to receive the money, on the ground that he had paid taxes on the land since his purchase; and he had the tract of one hundred and thirty-eight acres surveyed, and obtained a deed for it from the clerk of

the County court. Upon a bill filed by P's heirs to set aside the deed—HELD:

1. P's heirs had the right to redeem the land at the time they paid the money to the clerk, by paying the amount for which the same was sold, and such additional taxes thereon as may have been paid thereon by H, with ten *per cent.* interest thereon from the time the same was paid by H.

Hale v. *Penn's heirs*, 261

2. H having been out of the county at the time, they properly paid the money to the clerk of the County court.

Idem, 261

3. The tract of one hundred and thirty-eight acres not having been sold for
1032 taxes, H did not buy it, and the *deed from the clerk to him is null and of no effect. *Idem*, 261

4. The taxes which H paid upon the tract of one hundred and thirty-eight acres was not upon the one hundred and thirty acre tract, and P's heirs were not required to pay them with ten *per cent.* interest, in order to redeem the tract sold. Therefore, what they paid the clerk was a redemption of their land. *Idem*, 261

5. The court should not only have decreed the deed to H to be null and void, but should have directed him or a commissioner to reconvey the title to the one hundred and thirty-eight acre tract to P's heirs; and should have directed the clerk to pay to H the money received from P's heirs.

Idem, 261

6. P's heirs are not liable for the payments made by H for the survey and report, or for the making, stamping and recording the deed made to him by the clerk. But they should pay the taxes on the one hundred and thirty-eight acre tract since 1860, paid by H, with six *per cent.* interest.

Idem, 261

3. In April 1870 S was appointed sheriff of C, and gave bond and qualified; and he was to continue in office until his successor was elected and qualified. In November 1870 J was elected sheriff for the next year, but failed to give the bond. On the 13th of February 1871 the County court of C appointed S collector of taxes, &c., of 1870, and he gave bond with sureties and qualified—HELD:

1. The County court was authorized to make the appointment and take the bond; and it is a valid bond, and binds the sureties.

Chapman & als. v. *Commonwealth*, 721

2. The County court having made the appointment, and S and his sureties having executed the bond, they are estopped from denying that it is valid and binding upon them. *Idem*, 721

4. S collects a part of the taxes of 1870, and pays it to the auditor prior to the 13th of February 1871, directing it to be applied to his indebtedness for taxes of 1869, which is done by the auditor, he not knowing that the money was derived from that source. All the rest of the taxes of 1870 are properly accounted for; but there is a deficit in the account of S to the amount so collected and paid. The sureties are liable for the deficit.

Idem, 721

5. In July 1871 H became the surety of B as collector of township B. At that time the taxes for that year, by law, went into the hands of the collector on the 1st of September, and were to be accounted for to the county treasurer on the 1st of December. After the execution of the bond by H, there were several extensions, by joint resolutions and statutes of the general assembly, of the time in which collectors should make their settlements with the county treasurer—HELD:

1. That though it is true that the law at the date of the contract enters into and forms part of the contract, yet laws which are merely directory to officers of the government form no part of the contract; and the extension of the time, as aforesaid, does not release the surety H.

Commonwealth, by &c. v. *Holmes*, 771

2. Where new duties are imposed upon a public officer by statute after the execution of his official bond by his surety, the bond should be held good against the surety to the extent of the duties lawfully covered by it; though it may not be good as to the new duties imposed since its execution.

Idem, 771

6. The same principles held as to the sureties of a treasurer of the county. See *Sureties*, No. 11, 12, and

Smith & als. v. *Commonwealth*, 780

7. How prior to the act of April 2, 1873, Sess. Acts 1872-'73, ch. 373, § 6, p. 372, the treasurer was to settle his accounts. See *Collectors & Treasurers of Taxes, &c.*, No. 3, 4, and *Idem*, 780

8. The act, ch. 240, § 104, Sess. Acts of 1874, which imposes a license tax on merchants is constitutional.

Moore & Goodson's case, 951

TENDER.

1. When tender of notes of a bank in payment of a debt is not a good defense. See *Banks*, No. 1, 2, and

Bank of the Valley, for, &c., v. *Marshall*, 378

1033 *THEOLOGICAL SEMINARIES.

1. See *Charitable Bequests*, No. 2, 3, 4, 5, and

Roy's ex'ors v. *Rowzie & als.*, 599

TROVER.

1. Trover may be sustained against a personal representative as such, though the goods never came into his hands.

Ferrill v. *Brewsis' adm'or*, 765

TRUSTS AND TRUSTEES.

1. The conversion into money by a trustee, of well secured bonds belonging to a trust

fund, by a sale thereof, at a large sacrifice, to a purchaser with full notice of the trust, constitutes such an improper dealing with and *devastavit* of the trust subject as will render both trustee and purchaser *prima facie* responsible therefor. And it will be for them to show that the necessities of the trust required the sacrifice.

Cocke & al. v. *Minor & als.*, 246

2. In such a case it is not sufficient, for the purchaser to say in his answer, though it is not replied to, that the trustee informed him that he needed the money to meet debts contracted for his *cestuis que trust*, and from all the information he had he was led to the belief that the trustee wanted the funds for proper purposes. *Idem*, 246

3. In such a case, it is not sufficient, though there is no replication to the answer, for the trustee to say the necessities of the *cestuis que trust* required the sale of the trust fund, and that he had properly applied the proceeds thereof to their uses, without showing how they were applied, and without showing or alleging that he had ever kept or settled an account of his transactions as trustee. *Idem*, 246

4. See *Practice—in Chancery*, No. 7, and *Idem*, 246

5. Though a testator appoints his executor a trustee for legatees, a court of equity may, for good cause, appoint another trustee for the management of the fund.

Crickard's ex'or v. *Crickard's legatees*, 410

6. See *Husband and Wife*, No. 11, and *Burnett & wife* v. *Hawpe's ex'or*, 481

UNITED STATES CURRENCY.

1. There are two kinds of United States currency, both of which may properly be called national currency of the United States. Of these, one consists of treasury notes, and the other of national bank notes.

Dull's case, 965

UNLAWFUL DETAINER.

1. T having, under the act of April 1st, 1873, obtained an assignment of certain oyster beds, for the planting and sowing of oysters for one year, and having paid the tax and had the beds staked off as required, before the 1st of May 1874, has such an exclusive interest in them that he may maintain an action of unlawful detainer against a party who enters upon said beds and holds them against him.

Power & Kellog v. *Tazewells*, 786

USURY.

1. The act of March 22, 1873, Code of 1873, ch. 57, § 36, p. 544, in reference to the defense of usury by corporations, is retroactive in its operation, and applies to contracts made by a corporation before the passage of the act; and this though suit has been brought upon such contract before its passage. And the act is not in violation of the constitution of the United States, or of that of Virginia.

Town of Danville v. *Pace*, 1

2. In August 1867, B went to the city of Baltimore with a negotiable note for $3,500, blank as to date and place of payment, but signed by himself and endorsed by five persons, he and they living in Virginia. This note he sold to M, of Baltimore, at a discount of one and one-fourth *per cent.* per month; the proper date was inserted and the place of payment fixed at the Nat'l Exch'ge Bank of Baltimore. This note was renewed by the same parties, and in April 1868 B made a payment on it of $550, and another note to meet the balance was made by the same parties, payable at the same bank, and M agreed to take the note at the same discount. The last note not being paid, M sent it and all the previous notes and papers connected with the loan, with a statement of the amount due him, to a friend residing in Harrisonburg, with a request that he would take B's note for what was due, endorsed 1034 by the same parties. *This was done, and the note was made payable at the National Bank at Harrisonburg.—HELD:

1. The taking of the last note was not a novation of the previously existing debt; but the contract is still a Maryland contract, to be governed by the law of Maryland.

Bowman v. *Miller & Co. & al.*, 331

2. By the law of Maryland the contract was not null and void; but M might recover upon it there the principal and legal interest. *Idem*, 331

3. The last note, not providing on its face for the payment of more than legal interest, it not being a Virginia contract, and not being void by the law of Maryland, it will be enforced as a Maryland contract in the courts of Virginia. *Idem*, 331

4. If a Virginia court may administer the Maryland remedy in a defense of usury, the defendant must file such a plea as the law of that state prescribes. *Idem*, 331

VENDOR AND PURCHASER.

1. When equity will not decree specific performance of a contract, but will rescind it. See *Specific Performance*, No. 1, 2, and

Hendrick & als. v. *Gillespie*, 181

2. When equity will not rescind a contract for the exchange of land, but will enforce it. See *Specific Performance*, No. 3, and

Stimson v. *Thorn*, 278

3. In December 1862 H sold to W two hundred and sixty-five acres of land, more or less, known as Knob Fork, purchased by H of B, and bounded by the deed of B for $3,250, of which W paid $2,000, and gave his bond for $1,250. On a survey of the land by W, it was found there was but one hundred and ninety-nine acres, and twenty-seven acres of this was recovered by V upon a superior title—HELD:

1. W is entitled to an abatement for the deficiency of sixty-six acres.

Walsh v. *Hale*, 314

2. For the twenty-seven acres the value of the land recovered, whether more or less

than the average of the whole tract, is to be abated. *Idem*, 314

3. For the remainder of the deficiency, the abatement is to be according to the average price per acre of the whole tract. *Idem*, 314

4. The contract having been a Confederate contract, the amount of the bond is, under the circumstances of this case, to be scaled according to the value of Confederate money at the time of the contract. *Idem*, 314

4. See *Specific Performance*, No. 4, and *Kemper* v. *Ewing & als.*, 427

VIRGINIA.

1. The present State of Virginia is bound to the creditors of the state for debts due before the division for the whole of their debts. And West Virginia is equally bound for them.
Higginbotham's ex'x v. *The Commonwealth*, 627

2. Under the statute, the State of Virginia may be sued for any debt or claim due, whether liquidated or unliquidated. *Idem*, 627

WILLS.

1. Upon the proceeding for the probate of a will, J, who is the nominated executor and propounder of the paper, and also a devisee and legatee under it, is a competent witness to sustain the probate. See Code of 1873, ch. 172, § 21, 22.
D. Martz's ex'or v. *D. Martz's heirs*, 361

2. A will is not a contract, and an executor or legatee is not a party to it in the sense of the statute. *Idem*, 361

WITNESSES.

1. In a controversy between an unmarried woman on the one part and husbands and wives on the other, in relation to a transaction between them, in which all are interested, as the husbands and wives are incompetent from their relation to each other to testify in their own behalf in the case, the unmarried woman is not a competent witness in her own behalf.
Statham & als. v. *Ferguson's adm'or & als.*, 28

2. See *Depositions*, No. 1, and *Idem*, 28

3. Upon the proceeding for the probate of a will, J, who is the nominated executor, and propounder of the paper, and also a 1035 devisee and legatee under it, is a *competent witness to sustain the probate. See Code of 1873, ch. 172, § 21, 22.
D. Martz's ex'or v. *D. Martz's heirs*, 361

4. A will is not a contract, and an executor or legatee is not a party to it in the sense of the statute. *Idem*, 361

5. One party to a suit is incompetent as a witness on account of the disqualification of the other party only in a case where he was a party to the transaction which is the subject of the suit or proceeding, and the other party to it is dead, insane, or incompetent from some legal cause. *Idem*, 361

6. Where the objection is to the competency of the witness, and the objection is sustained, it is not necessary to state in the exception what the party offering him expects to prove by him. *Idem*, 361

7. All persons examined as witnesses must be fully possessed of their understanding; that is, such understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong; and, therefore, idiots and lunatics, whilst under the influence of their malady, not possessing their share of understanding, are excluded. *Coleman's case*, 86

8. A witness is not excluded by this rule merely because he is a lunatic. That is not enough *per se* to exclude him; but he must at the time of his examination be so under the influence of his malady as to be deprived of that "share of understanding" which is necessary to enable him to retain in memory the events of which he has been a witness, and gives him a knowledge of right and wrong. If at that time he has this share of understanding he is competent. *Idem*, 865

9. Of the competency of the witness in such case the court is the judge, whilst the weight of the testimony, the credit to be attached to it, is left to the jury. *Idem*, 865

10. On a trial for forgery, M was introduced as a witness by the commonwealth, and gave important testimony against the prisoner. He was examined and cross-examined for two days, and neither the counsel nor the court suspected he was deranged, though they thought he was drinking deeply. After the conviction and sentence of the prisoner he moved for a new trial, on the ground that M was deranged when he gave his evidence; and it was proved that he had been deranged a few days before the trial, and within a few days after it, and so continued. But the judge who tried the prisoner overruled the motion, and certified that at the time of M's examination he was a competent and proper witness, and not laboring under any mental disability whatever. The proofs not showing derangement at the time of his examination as a witness, he was a competent witness; and the judgment affirmed. *Idem*, 865